EXPLANATORY MEMORANDUM TO

THE COUNTY COURT REMEDIES REGULATIONS 2014

2014 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice ("MoJ") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. This instrument ("the 2014 Regulations") revokes and replaces the County Courts Remedies Regulations 1991 (S.I. 1991/1222) ("the 1991 Regulations"), in consequence of which the County Court will now have unrestricted jurisdiction to grant freezing injunctions (also referred to as "freezing orders"), but, as is currently the case, will not have jurisdiction to grant search orders. The intention is to re-balance jurisdiction between the High Court and the County Court and to make optimum use of judicial resources by widening, where appropriate, the jurisdiction of the County Court, while enabling High Court judges to focus on cases that require a greater level of expertise. The Regulations will come into force on 22nd April 2014 or, if made on or after that date, the day after the day on which they are made.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4. Legislative Context

4.1. The 2014 Regulations are made under section 38 of the County Courts Act 1984 (c.28) ("the 1984 Act").

4.2. Section 38 of the 1984 Act concerns injunctive remedies available in the County Court. Section 38(1) provides that the County Court may make any orders which the High Court could make if the proceedings were in the High Court. However, section 38(3) provides that the County Court does not have power to make an order of a prescribed kind. In this case "prescribed" means prescribed in regulations made by the Lord Chancellor after consulting with the Lord Chief Justice (section 38(5)).

4.3. The 1991 Regulations prohibited the County Court from granting (except in specified circumstances) "prescribed relief", namely—

(a) an order allowing a party to search premises for the purpose of obtaining evidence in proceedings (formally known as an "Anton Piller"[1] order, but now referred to as a "search order" in the Civil Procedure Rules 1998 (S.I. 1998/3132)); and

(b) an interlocutory injunction preventing a party from either removing assets out of the jurisdiction of the High Court or dealing with assets whether within the jurisdiction of the High Court or outside that jurisdiction (formally known as a "Mareva" [2] injunction, but now referred to as a "freezing injunction" or "freezing order" in the Civil Procedure Rules).

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[1] *Anton Piller KG v Manufacturing Processes Limited* [1976] Ch 55 ("Anton Piller").

[2] *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1All ER 213.

4.4. By revoking the 1991 Regulations without making similar provision in respect of freezing orders in this Order, the County Court's power to grant these injunctions is no longer restricted. Consequently, the 2014 Regulations now only prohibit the County Court from granting a search order. The remaining provisions in the 1991 Regulations, which applied to search orders, are replicated in the 2014 Regulations, accordingly—

(a) judges of the Court of Appeal and High Court judges may continue to grant a search order when sitting as a judge of the County Court (regulation 3(2));
(b) applications to the High Court for a search order shall be deemed to include an application for transfer of the proceedings from the County Court (regulation 4); and
(c) where proceedings (and not just the application) are transferred to the High Court, the Regulations provide for transfer back to the County Court once the application has been dealt with (regulation 5).

4.5. In the 2014 regulations, the reference in the 1991 Regulations to "prescribed relief" has been replaced by the term "search order" which is defined by reference to an order made under section 7 of the Civil Procedure Act 1997 ("the 1997 Act"). Notwithstanding that section 7 provides that such orders are made by the High Court, it is necessary to preserve the effect of the 1991 Regulations in respect of search orders—

4.5.1. "Anton Piller" established that the High Court had jurisdiction to make such orders.

4.5.2. Section 38 of the 1984 Act provided that the County Court could make such orders as the High Court could make if the proceedings at hand were in the High Court. Hence section 38 enabled the County Court to make search orders. However, this power was limited by the 1991 Regulations.

4.5.3. The High Court's common law jurisdiction to make such orders was put on a statutory footing by the 1997 Act. However, this did not affect the County Court's jurisdiction, previously conferred by section 38 of the 1984 Act.

4.5.4. As such, the position regarding the County Court has not changed since 1997. Consequently, the prohibition in the 1991 Regulations remains necessary to prevent the County Court from exercising its general powers under section 38 to make search orders.

4.6. As required by section 38(7) of the 1984 Act, the Lord Chief Justice has been consulted in respect of these Regulations and has confirmed that that he is content with them.

5. Territorial Extent and Application

5.1. This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1. Shailesh Vara, Parliamentary Under Secretary of State, Ministry of Justice, has made the following statement regarding Human Rights:

"In my view the provisions of the County Court Remedies Regulations 2014 are compatible with the Convention rights".

7. Policy background

- ***What is being done and why?***

7.1. A freezing order is an interlocutory injunction which restrains a party in civil proceedings from disposing of, or dealing with, their own assets. Currently, the County Court's jurisdiction to make freezing orders is limited to making orders for the purpose of preserving property which forms or may form the subject matter of proceedings, or to preserve assets following judgment, but prior to execution of that judgment. Save in these circumstances, the County Court is prohibited from making pre-judgment freezing orders.[3] These restrictions do not apply if a Court of Appeal Judge or a Judge of the High Court is sitting as a judge in the County Court, or if the order is made by a Mercantile Judge in respect of proceedings in the Central London County Court Mercantile List, who will be a Circuit Judge nominated by the Senior Presiding Judge.

7.2. However, in all other cases, if a freezing order is required in County Court proceedings, the application must be made to the High Court, even though the substantive case is being heard in the County Court.

7.3. In January 2008, the Judicial Executive Board ("JEB"), chaired by the then Lord Chief Justice, commissioned Sir Henry Brooke to conduct an inquiry into the question of civil court unification. In August 2008, following extensive consultation with the judiciary and Her Majesty's Courts and Tribunals Service (HMCTS), Sir Henry published his report, *Should the Civil Courts be Unified?*[4] In the report, Sir Henry did not recommend civil court unification, but instead made a number of recommendations to improve the administration of civil justice and to provide a more efficient use of judicial resources. One of the recommendations was to permit Senior Circuit Judges (with civil jurisdiction) and suitably ticketed Circuit Judges, authorised by the Lord Chief Justice, to grant pre-judgment freezing orders in the County Court.

7.4. The JEB accepted this recommendation on the basis that extending the scope of the County Court's jurisdiction to make freezing orders would introduce flexibility and obviate the need for technical transfers between the High Court and the County Courts. The JEB agreed with Sir Henry that the jurisdiction should be limited to specified judges and made the point that freezing orders should not be granted in a routine manner. It noted that in exercising the functions of the Lord Chief Justice, the presiding judges, in consultation with chancery supervising judges, should grant the jurisdiction at their discretion to meet local requirements.

7.5. The MoJ consulted on the recommendation to extend jurisdiction to the County Court in its twelve-week public consultation entitled: "*Solving disputes in the County Courts: creating a simpler, quicker and more proportionate system*[5], published in March 2011. A majority of respondents supported the proposal but suggested that only suitably experienced and qualified Circuit Judges in the County Court should be given the jurisdiction.

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[3] A further exception applies to specified family proceedings. The Family Court's jurisdiction to make freezing orders will, in future, be subject to separate legislation.

[4] Which is available at: http://www.judiciary.gov.uk/publications-and-reports/reports/civil/civil-courts-unification

[5] CP6/2011, which is available at: http://webarchive.nationalarchives.gov.uk/20110406054056/http://www.justice.gov.uk/docs/solving-disputes-county-courts.pdf

7.6. On 9 February 2012, accompanied by a written ministerial statement (House of Commons, Official Report, column 53WS)[6], the Government published its response to the consultation (CM 8274)[7], announcing its intention to implement the recommendation to extend jurisdiction to the County Court. The draft 2014 Regulations implements that proposal.

- ***Consolidation***

7.7. The Department has no plans to consolidate any legislation as a result of this legislation.

8. Consultation outcome

8.1. The consultation lasted for twelve-weeks (29 March 2011 to 30 June 2011) and copies of the consultation paper were sent to:

- **Judicial and legal bodies** including the Senior Judiciary, the Council of HM Circuit Judges, the Association of District Judges, The Law Society, The Bar Council, and the Institute of Legal Executives.
- **Consumer bodies, representative bodies and business organisations** for example The County Court Users' Association, British Bankers Association, Confederation of British Industry, Finance and Leasing Association, The Trade Union Congress.

8.2. Responses were also welcomed from anyone with an interest or views on the proposals. Responses from individual practitioners, or members of the public were also sought.

8.3. The MoJ consultation paper posed one question in relation to the freezing orders jurisdiction. The first asked:

Question 64*: Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the County Courts? If not, please explain why.*

8.4. A total of 120 respondents answered this question, of which 108 respondents (90%) agreed and 12 respondents (10%) disagreed.

8.5. A majority of the 120 respondents in favour of extending freezing orders to the County Court were legal practitioners. Others in favour included members of the judiciary and judicial bodies, regulatory bodies, representative bodies, business representative bodies, Local Authorities, Mediators and Mediation Advocates, academics, Citizens Advice Bureaus, financial organisations, members of the public, and HMCTS. The reasons given for support included that:

- County Court judges can handle applications for freezing orders but only suitably experienced and qualified Circuit Judges of the County Court should be given the jurisdiction.
- The proposal is overdue and would save time in the High Court, allowing High Court Judges to deal with more complex cases.

[6] Which is available at: http://www.publications.parliament.uk/pa/cm201212/cmhansrd/chan264.pdf
[7] Which is available at: https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf

- Many Circuit Judges who sit as Deputy High Court Judges are familiar with freezing orders which are not complex applications that warrant a hearing by a High Court Judge.
- The current position is disproportionate and unnecessary.
- Having to apply to the High Court, often many miles away, or in London can be wasteful in both cost and time.
- There is no reason for a Circuit Judge not to deal with applications for freezing orders.

8.6. Of those who disagreed, some respondents argued that the nature of freezing orders meant that the expertise of a High Court Judge was in fact needed, and that they should be dealt with very carefully and with the highest level of experience and expertise. But, overall, the responses to the question suggest that businesses and court users are supportive of the proposed measures to extend freezing orders to suitably qualified Circuit Judges in the County Court, as are the Judiciary and HMCTS.

9. Guidance

9.1. Information about these Regulations will be published on the judicial website, when it is laid, alerting the Judiciary that the Order is being considered in both Houses of Parliament. Information will also be placed on the HMCS website informing court staff of the impending changes if the Order is approved. The legal professions will also be informed of the impending changes.

10. Impact

10.1. An Impact Assessment has not been provided for this instrument. However, an Impact Assessment[8] and Equality Impact Assessment[9] covering four recommendations set out in the Brooke report, including the above recommendation, was published alongside the consultation paper and response document. That Impact Assessment was cleared, with a green rating, by the Regulatory Policy Committee.

10.2. This instrument has no impact on the public sector.

11. Regulating small business

11.1. The legislation does not apply to small business.

12. Monitoring & review

12.1. We do not envisage that the Regulation will create significant additional workload for County Courts. The Impact Assessment accompanying the 2011 consultation indicates that overall the impact will be slight - while no data is collected relating to the number of freezing orders requested in the High Court, 18 freezing orders were granted in the district registries, over which time the district registries accounted for about 70% of all proceedings started in the Queens Bench Division of the High Court.

[8] Which is available at: https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/reforming-civil-jurisdiction-limits-response-ia.pdf
[9] Which is available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/reforming-civil-jurisdiction-limits-response-eia.pdf

13. Contact

13.1. Any enquiries about the contents of this memorandum should be addressed to: Meg Oghoetuoma, Civil Justice Reforms, Access to Justice Policy, Ministry of Justice, 4th floor (Post Point 4.37), 102 Petty France, London, SW1H 9AH or by e-mail at magdalene.oghoetuoma@justice.gsi.gov.uk. Telephone: 020 3334 3195.