EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT) RULES 2017

2017 No. 95 (L. 1)

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) ("the CPR"), which apply to civil proceedings in the Civil Division of the Court of Appeal, the High Court and the County Court.

2.2 The amendments to the CPR covered by this instrument relate to a variety of changes including rules governing payment and refund of hearing fees, costs budgeting procedures, clarification of the application of a fixed costs regime in low value personal injury claims, introduction of a revised costs protection regime for Aarhus Convention claims, streamlining procedures for shipping collision cases, making minor amendments to provide for an appeal route in Patents, European references

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make Civil Procedure Rules. The first CPR were made in 1998. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and the County Court, replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC).1 The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The changes were made, and continue to be made, in response to the report 'Access to Justice' (1996) by Lord Woolf.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales only.

5.2 This instrument applies to England and Wales only.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 Payment and refund of court fees for hearings. The rules are amended to reflect a policy change in the collection and refund of hearing fees. Hearing fees are payable where a court claim that is defended is listing for hearing. The hearing fee is on a sliding scale depending on the value of the claim and complexity of the claim, ranging from £25 to £1090. The fee is usually payable within 14 days of receipt of the notice of hearing for lower value claims or eight weeks before trial for higher value claims. Parties are notified of the date on which the fee is payable. Currently where a claim is settled without a hearing the whole or part of the hearing fee will be automatically refunded. Where the court is notified that the claim has settled within 28 days of the hearing date 100% of the hearing fee is refunded, 75% is refunded if the court is notified between 12-28 days before the hearing and 50% is refunded if the court is notified between 7 and 14 days before the hearing. The change in policy means that fees will no longer be automatically refunded which will significantly reduce the number of financial transactions and consequentially administrative work for court staff. To ameliorate the effect of payment of a non-refundable fee the date at which the hearing fee becomes payable will be much later in the process, approximately four weeks before the hearing date. Those cases likely to settle will have the incentive to do so earlier to avoid paying the hearing fee. Courts will be able to take advantage by filling vacated hearing days with other cases saving judicial and court resources. Those cases which continue to trial will not have to pay until close to the hearing date where parties will have a better idea of the viability of the claim and defence.

7.2 Cost budgeting procedures. Represented parties in high value cases are required to file a budget showing incurred costs and estimated future costs. Budgets where possible should be agreed between the parties. The amendments clarify the courts powers in that the courts approval of a cost budget relates to estimated costs only, and that the detailed assessment process (judicial consideration of the recoverable costs of a party at the end of a case) applies. The amendments are made following a judgment in the Court of Appeal (Sarpd Oil v Addax http://www.bailii.org/ew/cases/EWCA/Civ/2016/120.html).

7.3 Application of fixed costs in low value personal injury claims. Claims in respect of low value personal injury claims may be resolved quickly without court proceedings using an online portal. A fixed cost system is in place for claims within the portal process. The rules are amended to clarify that the fixed costs system applies to those cases that fall out the pre-court process, for example where liability is not admitted, and a claim is issued through the usual court procedure and subsequently allocated to the multi-track. Case that are high value, and/or complex, and/or will require significate court hearing time (over one day) are usually allocated to the multi-track.

7.4 Costs Protection regime in Aarhus Convention claims. The Aarhus Convention (implemented in EU law by a series of Directives) requires Contracting States to make sure that the costs of bringing certain environmental challenges are not prohibitively expensive. Section VII of Part 45 of the CPR makes provision for a special costs

protection regime for such "Aarhus Convention claims", and these Rules replace it with a new Section VII, together with new provision in Part 52 covering appeals in such cases. The new provisions have been drafted with particular regard to the principles set out by the Court of Justice of the EU (CJEU) in its decisions in cases C-530/11 *Commission v. United Kingdom* and *C260/11 Edwards*. The new provisions , like those they replace, start with a cap on the liability of an unsuccessful claimant in such a case to pay the defendant's costs of £5,000 or £10,000 (depending on whether the claimant is an individual or not), and cross-cap on an unsuccessful defendant's liability to pay the claimant's costs of £35,000; but they differ in the following main respects—

a) extending beyond judicial reviews to include statutory reviews (in particular planning challenges);

b) allowing the court to vary the cap and cross-cap either up or down, provided always that any change does not render the cost of proceedings prohibitively expensive for the claimant (and requiring the change if the cost would be prohibitively expensive for the claimant without it);

c) requiring the court, when assessing whether proceedings would be prohibitively expensive if the change is or is not made, to take into account a list of factors which mirrors those set out by the CJEU in the *Edwards* case;

d) making specific provision for appeals requiring the court to apply the same principles on appeal as at first instance (as required by the *Commission v. United Kingdom* case).

7.5 Streamlining procedures for shipping collision cases. Courts have traditionally been used for determining fault in claims where ships collide. However, most ships now have devices that record electronically the course, heading and speed of a vessel, radar observations, helm and engine orders and engine movements. The result is that there is rarely a need for a trial to find the facts and so there are now very few collision trials. However, there are some cases which require a trial, because some factual matters may remain in dispute or because the damages claims on either side are very substantial and settlement is difficult or because there is a dispute as to the meaning or application of the Collision Regulations. The rules are amended to acknowledge the use of technology and to reflect the different nature of matters before the court.

7.6 Appeals in respect of Patents Claims. Following the abolition the Appeal Tribunal an amendment is made to provide for appeals in registered design cases to be made to the Patents Court. A minor amendment is made to correct a cross referencing error.

7.7 European references. Amendments are made following concerns raised by the Court of Justice of the European Union (CJEU), about the length and complexity of UK requests for preliminary rulings. A request can be made where a case raises a question on the interpretation or validity of European law and the national court considers that a decision on it is necessary to enable it to give judgment. The national court must apply the ruling in reaching a decision in the national proceedings, and the ruling is binding not only on the national court which made the reference, but also on the national courts of all Member States. The preliminary ruling procedure therefore plays a central role in ensuring that European law is applied consistently and correctly across the European Union. The amendments make clear the precise nature of the wording of references and format in which they must be submitted.

7.8 Consequential amendments are made to a number of rules in respect of the amendments detailed in 7.2 and 7.4 above.

Consolidation

7.9 No further consolidation of the rules is planned at present.

8. Consultation outcome

8.1 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 Action 1997). The Committee did not consider that any of the proposals for rules before it required separate consultation by the Committee.

8.2 The Ministry of Justice consulted on changes in respect of environmental claims. The consultation 'Costs Protection in Environmental Claims: proposals to revise the costs capping scheme for eligible environmental cases' was published on 17 September and closed on 10 December 2015. The Ministry of justice received 289 responses and a response to the consultation was published on 17 November 2016 (the consultation document and the Government response, together with an impact assessment, are at https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/).

9. Guidance

9.1 The rules will be published in a consolidated version and will be available on the Ministry of Justice website but no specific guidance is consider necessary on their operation.

10. Impact

10.1 There is a minimal impact on business, charities or voluntary bodies.

10.2 In relation to the costs protection regime in Aarhus Convention claims, or other amendments contained in these amendments, there is minimal impact on the public sector.

10.3 A separate Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 These rules will form part of the Civil Procedure Rules 1998 that are kept under review by the Civil Procedure Rule Committee.

13. Contact

13.1 Jane Wright at the Ministry of Justice, Telephone: 020 3334 3184 or email: jane.wright@justice.gov.gsi.uk can answer any queries regarding the instrument.