

EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (AMENDMENT) RULES 2020

2020 No. 82 (L. 6)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 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 six matters, explained in paragraph 7, below.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The amendment made by rule 6 of this instrument (explained in paragraph 7.5 of this memorandum) is intended to address an instance of defective drafting identified by the Joint Committee on Statutory Instruments in paragraph 1.3 of its Second Report of Session 2019-20.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The Civil Procedure Act 1997 established the Civil Procedure Rule Committee (“CPRC”) and gave it power to make Civil Procedure Rules, which are rules governing practice and procedure in civil proceedings in the County Court, High Court and Court of Appeal (Civil Division). 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). The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedure and reduce, or at least control, the cost of civil litigation in England and Wales. The first CPR were made in 1998, and amendments are regularly made in response to practical experience of the operation of rules or decisions of the higher courts, to provide procedure for new matters such as new types of order provided for in new Acts of Parliament, for updating generally and for modernising purposes such as making provision for online or other electronic methods. References below to a rule, or Part, by number alone are references to the rule or Part with that number in the CPR.

7. Policy background

What is being done and why?

- 7.1 The changes are relatively minor and technical in nature. They amend the CPR in the following way -
- 7.2 Entry of default judgments: clarification is provided as a result of varying judicial interpretations of rule 12.3(1) which sets out the conditions which must be satisfied before a request or application for judgment in default of the filing of an acknowledgement of service or defence may be made. Following consultation, the amendment allows an acknowledgment of service or a defence to be a bar to the entry of judgment in default where it is filed before judgment is entered.
- 7.3 Disclosure of Part 36 offers on appeal: rule 52.22 provides for non-disclosure of Part 36 offers on appeal (and on applications for permission to appeal). The rule applied not just to Part 36 offers made on appeal but also to Part 36 offers made in other circumstances. An exception being if they are relevant to the substance of the appeal. The only case on the rule *Garrett v Saxby* [2004] EWCA 341, emphasised the importance of the principle that Part 36 offers should not be disclosed in an appeal on the merits. In *Garrett* the only appeal was on the merits, not costs. Although costs are discretionary and therefore difficult to appeal, it is not uncommon for appellants to appeal both the merits and the costs ruling and to do this in a single Notice of Appeal with a single set of grounds. A single appeal bundle is prepared and it includes the Part 36 material. There are a number of reported cases (*Dickinson v Cassillas* [2017] EWCA Civ 1254; [2017] H.L.R. 43 *Drury v Rafique* [2018] EWHC 1527 (Ch), *Shalaby v London North West Healthcare NHS Trust* [2018] EWCA Civ, *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12) in which this seems to have taken place and thus might be contrary to r52.22. Alternatively, those cases may not have been contrary to the rule if the exception applies to them because “the appeal” includes both merits and costs such that the Part 36 material, being relevant to the costs aspect, can be in the papers for the merits appeal. The amendment makes it clear that the court may have a hearing of both substantive issues and costs issues and that in such circumstances the usual restrictions on informing the court of a Part 36 offer (to settle the claim) is removed.
- 7.4 CILEX Fellows: Amendments to Part 52 and Part 54 allow for court staff who are Fellows of the Chartered Institute of Legal Executives (as well as those who are barristers or solicitors) to be able to be authorised to perform certain functions of the court which the rules permit to be performed by legally qualified members of staff. The amendments explained in paragraph 7.7 below also include provision including CILEX Fellows in the definition of “legal adviser”.

- 7.5 Media and Communications List: The amendment here is to Part 53 (rule 53.2(2)) in relation to the operation of the Media and Communications List (“MAC List”) in the High Court. Adopting a similar approach in this regard to rule 54.22(2) (which concerns the judge in charge of the Planning Court specialist list), the amendment makes clear that the Judge in Charge of the MAC List will be nominated by the President of the Queen’s Bench Division. It was previously not stated how and by whom the Judge in Charge of the MAC List would be appointed.
- 7.6 Housing matters: the amendments to CPR rule 55.11 together with the substitution of a new streamlined rule 52.12 remove demoted assured shorthold tenancies and oral tenancy agreement cases from the accelerated possession process. Both sorts of case are now rare, and there is considered to be no justification for retaining them within the accelerated procedure.
- 7.7 Legal Advisers Final Charging Order provisions: provisions of the current pilot (contained in Practice Direction 51T ‘The County Court Legal Advisers Pilot Scheme – Final Charging Orders’) are moved to business as usual. The pilot has been in operation successfully since August 2018. It enables legal advisers (court officers with legal qualifications), in certain circumstances, to make final charging orders, discharge interim charging orders, or to refer the matter to a judge. It also allows for decisions of a legal adviser to be reconsidered by a District Judge. There is a distinction between the approach to be taken to making such a decision, so that decisions by a legal adviser are to be made without a hearing but reconsideration of a legal adviser decision by a District Judge may take place without a hearing (the question of whether there should be a hearing in any individual case being left to the complete discretion of the Judge; the CPRC considered that it would not be appropriate to fetter judicial discretion in this regard).
- 8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**
- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.
- 9. Consolidation**
- 9.1 No further consolidation of the rules is planned at present.
- 10. Consultation outcome**
- 10.1 [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.
- 10.2 The amendment relating to entry of default judgments follows a limited consultation exercise of judiciary, the legal profession and court users between 13 March 2019 and 3 May 2019 in which the consultees were invited to indicate their preference from the

options identified by Andrew Baker J in *Cunico Resources NV & ors -v- Konstantinis Daskalakis* (1) and *Arvind Mundhra* (2) [218] EWHC 3382 (Comm). The responses informed the Committee's consideration of possible amendments (and the amendment ultimately made is consistent with the majority of consultees' views).

- 10.3 The amendment relating to the MAC List serves to address the observations made by the Joint Committee on Statutory Instruments in its Second Report of Session 2019-20. In drafting this amendment, the President of the Queen's Bench Division (the jurisdiction to which the subject matter relates) and the Judge in Charge of the MAC List were duly consulted.

11. Guidance

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, Bar Council, advice sector) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunals Service. News of changes to the rules, together with the consolidated version of the rules, are published on the Ministry of Justice website at <https://www.justice.gov.uk/courts/procedure-rules/civil>.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private, public or voluntary sectors is foreseen.

13. Regulating small business

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

14. Monitoring & review

- 14.1 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.

15. Contact

- 15.1 Amrita Dhaliwal at the Ministry of Justice. Direct line telephone 020 3334 6306 and email: amrita.dhaliwal@justice.gov.uk can answer any queries regarding this instrument.
- 15.2 David Parkin, Deputy Director for Civil Policy & Law, Access to Justice Directorate, at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Chris Philp MP, at the Ministry of Justice can confirm that this Explanatory