EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT No. 3) RULES 2016

2016 No. 788 (L. 11)

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 principal amendments made by this instrument are to CPR Part 52, and concern the procedure for appeals to the Court of Appeal and the exercise, by court officers, of functions of the Court of Appeal. In making these amendments, the opportunity was taken to re-order the rules in Part 52, which is replaced by a revised consolidated Part 52, with consequential amendments made to a number of other rules within the CPR which refer to Part 52. In addition, the instrument makes various more minor amendments: providing for the transfer of certain cases from London County Court business centres to the County Court at Central London; including Registrars in Bankruptcy in the definition of "the court" in Part 2 of the rules so that it is clear that they can perform functions of the court; consequential changes reflecting the changes in routes of appeal brought about by The Access to Justice Act 1999 (Destination of Appeals) Order 2016; and an amendment in rule 54.5(6) to correct a cross-reference to other legislation.

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 Civil Procedure Rule 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). 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

Appeals to the Court of Appeal.

7.1 Amendments are made to CPR Part 52 – *Appeals*, and the opportunity is taken at the same time to re-order the rules and consolidate them in their amended and re-ordered form as a new Part 52 substituted for the existing Part. The purpose of the amendments is to reduce waiting times in the Court of Appeal, by ensuring applications for permission to appeal are dealt with quickly and where an oral hearing is required, promptly. The major amendments relate to the determination of applications for permission to appeal to the Court of Appeal and the exercise of functions of the Court of Appeal by court officers.

7.2 The present position is that permission of the court is required, with some limited exceptions, to make an appeal against a decision of the court. Applications for permission to appeal may be made at the time the decision is made in the lower court or an application for permission may be made to the appeal court in the appeal notice. If the lower court refuses the application for permission to appeal an application may be made to the appeal court. Where an application for permission to appeal is made to the Court of Appeal the Court may determine the application on the papers without an oral hearing. If the application is refused the person seeking permission may apply to the court for an oral hearing, unless the application has been determined as totally without merit.

7.3 The amendments to the rules do not change the circumstances in which permission to appeal is required, nor the court to which the application may be made. The main change which is made, in rule 52.5 in the new Part 52, concerns the way in which the Court of Appeal determines an application for permission to appeal to it. Instead of the application being initially determined on the papers without a hearing, with the automatic right to an oral hearing in the event of refusal, the application will be determined on the papers unless the court considers that it should be determined at an oral hearing. The court is given a discretion to "call in" the application for oral hearing in this way, and is placed under a duty to do so if it is of the opinion that it cannot fairly determine the application on the papers. The court may also direct that the party seeking permission provide further information in support of the application, and that the respondent to the appeal attend the hearing. Unless the court directs otherwise in an exceptional case, the oral hearing, where one is directed, will be listed within 14 days of the direction for an oral hearing, before the judge who "called in"

the application. Revised rules 52.8-52.10 (covering matters in existing rules 52.15 and 52.15A) are amended to align their provisions on permission to appeal with the approach in rule 52.5.

7.4 Changes are also made (in new rule 52.24, which replaces existing rule 52.16) in relation to the exercise of certain functions of the Court of Appeal by court officers. The Civil Procedure Rule Committee may make rules of court to provide for officers of the court to exercise the jurisdiction of the Court. The existing position is that with the consent of the Master of the Rolls qualified officers (a solicitor or barrister) may exercise jurisdiction of the Court of Appeal in relation to certain ancillary matters such as applications for an extension of time. An application may be determined on paper by the officer of the court and parties may apply for an oral hearing.

7.5 There is no change in relation to the court officers themselves, and only a minor change (clarifying that a court officer may not decide an application for a stay of proceedings in the lower court) in relation to the matters which they may deal with. The changes made are in relation to the procedure for making and reviewing decisions, and align the approach to that for applications for permission to appeal to the Court of Appeal. Thus a review of a decision of a court officer by a single judge (and similarly a reconsideration by a judge of a decision made by a single judge) will be undertaken on the papers unless the judge determines there should be an oral hearing (which the judge must do if of the opinion that the matter cannot be fairly determined without an oral hearing).

Amendments consequential to changes to the routes of appeal.

7.6 The Access to Justice Act 1999 (Destination of Appeals) Order 2016 (http://www.legislation.gov.uk/ukdsi/2016/9780111146620/contents), which has been approved by both Houses and is shortly to be made, simplifies the appeals process to ensure that, as far as possible, an appeal should lie to the next level of judge. CPR Part 40 – *Judgments, Orders, Sale of Land etc*. is amended to provide that where the High Court is the appeal court, any judgment or order of the lower court must indicate the appropriate division of the High Court to which any appeal must be made. Part 63 is also amended to reflect provision in the Order that in cases allocated to the small claims track of the Intellectual Property Enterprise Court, an appeal will lie from a decision of a District Judge to an enterprise judge.

Transfer of cases from business centres to the County Court at Central London.

7.7 Cases issued in the County Court Money Claims Centre or via the on-line process at the County Court Business Centre are transferred to a local hearing centre when, and if, a case is defended and a trial for determination of a claim is required. At the end of the case management process and once the matter is ready for trial the case will either remain at the local hearing centre or be transferred to the appropriate hearing centre for trial. Her Majesty's Court and Tribunals Service (HMCTS) identified a significant delay between transfer to the local centre and resolution of the matter at a trial centre for higher value claims initially sent to London hearing centres. A pilot scheme was introduced in October 2014 to provide that higher value claims (cases provisionally allocated to the multi-track where the value of the claim is £25,000 or more) that would have been sent to one of the 16 London hearing centres are sent directly to the County Court at Central London (CCCL). The 16 London hearing centres are: Barnet, Bow, Brentford, Bromley, Clerkenwell & Shoreditch, Croydon, Edmonton, Kingston-upon-Thames, Lambeth, Mayor's & City of London, Romford,

Wandsworth, West London, Willesden, Woolwich and Uxbridge. On receipt at the CCCL an immediate assessment of the case is made by a judge who will determine the most effective way to deal with the case. Judicial resources were moved from the London hearing centres to the CCCL to support the scheme. A significant improvement in waiting times was achieved during the pilot with the delay being reduced by 19 weeks. The rules are amended to put the pilot scheme on a formal basis and provide that court staff may send a multi-track claim to the CCCL rather than to one of the London hearing centres.

Registrars in Bankruptcy.

7.8 CPR rule 2.4 lists the judges who are "the court" and so can perform any functions expressed as functions of "the court". Registrars in Bankruptcy are not included in that list, although the Registrars hear and determine company matters which fall within the remit of the CPR. An amendment is made to remedy the oversight by adding Registrars in Bankruptcy to the list.

Public Contracts Regulation 2015.

7.9 The Regulation which came into force in February 2015 (http://www.legislation.gov.uk/uksi/2015/102/schedule/6/made) amended CPR 54.5(6). The amendment to the rule made by virtue of the Regulation incorrectly identifies the relevant provision as "regulation 92" instead of "regulation 92(2)" and this statutory instrument corrects the inaccuracy.

Consolidation

7.10 The new Part 52 is itself a consolidation of a part of the rules. 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 Act 1997).

8.2 The Committee consulted on a number of proposals (which had previously been aired in the *Civil Courts Structure Review: Interim Report* (https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf) designed to alleviate the burden on the Court of Appeal. The consultation which ran from 19 May to 24 June 2016 included research conducted by and on behalf of the Court on Appeal on the current workloads and identified areas for reform (https://www.judiciary.gov.uk/wp-content/uploads/2016/05/appeals-to-the-coa-proposed-amendments-to-cpr-cprc-outline.pdf). Sixty-eight responses were received from the judiciary, academics, professional bodies such as the Law Society and Bar Council, solicitors and barristers, support organisations such as Justice, trade unions and individuals.

8.3 Forty-five responses were received in respect the proposal to remove the right of oral renewal for an application for permission to appeal to be replaced by a system allowing for determination of such an application by a single LJ on the documents coupled with power to call the application in for an oral hearing, before the same judge if the judge is unable to fairly determine the matter on the papers alone. Twenty-nine respondents were against the proposal and 16 in favour.

8.4 The majority of responses from the judiciary are in favour of the proposal, provided that the judge has an unfettered discretion to call in parties for a hearing if necessary to fairly determine the case and that where the matter is determined on papers the detailed reasons for that decision are fully recorded. The two responses from academics support the change. The majority of practitioners, their representative bodies and other groups were not in support of the proposal, with the notable exception of APIL and Justice.

8.5 Those against expressed concern that complex appeals benefit from oral discussion of written arguments, and that occasionally judges may misunderstand the written arguments put forward and reach the wrong conclusion. A further argument was that more robust applications for permission would be required to enable a fair decision and that some litigants would be disadvantaged as they may feel more comfortable expressing themselves orally rather than on paper. An oral hearing allows the judge to identify a potentially meritorious ground which was merely hinted at in the appeal notice or even wholly lacking. The oral application is the opportunity for the appeal process to ensure that a meritorious case is not struck out because it has been poorly expressed. This proposal may therefore result in wrong and unjust decisions. Under this proposal a single judge's refusal of permission would be without any form of scrutiny, under the current system there is the prospect that a refusal of permission will be reviewed by another judge who will the arguments at a hearing.

8.6 Those in favour of the proposals felt that its implementation would substantially reduce the amount of judicial time spent on determining applications for permission to appeal, and time freed up can be redeployed in the hearing of substantive appeals, thereby reducing delays. The current time take to determine an application on paper takes six months together with an oral renewal a further six months. This creates uncertainty for applicants, especially where permission is ultimately refused, and is as inimical to access to justice as are delays in the disposal of full appeals. The removal of the right to oral renewal has the potential to facilitate the prompt determination of applications for permission to appeal - a positive end in itself. There is relatively little evidence that an oral hearing makes the Court of Appeal more likely to reach the 'correct' decision on whether to grant permission to appeal. The number of successful appeals in which permission was denied on the papers, but then granted upon oral rehearing, is small. This suggests that concerns about meritorious appeals being denied permission on the papers are relatively limited. This is doubly true given that the would-be appellant will already have had two chances to persuade a judge that their appeal has some merit. In addition, accepting that there is going to be a small number of incorrectly made decisions in any judicial system is in line with the 'best possible, not perfect' conception of access to justice. Giving the reviewing judge the power to direct an oral hearing where they consider that the application cannot be fairly determined on paper represents an appropriate 'half-way house' between preserving and wholly abrogating the right of oral renewal.

8.7 Thirty respondents commented on the proposal to align the proposal to remove the right to an oral hearing following refusal of permission to appeal in respect of judicial review appeals from the High Court and Upper Tribunal. Eighteen were in support of the proposal and 12 against. Those in support of the change to standardise the rules and bring consistency to all cases before the court included the Law Society and Chancery Bar. Those against the change included the Personal Injuries Bar Association who commented that for personal injury and clinical negligence claims the current procedure should be retained.

8.8 Of the 29 responses received in response to the proposal that the automatic right to an oral hearing for reconsideration of decisions on other applications made in the course of proceedings in the Court of Appeal, be removed replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application on the documents, 18 were in favour and eight were against the proposal. In responses those in favour indicated that the proposal would reduce delay and provide a consistent approach to all applications whether dealt with by the judge or court officer. One practitioner felt that an 'automatic' right allows parties to continually use the court to their own end, even though the court has no option but to honour this automatic right even if it is plain that a particular case should not be allowed for reconsideration. A practitioner arguing against the proposal felt the automatic right to oral renewal should be retained as they can in practice result in determination of the Appeal and in particular that hearings on papers before a single judge carry increased risks of errors and the current process should continue.

8.9 The Civil Procedure Rule Committee carefully reviewed all the responses to the consultation and after a full debate agreed to implement three of the proposals set out in the consultation. In respect of the approach to permission to appeal, the Committee agreed to provide for the court to have a discretion to "call in" the application for an oral hearing, and a duty to do so if of the opinion that the matter could not fairly be determined without an oral hearing.

8.10 The Committee did not consider it necessary to consult on other proposals contained in this instrument.

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 considered necessary on their operation.

10. Impact

10.1 The impact on business, charities or voluntary bodies is considered to be minimal. The instrument will impact on claimants (individuals, businesses, charities or voluntary bodies) who apply for permission to appeal in that an oral hearing of the application will not be an automatic right, but this is balanced by the safeguard that no application for permission to appeal to the Court of Appeal will be determined on paper if the court is not satisfied that sufficient and appropriate material is available to determine the application on paper. Parties who are granted permission to appeal will benefit from reductions in the time taken for appeals to be heard.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument as no, or no significant impact on the private or voluntary sectors is foreseen.

11. Regulating small business

11.1 The instrument 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, jane.wright@justice.gov.gsi.uk, direct telephone line 020 3334 3184, can answer any queries regarding the instrument.