EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2017

2017 No. 889 (L. 12)

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.

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 to: (a) put beyond doubt the power to remit proceedings to a Divisional Court comprising judiciary from different divisions of the High Court; (b) signpost users to the relevant supporting information required when preparing bills of costs; (c) ensure that it is possible for applications for permission to appeal and appeal hearings to be heard together where appropriate; (d) reflect the renaming of the Mercantile Court (as the Circuit Commercial Court) and accordingly the judges of that court; (e) ensure that the rules in relation to two EU Regulations concerning certain cross-border aspects are consistent with revisions of those regulations; and (f) provide for judicial scrutiny of requests for issue of writs of possession in certain circumstances.

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, which are rules governing practice and procedure in civil proceedings in the County Court, High Court and Court of Appeal (Civil Division). 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 procedure 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. References below to a rule, or Part, by number alone are references to the rule or Part with that number in the CPR.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is England and Wales.

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 Divisional Courts. Rule 3.1 is amended to make explicit that the court may, in its general case management powers, direct that a hearing may proceed before a Divisional Court of the High Court (which is made up of at least two judges). The High Court has three Divisions: Chancery, Family and the Queen's Bench Division. Each has jurisdiction to hear any High Court action, but for administrative convenience, the divisions specialise in specific areas of work.

Section 66 (1) of the Senior Courts Act 1981 provides for hearings in the High Court to be before a Divisional Court where this is required by legislation or by rules of court (which for the present purposes means the CPR). It is increasingly apparent that there is a need to list proceedings before Divisional Courts constituted of judges of different Divisions of the High Court, because proceedings are raising complex issues of law that go beyond the expertise of judges of specific Divisions. For example, recent proceedings concerning matrimonial property raised complex issues that required the expertise of judges of both the Family and Chancery Divisions.

The amendment makes it explicit to judges and practitioners what has been regarded as implicit in the general powers of the court under the rule. Namely that the court has power to require proceedings to be heard by a Divisional Court in appropriate circumstances where this will further the overriding objective of enable the court to deal with cases justly and at proportionate cost.

7.2 Assessment of bills of costs. Part 47 makes provision for the procedure governing detailed assessment of costs between parties (including when a costs assessment may be carried out, the court venue that will deal with assessment proceedings; the form and content of the bill of costs; default provisions, costs orders and appeals). The procedure involves the submission by the party entitled to costs (the receiving party) to the party ordered to pay costs (the paying party) of a "bill of costs" (which is a breakdown of the costs incurred by the receiving party). If the parties are unable to agree the amount of costs or there is a dispute as to the costs claimed, the bill of costs is submitted to the court for assessment. Rule 47.6 is amended to provide for the filing of electronic and/or paper versions of the bill of costs, if appropriate, and to direct users to the relevant practice direction supplementing Part 47 (Practice Direction 47).

7.3 Appeals against court orders. Rule 52.4 is amended to make clear that a judge hearing an application for permission to appeal may, in what is known as a "rolled-up" hearing, hear the application for permission to appeal and the appeal at the same time, if possible and appropriate. This addresses a possible argument that changes to Part 52 in 2016 had inadvertently removed this power. In most cases the permission of the

court is required before an appeal can be made and permission must be obtained before an appeal proceeds. Applications for permission to appeal a decision of the court are generally considered by the judge without the parties being present. However, there are circumstances where the court will have made a decision, with all parties present, where it will be appropriate for the application for permission to appeal that decision, and for the appeal hearing itself, to be heard at the same time and whilst the parties are still present at court. An example is where a District Judge has refused an application to suspend a warrant of possession. Applications of this nature are frequently made just before, or on the day a warrant of possession will be executed and the party evicted from their home. Parties will attend the hearing of the application for the suspension of the warrant. If the application is refused, parties may seek permission to appeal. That application is usually issued and referred immediately to the judge whilst the parties are still at court, and it is expedient to deal with both the application for permission and the appeal whilst the parties are in court.

7.4 Mercantile Court - renaming. From July 2017, the international dispute resolution jurisdictions for England and Wales have been given the name of the Business and Property Courts (BPC). They will act as a single umbrella for business specialist courts across England and Wales. The BPC will encompass the specialist courts and lists of the High Court including the Commercial Court, the Admiralty Court, Mercantile Court, the Technology and Construction Court and the courts of the Chancery Division (including those dealing with financial services, intellectual property, competition, and insolvency). Some County Court work will also come under the umbrella of the BPC. One of the aims of the project is to simplify and clarify for domestic and international users the names of the specialist courts and lists that will make up the Business and Property Courts, and to get rid of antiquated terminology that fails to identify the work of those jurisdictions accurately. The first such change is to rename the Mercantile Court as the Circuit Commercial Court, and the judges of those courts as Circuit Commercial Court judges. Amendments are accordingly made to Part 59 (Mercantile Courts) to implement the name change and to amend references to the Mercantile Court and judges where they appear throughout the CPR.

7.5 European Small Claims Procedure and European Order for Payment. Amendments to Part 78 (European Procedures) are made to reflect the changes made by EU Regulation 2015/2421 to the EU Regulations establishing the European Small Claims Procedure (ESCP) Regulation (Regulation 861/2007) and European Order for Payment Procedure (EOP) (Regulation 1896/2006). The existing procedures are well established. The ESCP provides for a cross-border low value money claim to be conducted on paper between litigants in member states. The EOP is a simplified procedure which allows a creditor who has an uncontested claim for a specified amount of money to apply to a local court for an order which can be enforced against the defendant in other member states. Following a report on the application of the ESCP Regulation in November 2013 the European Commission issued a proposal with the aim of improving its functioning and use, and to make it more attractive to small businesses. The amending Regulation is now in force (since 14 July 2017), so the rules need to reflect the amendments.

The revised Regulation increases the upper limit for ESCP claim from €2,000 to €5,000 and provides that if an application for a EOP is opposed the application will be transferred into the ESCP. The rule amendments reflect these changes.

7.6 Judicial scrutiny of applications to issue writs of possession. Part 2 of the Immigration Act 2016 amends the Immigration Act 2014 ("the 2014 Act"). It provides (among other measures calculated to discourage people from over-staying or otherwise remaining in the UK without appropriate authorisation to remain) that a landlord may terminate a residential tenancy agreement where the Secretary of State has given notice in writing to that landlord that a single identified occupier of the premises is disqualified because of their immigration status; or if there is more than one occupant all the occupiers are disqualified because of their immigration status. A notice given by the landlord to the occupier(s) is to be treated as a notice to quit where a notice to quit would otherwise be required to end a residential tenancy. The prescribed form of the notice - Notice of eviction and end of tenancy (equivalent to a notice to quit) is contained in (the Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc.) Regulations 2016 (http://www.legislation.gov.uk/uksi/2016/1060/contents/made). Attached to the notice which is given to the disqualified person(s), will be the notice issued by the Secretary of State identifying the person(s) as disqualified because of their immigration status.

The 2014 Act as amended provides that the notice of eviction and end of tenancy given by the landlord to the disqualified person(s) may be enforced in the High Court as if it were an order of the High Court, if the disqualified person(s) do not leave the property. If the disqualified persons do not leave the premises within the time provided by the notice (28 days) the landlord may then request the High Court to issue a writ of possession. A writ of possession gives a High Court Enforcement Officer authority to recover the property or land on behalf of the owner from the tenant(s). Requests for writs of possession would usually follow court proceedings where the court has determined and made an order that possession should be given to the owner and where the tenant(s) has failed to comply with the court order to leave the property. As the Court has already considered the facts of the case and made a decision, the issue of the writ of possession following non-compliance with the order of the Court is an administrative function. There will be no such proceedings in cases where a notice has been served on a disqualified person(s) and the Civil Procedure Rule Committee considered that there should be judicial scrutiny of an application for a writ of possession to satisfy the court that all the appropriate steps have been taken, and that all interested parties are aware of the proceedings and what action they can take. The amendment to Rule 83.13 provides that such applications are supported by the relevant documents and referred to a judge for consideration as to whether a writ should be issued rather than the writ being routinely issued by court staff.

Consolidation

7.7 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). The Rule Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of other 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.

8.2 The Committee undertook informal consultation of the sort outlined above (including taking account of the views of the Home Office, practitioners and judiciary in the specialist business courts and, through its members, of practitioners more widely as well as those representing the interests of consumers and litigants in person), but did not consider that any of the proposals for rules before it forming part of the present instrument required separate formal consultation by the Committee.

9. Guidance

9.1 Amendments to the Civil Procedure Rules are drawn to the attention of participants in the civil justice system by correspondence addressed by the 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 Tribunal 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.

10. Impact

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

10.2 There is no impact on the public sector.

10.3 A separate Impact Assessment has not been prepared for this instrument as the majority of amendments supplement legislation already made.

11. Regulating small business

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

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.uk, direct telephone line 020 3334 3184, can answer any queries regarding this instrument.