

## Approved

### Minutes of the Civil Procedure Rule Committee

Friday 9<sup>th</sup> July 2021 (via video conference due to the Covid-19 Pandemic)

#### Members attending

The Master of the Rolls & Head of Civil Justice (Chaired jointly with Lord Justice Birss)

Lord Justice Birss, Deputy Head of Civil Justice

Mr Justice Kerr

Mr Justice Trower

His Honour Judge Jarman QC

His Honour Judge Bird

Master Cook

District Judge Parker

Brett Dixon

Masood Ahmed

Lizzie Iron

Dr Anja Lansbergen-Mills

John McQuater

David Marshall

Isabel Hitching QC

Tom Montagu-Smith QC

#### Apologies

District Judge Cohen and His Honour Judge Philip Waller CBE

#### Item 1 Welcome, Minutes, Action Log & Matters Arising

1. The minutes of the meeting on 11<sup>th</sup> June 2021 were **AGREED**.
2. The Action Log was duly **NOTED**.

#### Item 2 Disclosure Pilot for the Business & Property Courts (BPC) PD51U CPR(21)35

3. The Chancellor of the High Court, Lord Justice Flaux, was welcomed to the meeting to present the matter. Ed Crosse from the Disclosure Working Group was also present and contributed, along with Natalie Osafo.
4. It was explained that the proposals represent a series of relatively minor amendments in response to helpful feedback from users and in order to carry out a *tidying up* exercise. However, the principal changes concerning new provisions for a separate regime within the pilot for, "Less Complex Claims" may be seen as more significant. They are not intended to be limited to new cases only, they are to apply to less complex cases issued before the changes come into effect as well as new claims. Other modifications include improvements for multi-party claims and some other simplifications, specifically in relation to the provisions relating to lists of issues for disclosure, these being proposed following careful review of the way the pilot operates; Disclosure Guidance (at paragraph 11 of the PD) has also been re-drafted to remove the emphasis on the need for a hearing, and a new paragraph 6A inserted to explain that, 'court control' over disclosure can be provided by guidance being given or the court resolving differences in the traditional way, by a party bringing forward an issue for determination.
5. The Committee was taken through the proposed changes in detail, which comprised, draft amendments to: PD51U's Appendix 1; Disclosure Review Document and explanatory notes (DRD) at Appendix 2; Disclosure Certificate at Appendix 4; proposed new Appendix 5 for "Less Complex Claims" and the proposed new Appendices 6 and 7, the new DRD

for “Lower Value Claims”. No changes are considered necessary to Appendix 3 (Certificates of Compliance) because it is not materially affected by the other proposed revisions.

6. The MR opened the discussion by asking about the rationale for an extension rather than a move to import the pilot into the rules as permanent provisions. The Chancellor explained that more time was needed for the changes to bed in, so a 12 month extension to the pilot would assist; there was also a desire to assess the extent to which the scheme saved costs and that there would need to be further consultation before any request was made to make it part of the substantive rules. The MR indicated that the process of deciding whether to make the pilot permanent would need to start as early as possible.
7. In reviewing the drafting, Mr Crosse raised an additional modification to the proposed draft Appendix 5 at paragraph 1; he also acknowledged receipt of some other written comments out-of-committee, from Masood Ahmed and undertook to review them before the final drafting was cast and this was **NOTED. Action:** Ed Crosse to review Masood Ahmed’s drafting comments.
8. His Honour Judge Bird observed that the proposed new Appendix 5 for Less Complex Claims should serve as a welcome addition for the BPCs outside the Rolls Building.
9. With the support of the MR, Lord Justice Birss explained that, given the very limited time available to include any additional provisions in the summer PD Update, it was only possible to consider the extension provision for approval today and this was discussed. It was **RESOLVED:**
  - (i) PD51U Disclosure Pilot for the Business & Property Courts be extended for a further 12 months, until 31<sup>st</sup> December 2022, **AGREED** to allow more time for the scheme to bed down and to provide an opportunity to make further improvements.
  - (ii) Suite of other proposed revisions to PD51U were **AGREED IN PRINCIPLE, subject to final drafting and further determination.**
  - (iii) Working Group to publish the draft drafting before the end of term, to provide users with notice of the anticipated changes in advance of formal adoption via a PD Update in due course.
  - (iv) Matter to return to a (remote) meeting of the CPRC in September for final approval.
10. **Actions:** (i) Drafting Lawyers & Secretariat to include PD51U extension in the imminent summer (133<sup>rd</sup>) PD Update (ii) Disclosure Working Group, in liaison with the Secretariat, to publish the other draft proposals by end July 2021 (iii) Secretariat to allocate time in September for consideration of the outstanding amendments.

### **Item 3 Deeds Poll CPR(21)37**

11. Birss LJ summarised the background. The matter was last before the CPRC substantively in May and Master Cook gave a brief oral update in June. Although a significant amount of work had been carried out so that the Family Court can be directly involved in child name changes there was still an issue of policy that remained outstanding and until that was resolved it was not appropriate to settle on a definite commencement date for the Regulations, nor, therefore, an in-force date for the amended CPR provisions under PD5A.
12. Peter Farr was welcomed to the meeting and his report was duly **NOTED.**
13. Master Cook, chair of the Judicial Working Group reviewing the enrolled deed (change of name) regulations, explained there are two elements to name changes: enrolled name

changes which are within the responsibility of the MR and unenrolled name changes which are not governed by the MR. Notwithstanding that unenrolled name changes were outside the MR's control, he updated the Committee on the considerable political interest concerning unenrolled name changes and this was **NOTED**.

14. In reviewing the proposed drafting, it was highlighted that, at a recent Working Group meeting it was decided that a statutory declaration should be restored to the proposed amendments, in place of a statement of truth. This is because the use of a statement of truth here would need a change to the CPR (r.32.14) to add deeds poll regulations, while a statutory declaration involves ready-made and applicable criminal sanctions under the Perjury Act 1911 for making a false statement. Alasdair Wallace has thus redrafted regulation 8(5) from the draft regulations accordingly. The revised proposal amends the existing regulations – at present the statutory declaration is made by a person verifying the identity of the applicant; the amendment would mean it is the applicant who must provide the declaration. The revision has reduced the new regulation 5 to a single paragraph and produced a minor tweak in regulation 8(5) in consequence (changing “statement of truth” to “statutory declaration”). This and the other amendments were discussed in detail. In response to the observation of possible confusion regarding the presence of an apparent double negative, it was proposed to move sub-reg (6) under reg 8 to be within reg 6 itself and this was **AGREED**.
15. The proposed amendments to PD5A were also reviewed.
16. It was **NOTED** that further work, with and by the FPRC and officials is ongoing as regards updated forms, training materials for the family judiciary and guidance for applicants.
17. It was **RESOLVED to recommend to the MR** that:
  - (i) the Enrolment of Deeds (Change of Name) Regulations 1994 be amended, subject to final drafting.
  - (ii) PD5A be amended, subject to final drafting and for an in-force date to be aligned with the related changes to the FPR.
18. **Actions:** MoJ Policy/Drafting Lawyers to advise Secretariat when PD5A revisions are ready to be included in the CPR Update cycle.
19. The MR left the meeting and handed the Chair to Lord Justice Birss.

#### **Item 4 Vulnerable Parties Sub-Committee CPR(21)36**

20. The Chair made some introductory comments and explained that this item is to consider drafting proposals in consequence of s.64 and s.66 (concerning civil special measures) of the Domestic Abuse Act. He thanked the sub-committee for their extensive work thus far on such an important topic and for Brett Dixon's time to discuss Mr Justice Kerr's alternative drafting proposal in advance of the meeting.
21. Mr Dixon explained that the sub-committee's initial drafting approach was out of an abundance of caution which replicated wording from the Act. However, in the interests of brevity, there were no objections from the sub-committee to the proposed alternative drafting. It has also been shared with both civil and family MoJ officials and drafting lawyers for consideration. Liaison with other rule committees is ongoing.
22. In discussing the proposed alternative drafting in detail, it was observed that vulnerability, in the context of the civil courts, is wider than domestic abuse and that various other consequential provisions required consideration, for example: considering modifications to court forms, the interplay between these provisions and those of CPR Part 32 (power of the

court to control evidence) and PD16 (statements of case and how a party brings a cause or injunction to the notice of the court).

23. The proposed alternative drafting for the revised CPR Part 1 and PD1A were **AGREED subject to the following points and final drafting:**

- (i) As a matter of principle, the rules are not the place to educate readers about the substantive law. If the CPRC tried to do that it may be in conflict with its statutory duty under s.2(7) Civil Procedure Act 1997 to, ‘...try to make rules that are both simple and simply expressed.’ The overall view was that users were focused on what the rules were, not why they are there.
- (ii) CPR Part 1 – the Overriding Objective r.1.1(1) – remove the now superfluous, “new” from the first sentence.
- (iii) PD1A – additional PD headings are seen as useful and are to be adopted.
- (iv) PD1A, para 8 – to be recast to (i) remove the quotation marks from the term “ground rules”, but leave the term in situ, unpunctuated (ii) replace the proposed addition of, “party” with, “person”.
- (v) PD1A, para 8(d) – remove, “in the exercise of” from the first line.
- (vi) PD1A, para 9 – to be recast to (i) replace, “the” (party or witness) with, “a” party or witness (ii) replace, “and” (giving evidence) with, “or” giving evidence (iii) remove the proposed text in square brackets.
- (vii) Consider CPR 32.1(1)(c) concerning the power of the court to control evidence and the way in which the evidence is to be placed before the court when the final drafting is being cast.

24. It was **NOTED** that:

- (i) the sub-committee and officials to identify and consider the ancillary changes required, such as, to the Directions Questionnaire, Pre-Trial Checklist, Application form and any other court form/s used to identify vulnerable parties to the court.
- (ii) Sections 64 & 66 of the Act are due to come into force in April 2022, so this drafting (and any other ancillary CPR aspects) should be settled at/by the 3<sup>rd</sup> December 2021 CPRC meeting for inclusion in the winter CPR Update cycle for signing/laying in Jan/February and in-force as part of the April common-commencement date.
- (iii) Matter to return in October.

25. **Actions:** Secretariat to allocate time within the 8<sup>th</sup> October 2021 agenda.

**Item 5 Section 2(7) Sub-Committee CPR(21)41**

26. The Chair provided some introductory comments and thanked the sub-committee for its continuing efforts following the resolution in June to approve, in principle, the proposed phased works programme to simplify the rules.

27. Mr Justice Kerr provided an update on the sub-committee’s activities thus far which were discussed. A steer on the proposed principles and direction of travel was also sought. Kerr J said that a clear message needed to be made to the civil litigation community that the CPR and PDs should no longer accommodate the weight of secondary and tertiary material that has accumulated over the 22 years since the CPR’s inception. So far, the

sub-committee has conducted an initial review of Parts 2 (Application and Interpretation), 3 (Case management powers), 4 (Forms), 7 (How to start proceedings) and 8 (Alternative claims procedure); accordingly, sufficient time should be scheduled in for debate, consultation and decision. The sub-committee did start considering Part 5 as well, but feel it would be better for that to be considered by the sub-committee already seized of the task to review rules 5.4C and 5.4D and the issues arising from the Supreme Court Judgment in Cape (ref Item 9 below). It is difficult to address the rest of Part 5 in isolation from their work and this was **AGREED**.

28. Nonetheless, it was possible to present for decision, formulated drafting proposals for revised Parts 10 (Acknowledgment of Service) and 12 (Default Judgment) and associated PDs. Isabel Hitching QC explained that the proposed amendments were not intended to make changes of substance, although the location of some provisions has changed; the aim was to reduce the length and provide improved sense and clarity. In doing so, a number of technical terms have been identified that may not be readily understood by litigants in person, so it may be useful in due course to expand the definitions section or amplify the CPR's glossary; gender neutral language has also been adopted.

29. A detailed discussion ensued. It was **RESOLVED**:

(i) The proposed changes to CPR Parts 10 and 12 and the proposed deletion of PD10 and PD12 were **AGREED in principle and subject to final drafting**. Final drafting is to be published for consultation before final determination by the CPRC and incorporation into a CPR Update cycle.

(ii) Drafting principles and sub-committee's direction of travel **AGREED**.

(iii) Introduction of a process and programme of conducting, "rolling consultations" **AGREED**. The practice being that when the CPRC is content with the sub-committee's proposed reforms, they can be published for public consideration prior to formal adoption and onward incorporation into a future CPR Update.

(iv) Drafting Lawyers and officials need to be involved in the project and work closely with the sub-committee.

(v) Proposed "LOOP" (Library of Online Practice) which seeks to serve as a *liberty* measure to declutter the rules in the interests of usability, is a self-contained concept and requires quite extensive feasibility work to consider, amongst other issues: structure, boundaries, contents, status, access, curatorship. The digitally excluded also needed to be considered. However, the concept was, in principle, considered to have merit.

30. **Actions:** (i) In liaison with the Chair et al, the Secretariat to facilitate a process for rolling consultations (ii) Drafting Lawyers, MoJ & HMCTS to identify contact/s to work with the sub-committee (iii) Sub-Committee to liaise with Holgate J on Planning Court related matters (iv) Isabel Hitching to check the points of detail raised in discussion, consult the Forms Sub-Committee as necessary and produce final drafting for reformed Parts 10 & 12; Secretariat to publish at earliest opportunity so as to invite wider comments (iv) Secretariat to allocate a standing time slot at ensuing CPRC meetings.

## **Item 6 Possession Proceedings PD55C Coronavirus: Temporary Provisions CPR(21)38**

31. The Chair summarised the background and thanked Lord Justice Stephen Males for his report from the Civil Leadership Group, which was duly **NOTED**.

32. It was reiterated that in response to the pandemic, the then MR established a cross-sector Working Group, chaired by Mr Justice Robin Knowles CBE with a specific focus on the

short term impact of the pandemic upon possession proceedings. The Working Group has carried out excellent work and in establishing the Overall Arrangements.

33. PD55C was also introduced. It provides for temporary modification of CPR Part 55 during the pandemic. It deals with the reactivation of possession claims which have been subject to an automatic stay and with the procedure for new claims, including requirements for claimants to inform the court how they have complied with the Pre-Action Protocol and what knowledge they have as to the effect of the pandemic on the defendant and their dependants. It is due to expire at the end of July 2021.
34. It was proposed that PD55C be extended until the end of November 2021 to allow time for the cross-sector Working Group to report to the MR with recommendations for the future conduct of possession claims and for consideration at the CPRC's October meeting. By doing so, it allows some time to implement any further decisions. This was discussed, during which the position concerning Welsh housing cases was also raised.
35. It was **AGREED** to:
  - (i) Extend the operation of PD55C (Coronavirus: Temporary Provision in relation to Possession Proceedings) until 30<sup>th</sup> November 2021
  - (ii) Matter to return to the CPRC on 8<sup>th</sup> October 2021
36. **Actions:** (i) Drafting Lawyers and Secretariat to include in the summer (133<sup>rd</sup>) PD Update  
(ii) Secretariat to allocate time on the 8<sup>th</sup> October 2021 agenda for a further report.

#### **Item 7 Digital Notice of Change CPR(21)39**

37. The Chair provided a brief overview of the cross-jurisdictional work to digitalise the process to register a notice of change (of representation) and welcomed Steve Chapman to the meeting.
38. A report from the Judicial Digital Steering Committee was duly **NOTED**. Mr Chapman explained that the digital notice of change was already successfully in operation in some Tribunals and when the proposal was considered by the FPRC, it did not consider that any amendments were required to the Family Public Law PD (FPR PD36M) to accommodate it. An indicative plan for the civil jurisdiction was to introduce a digitalised process to register a notice of change later this year, if possible. Therefore, the main issue for the CPRC, is the extent to which, if at all, any amendments may be required to the relevant rules or PDs and this was discussed.
39. **Subject to** any concerns from members (to be registered by Friday 16<sup>th</sup> July 2021) no issues were identified and as such, it was **AGREED in principle** to digitalise the civil process to register a notice of change (of representation).
40. **Actions:** Members to register any concerns/necessary drafting points with HMCTS/Secretariat by 16<sup>th</sup> July 2021.

#### **Item 8 Default Judgment (Collision Claims) in the Admiralty Court CPR(21)40**

41. The Admiralty Judge, Mr Justice Andrew Baker, was welcomed to the meeting.
42. A possible lacuna in CPR 61.9(1) was explained in detail and concluded with the view that a rule change seems desirable, because the apparent exclusion of judgment in default of acknowledgment of service in Admiralty collision claims, is not intended. A proposed drafting solution had been prepared.

43. However, a preliminary discussion with Master Dagnall (Chair of the Lacuna Sub-Committee) out-of-committee had raised a point regarding explicit disapplication of CPR Part 15 to avoid inadvertent availability of judgment in default of defence, which the Admiralty Judge viewed as meriting further consideration. The desire for drafting revisions to be “future proofed” wherever possible was also observed.
44. Accordingly, it was recommended that the proposed drafting be agreed in principle only and that the Admiralty Court Users’ Committee be consulted on the form of amendment, whereupon it was **RESOLVED**:
- (i) The drafting proposal (that there be an amendment to confirm/restore the availability of judgment in default of acknowledgment of service in Admiralty collision claims) was **AGREED in principle**.
  - (ii) The Admiralty Court Users’ Committee be asked to consider the drafting further and to then liaise with the Lacuna Sub-Committee on the proposed form of amendment.
  - (iii) Matter to return to the CPRC at or before the December meeting for consideration as to inclusion in the next CPR Update, as part of the April 2022 in-force cycle.
45. **Action:** Secretariat to provisionally programme in for 5<sup>th</sup> November 2021 meeting.

#### **Item 9 Any Other Business & Close**

**Civil Justice Council Report on the Resolution of Small Claims** <https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf> -

46. The Chair commended the report as an excellent piece of work by the CJC Working Group, chaired by His Honour Judge Barry Cotter QC and noted with thanks the involvement of His Honour Judge Bird and others. Particular attention was drawn to the recommendation under paragraph 159 of the report which highlighted the view that CPR r.27.6 is unduly restrictive and thus should be amended to be less prescriptive as to when a preliminary hearing can be held. Following discussion, it was **RESOLVED** that Master Dagnall and District Judge Parker, will review the r.27.6 recommendation and report back to the CPRC with proposals.
47. The recommendation at paragraph 158 for a small claims mediation pilot at a court with referral across all claims tracks was also highlighted. Given that the CPRC has recently formed a sub-committee to consider paper determinations for some small claims, work with policy and operational officials was ongoing and this was **NOTED**.
48. **Action:** Secretariat to be advised when reports on both r.27.6 & Small Claims are ready to be programmed in for CPRC consideration.

#### **Access to court documents by non-parties (Cape Holdings) (LSC2019/28)**

49. The Chair explained that this matter was last aired at the 5<sup>th</sup> March 2021 CPRC meeting when it was resolved to form a sub-committee to consider the points arising from the Supreme Court Judgment in Cape regarding access to court documents by non-parties. In order for the work of the sub-committee to commence, an additional member was sought, to join the current constitution of Tom Montagu-Smith QC and Dr Anja Lansbergen-Mills.
50. **Action:** Secretariat to be advised when the sub-committee’s report is ready for CPRC consideration.

51. **Post Meeting Note:** *Mr Justice Trower appointed as sub-committee Chair.*

### **Register of Member Interests – Annual Review**

52. The Chair advised members to ensure they submitted to the Secretariat an updated Register of Interests before the end of term.

53. **Action:** Members to file an updated Register of Interests, including nil declarations, with the Secretariat by 30<sup>th</sup> July 2021.

### **Forthcoming Meetings**

54. It was confirmed that the next mainstream CPRC meeting would be held (remotely) as planned on 8<sup>th</sup> October 2021. Prior to that, the provisional September meeting would also be convened (remotely on 10<sup>th</sup> September 2021) in order to conduct only urgent business and it would not be expected to last beyond the usual lunch adjournment. At this stage, the only item of business is PD51U (as resolved under Item 2 above).

55. **Action:** any other critical business agenda item requests are to be with the Chair/Secretary before 30<sup>th</sup> July 2021 in order to determine suitability.

### **Lay Member Webinar**

56. An outreach webinar to encourage applications for lay members will take place on 14<sup>th</sup> July 2021. The session will be led by the Chair who will be joined by Lizzie Iron, John McQuater, the Secretariat and officials from the Public Appointments Team.

### **Covid-19 Pandemic related measures**

57. In response to a question concerning the operation of the pandemic related CPR measures, it was confirmed that all such measures had either specific expiry dates (which had now past) or, such as PD51Y (video and audio hearings) only remained in operation for as long as the Coronavirus Act was in effect; PD55C (possession proceedings) remains in operation and is currently under review (as per Item 6 above).

### **Valedictory – His Honour Judge Lethem**

58. The Chair advised that, after nine years, this would be HHJ Lethem's last CPRC meeting. HHJ Lethem served on the CPRC as a District Judge member from 2013 to July 2019 when his official term of office came to an end. However, since then he has continued to provide a significant amount of time and expertise to CPRC matters generally, and most notably with the Housing and Costs sub-committees, the Whiplash reforms and the OCMC Pilot. All present joined the Chair in expressing thanks and praise for his long and outstanding service. In response, HHJ Lethem remarked that his time with the CPRC had been a highlight and an honour.

C B POOLE  
July 2021

#### **Attendees:**

Carl Poole, Rule Committee Secretary  
Nicola Critchley, Civil Justice Council  
Amrita Dhaliwal, Ministry of Justice  
Alasdair Wallace, Government Legal Department  
Katie Fowkes, Government Legal Department  
Andy Currans, Government Legal Department (from Item 6)



Luke Classen, Government Legal Department  
Andy Caton, Judicial Office  
Faye Whates, HM Courts & Tribunals Service  
Master Dagnall, Chair, Lacuna Sub-Committee  
His Honour Judge Lethem  
The Chancellor of the High Court, Lord Justice Flaux (Item 2)  
Ed Crosse (Item 2)  
Natalie Osafo (Item 2)  
Peter Farr, Ministry of Justice (Item 4)  
The Admiralty Judge, Mr Justice Andrew Baker (Item 8)