Approved Minutes of the Civil Procedure Rule Committee: Annual Open Meeting
Friday 15th May 2020 (via video conference due to the Covid-19 Pandemic)

Members attending
The Master of the Rolls (opened the meeting and handed over the chair to Lord Justice Coulson)
Lord Justice Coulson, Deputy Head of Civil Justice (in the Chair from Item 2 onwards)
Mr Justice Birss
Mr Justice Kerr
His Honour Judge Jarman QC
His Honour Judge Bird
Master Cook
District Judge Parker
District Judge Cohen
Brett Dixon
Richard Viney
John McQuater
Lizzie Iron
Dr Anja Lansbergen-Mills
David Marshall

Item 1 Welcome and Introduction from the Master of the Rolls

1. The Rt. Hon. Sir Terence Etherton, MR, welcomed committee members, the public participants and officials to the annual open meeting, in his capacity as statutory Chair of the Civil Procedure Rule Committee (CPRC). Thanks were expressed to Lord Justice Coulson, to whom the MR delegates the day to day running of the CPRC as part of his role as Deputy Head of Civil Justice. The contributions made by other members of the committee were also acknowledged, in particular the work of the Online Civil Money Claims Sub-committee, chaired by Mr Justice Birss; the Open Justice, Brexit and Contempt Sub-committees, all chaired by Mr Justice Kerr; the Whiplash Reforms Sub-committee under the chairmanship of His Honour Judge Bird and the wide-ranging work of the Lacuna Sub-committee, chaired by Master Dagnall. The item today on Vulnerable Parties is also significant. Appreciation was further noted for the exceptional work of the Secretariat and drafting lawyers. The effectiveness of the committee is the result of a group effort, from all members and officials with this year having been – and promising to continue to be – especially busy. The MR highlighted the importance and value of the CPRC, working as an independent body to enhance civil litigation and civil conduct. The most recent example being the pace at which it responded to the urgency of the Covid-19 Pandemic to keep the civil justice system going.

Item 2 Apologies, Minutes, Action Log and Matters Arising

2. Apologies were received from Masood Ahmed.

3. The minutes of the meeting on the 03 April 2020 were approved as an accurate record.

4. Updates were provided in relation to the following items on the Action Log:

- **Whiplash Reforms AL(20)21**

  Lord Justice Coulson acknowledged that several of the pre-submitted questions from the public participants related to this topic. He explained that on 21st April 2020, the Government announced a pause in work on the whiplash reforms due to the impact of the Covid-19 pandemic (C-19) and gave a revised implementation date of April 2021. The CPRC will, therefore, re-engage with Ministry of Justice (MoJ) officials on this issue when it is appropriate to do so. The expectation is that further information on the proposed new rules and how they will work in practice

will be announced by the MoJ in due course. As such, it was not possible to provide any further information at this stage.

- **Contempt (CPR Part 81) Consultation AL(20)01**

  Mr Justice Kerr provided a brief overview of the rationale and work of the sub-committee, explaining that the proposed redraft of CPR Part 81 had reduced the number of rules from 38 to 10 and on which a public consultation had recently closed. The sub-committee were reviewing the responses and thanks were conveyed to all consultees. The aim was to be in a position to report more fully at the June meeting and, if possible, to settle the drafting for inclusion in the next Statutory Instrument (SI) to be effective from October 2020, but if that was not possible, then the next commencement cycle was April 2021. **Action:** matter to return to CPRC on 05 June 2020.

- **Commission for Justice in Wales AL(20)30**

  His Honour Judge Jarman QC advised that, having first raised this at the last meeting, the intention was for final drafting to be presented today. However, given the competing priorities in response to the C-19, officials required additional time to consider any policy and operational implications.

  HHJ Jarman reiterated that the Commission was established to review the operation of the justice system in Wales and to make recommendations for its long-term future. Its extensive, evidence based report was published in the autumn of 2019. One of the 78 recommendations proposes to make it compulsory for all claims involving a challenge to the lawfulness of a decision of a Welsh public authority to be issued and heard in Wales and the CPRC agreed this in principle at the last meeting.

  The aim was for a rule change to come into force in October 2020, as such the matter is to return to the June meeting. **Action:** MoJ and HMCTS officials to provide any advice, through the secretariat and drafting lawyers, in readiness for the 05 June meeting.

- **PD2B – Allocation of Cases to Levels of Judiciary AL(19)80**

  In recognition of the various public questions concerning PD2B, Master Dagnall confirmed that the CPRC had already established a sub-committee to review elements of CPR Part 2B. However, owing to C-19 circumstances, it had not yet reported and as such the public questions have been noted for consideration by said sub-committee. It may also be necessary to clarify the extent of the sub-committee's general remit, with a paper being formulated for either the June or July meeting. **Action:** In consultation with Master Dagnall, the Secretariat is to programme the matter in to a future CPRC meeting.

Item 3 Covid-19 related matters

5. Lord Justice Coulson opened the item by acknowledging the useful work done by District Judge Parker and Richard Viney, following the discussion at the last meeting. He then set out eight points, as follows:

   - **Practice Directions made as an immediate response to the Pandemic**: Members were praised for their enormously helpful comments and for the speed and clarity of responses. Given the circumstances, it was necessary to put measures in place urgently and as such each proposal had to be considered very

quickly. It was also **NOTED** that the recent challenge against the lawfulness of the possession proceedings related PD 51Z, failed. Neutral Citation Number: [2020] EWCA Civ 620.

- **Controlling Civil Justice through Listing practice:** The pressing need to prioritise work in a landscape of reduced staffing and court resources meant that at the end of March the, 'Civil Listing Priorities' document was issued to enable judges to be in control of whether or not cases needed a hearing and whether they were suitable for being heard remotely. With circumstances evolving, the document has been revised and was reissued on 14th May 2020.

- **Possessions:** PD51Z stayed possession proceedings for 90 days. Several of the public questions asked were about this: whether it was going to be extended and what was happening in the future? Fundamentally, this is a matter for Government. However, it is recognised that there are a large number of possession cases subject to the stay; the Civil Executive Team (chaired by Coulson LJ as Deputy Head of Civil Justice) are producing a paper, in consultation with Designated Civil Judges nationwide, highlighting the related issues, which include a concern regarding the level of advice for tenants and availability of duty legal representation, which will be provided to the Ministry of Housing, Communities and Local Government for their consideration.

- **Recovery:** The Civil Executive Team have prepared a related paper to consider options. It recognises that until normality is returned, backlogs are likely to continue in the courts and even when operating in recovery mode the expectation is to continue with some Video Hearings as a means to adjust, but that adjustment back to normal will be a huge task.

- **Civil Justice Council Consultation on C-19:** On 1st May 2020 a consultation was launched for two weeks, closing today (Friday 15 May) to seek feedback on the impact of the measures put in place to tackle the spread of C-19, given the significant changes in the operation of the civil justice system as a result. The feedback will be used to inform any further guidance that is issued and identify areas where additional work may be needed as part of the response to C-19. The aim is to report by the end of May 2020. Further details are available online: www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/

- **Email size and Service by email:** This was considered by the Civil Executive Team, but felt that it would be inappropriate to lift the current restrictions because of the lack of court staff available to read the emails and to action them.

- **Extensions to all limitation periods:** Essentially this was a matter for Government policy and there are a variety of issues with doing so during the Pandemic; as such it was very unlikely that anything would change substantively.

- **Video Hearings post the Pandemic:** In the short term, the expectation was that suitable hearings would continue to be held via remote technology; Video Hearings have been widely used in response to the current circumstances and it helps to reduce backlogs. However, any future model is unclear at this stage.

6. A discussion ensued which raised queries as to why parties were not being given greater flexibility to agree time limits beyond the 56 days extension allowed for in PD51ZA and if it was worth looking further at whether to temporarily adjust the timescales in CPR 55.5(3) concerning possession proceedings. The Chair explained that both issues had been considered in the initial stages of responding to the Pandemic. On the first point there was concern regarding the need for the court to maintain control of proceedings and on the

second point, the conclusion was that as there is no sanction for non-compliance with the timescales regarding possession hearings, there was not any issue which required specific provisions being introduced. However, these issues could be revisited as part of the considerations concerning recovery. The different levels of digital functionality currently in place within the High Court and county court could mean that different solutions may be required. **Action:** DJ Parker, in consultation with others and including the Association of District Judges, to consider producing a paper for the next meeting.

Item 4 Vulnerable Parties Sub-Committee CPR(20)15

7. District Judge Cohen summarised the report explaining that although it was an initial paper, it expressed views that were firmly held and he hoped that the committee found it to be comprehensive.

8. The CPRC sub-committee was formed in order to consider the Civil Justice Council's (CJC) report and recommendations for vulnerable witness and other parties in civil proceedings. The CJC's report was published on 20th February 2020. It is an extensive piece of work, recommending widespread changes to the CPR, practices, training and resources. DJ Cohen explained that the sub-committee's initial work only focuses on the CJC's recommendations insofar as they relate to the CPR. A steer was, therefore, sought as to the sub-committee's direction of travel on the CPR related topics. In board terms, the issues discussed were whether there should be a definition of vulnerability; the extent to which, if at all, the CPR's Overriding Objective should be changed; whether a new rule and/or PD should be formed to directly address vulnerability; and consideration of any specific measures in light of vulnerability, within the costs regimes.

9. The Chair made it very clear that this is a very important subject and at this stage, the discussion was purely to provide a steer for further work by the sub-committee; such views are, therefore, not binding and may change as final proposals are developed and presented. Given the potentially significant policy implications and other strands of related work, MoJ policy officials and drafting lawyers would need to work closely with the sub-committee.

10. The discussion emphasised the significance of the matter and although it was acknowledged that the issue of vulnerability should already be considered as a matter of course, there was merit in advancing the sub-committee's work to understand how this could be best served within the rules. Amending the Overriding Objective was something which should be approached with caution and generally, it is best avoided. However, it was recognised that this was a particularly special issue and a change to reflect that may be necessary on this occasion. The discussion also ventilated a point of detail as to whether any new PD would need to be "attached" to a new rule or whether an existing rule was appropriate. The case of *Aldred v Cham* [2019] EWCA Civ 1780 was also noted and which, having been aired by the Lacuna Sub-committee at the CPRC's March meeting, had been referred to the Costs Sub-committee.

11. It was **RESOLVED** that:

    (i) the sub-committee could work on the basis that proposals to amend the CPR's Overriding Objective could be drafted for further consideration.

    (ii) the concept of a new PD was agreed in principle and is to be drafted for further consideration.

    (iii) proposals as to revising the definition of proportionality in CPR 44.3(5) and other costs related provisions need to be reviewed with MoJ Policy officials.

12. **Actions:** (i) Secretariat to provide contact details of policy officials and MoJ legal to DJ Cohen. (ii) Matter to be programmed in to return to the CPRC in the autumn, if not before.

Item 5 Legal Adviser Scheme CPR Part 73 – Unless Orders CPR(20)16

13. This matter was last before the committee in March, when it was agreed, subject to final drafting, that Legal Advisers operating within the Final Charging Order Scheme at CPR Part 73, would, in limited circumstances, be able to make *Unless Orders*. Katie Fowkes explained that District Judge Hovington had been closely involved with the drafting. The committee then worked through various drafting points, each being discussed in detail and agreed as follows:

    (i) r73.7(4) – agreed to relocate and amend sub paragraph (4) to rule 73.10(6B) to clarify when applications for final charging orders are considered, but to include a signpost beneath r73.7(3). In doing so, the reference to, 'powers' was discussed in the context of whether it is a power or a duty, but it was concluded that 'powers' was acceptable. However, it was decided that the footnote drafting should change from 'for' to, 'of' a legal adviser…

    (ii) r73.10(6) – agreed to change, 'upon' to, 'after' expiry of the period…

    (iii) r73.10(6B) – requires review in response to questions as to whether the text, 'within the period specified by those subparagraphs…' was necessary.

    (iv) r73.10 (6C) – agreed to change, 'judgment debtor and judgment creditor' to, 'all the parties'.

    (v) r73.10(6B)(a) – agreed the sentence was too long and brackets [ ] should be added thus, …[together with a statement of the amount due under the judgment or order including any costs and interest], the application…

14. Subject to HMCTS being content on timing, the revised provisions were **AGREED** for inclusion in the next mainstream CPR Update as part of the October 2020 commencement cycle. **Actions:** (i) Drafting lawyers to recast drafting accordingly (ii) HMCTS to confirm position re timing/implementation to drafting lawyers.

Item 6 Consequential changes re 113th PD Update (Statements of Truth) CPR(20)17

15. Alasdair Wallace explained that following the introduction of the new, extended, statement of truth at paragraph 2.1 of PD22 (which came into effect on 06 April 2020 as part of the 113th PD Update) several enquires had been received from stakeholders.

16. Mr Wallace confirmed that there are numerous references to statements of truth in the CPR and its PDs. The correspondents had queried whether some of those references need to be amended to align with the new form of statement of truth. As such, drafting lawyers have checked through the rules and PDs and presented their findings. Mr Wallace firstly referred to extracts from the rules and PDs which mention statements of truth and gave a view on whether a consequential amendment was necessary or not. Secondly, those extracts where some amendment was proposed were set out with revised drafting.

17. Overall, the committee's view was that it would be beneficial to align the rules, but following discussion, concluded that the preferred approach was to produce a drafting solution which referred back to the new statement of truth in PD22, rather than inserting actual wording into all the other provisions. By doing so, it would better serve to *future proof* the rules, because if any subsequent change was made to the statement of truth in

PD22, it should prevent the need for extensive consequential changes throughout the CPR and this was **AGREED.**

18. The only immediate exception relates to Experts at paragraph 3.3 of PD35, because that is a specific statement of truth and it can not be addressed by way of a cross reference to PD22.

19. It was **FURTHER AGREED** to amend paragraph 3.3 of PD35 (Experts and Assessors) to read:

    3.3 An expert's report must be verified by a statement of truth in the following form –
    I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
    (Part 22 deals with statements of truth. Rule 32.14 sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.)

20. **Actions:** (i) MoJ lawyers present revised drafting for the necessary consequentials at the June CPRC meeting (ii) Secretariat and MoJ lawyers to note the resolutions above for inclusion in the next mainstream CPR Update as part of the October 2020 commencement cycle.

Item 7 Lacuna Sub-Committee CPR(20)18

21. The Chair explained the background as to why he had set up the Lacuna Sub-committee (LSC) and reiterated the praise from the MR for its work. It was also explained that all of the items being reported on today are costs related topics; currently there are several active costs related working groups: the CPRC has two, one deals with general costs related matters and has been active for some time and the other, which is still at scoping stage, is to focus more specifically on considering fixed costs rates/costs other than guideline hourly rates. Additionally, the CJC has a group considering guideline hourly rates and will report to Coulson LJ by the end of the year.

22. Master Dagnall introduced the item. Five matters were presented for consideration and although all relate to recovery of costs, four are connected with questions raised by the public, namely LSC2019/38 which is linked to LSC2020/7, plus LSC2020/3 all of which relate to Fixed Costs; LSC2020/6 concerns Qualified One Way Costs Shifting (QOCS) Set-Offs and LSC2020/8 relates to Costs Caps in the Intellectual Property Enterprise Court.

23. Other than the Fixed Costs Item LSC2020/3 where no action is recommended, all others are recommended for referral to the CPRC's Costs Sub-committee, chaired by Birss J.

24. Dr Anja Lansbergen-Mills spoke to LSC2019/38 explaining that it relates to fixed costs under the Road Traffic Accident (RTA) and Low Value Personal Injury (Employers' Liability and Public Liability) (EL/PL) Protocols Stage 3 (vehicle related damages and claims over £25,000) at CPR Part 45, Tables 6 and 6A. The solicitor stakeholder who raised the issue contends that the inclusion of the words '*but not more than £25,000*' in the second column of tables 6 and 6A precludes the recovery of any fixed costs in Stage 3 claims for damages totalling in excess of £25,000 and, in support of its interpretation and the call for reform, the correspondent highlights the CPRC's decision in 2017 to amend Tables 6B, 6C and 6D (within Section IIIA of Part 45) by removing a similar damages ceiling, consequent

upon the Court of Appeal judgment in *Qadar v Esure* [2017] 1 WLR 1924. Dr Lansbergen-Mills presented the sub-committee's appraisal.

25. Master Dagnall continued by explaining that LSC2020/7 was linked and raises issues relevant to Tables 6B, 6C and 6D (in addition to Tables 6 and 6A) as to fixed costs under claims started within the above protocols, but which are settled prior to allocation (to the multi-track). Both matters were discussed. The committee were supportive of the view to amend the wording in the headings of the second columns of tables 6 and 6A, but considered that the issues under LSC2020/7 were not matters for the CPRC, they were essentially matters of litigation tactics and as such it was not possible to expect the rules to cover every single variation in approach as a consequence of the fixed recoverable costs regime. Moreover, it was concluded that given the level of detail examined by the LSC, there was no material benefit in referring either matter for further consideration by the Costs Sub-committee. However, given the complexities of the costs regime, MoJ policy should be consulted before any changes are made. It was **AGREED:**

    (i) LSC2019/38 be referred to MoJ Policy with the recommendation to remove the words, *'but not more than £25,000'* from the headings of the second columns of Tables 6 and 6A in CPR Part 45. **Action:** Secretariat to relay to MoJ policy lead on costs and update the correspondent as a matter of courtesy.
    (ii) LSC2020/7 be noted and no further action taken.

26. Master Dagnall presented the remaining three referrals, which were discussed:

27. LSC2020/3 related to fixed costs, costs awards of settled claims which should have been in the RTA/EL/PL Protocols, but had been issued under Part 7. It was referred following the judgment in *Williams v SoS* [2018] EWCA Civ 852 (www.bailii.org / cgi-bin / format. Cgi ? doc = / ew / cases / EWCA / Civ / 2018/852.html). The LSC's view is that although there may be an argument to extend CPR45.24(2) to other non-judgment circumstances where costs liabilities arise, for example, settlements by way of acceptance of a CPR Part 36 offer, the sub-committee can see no need to do so, because the result in *Williams* was no different from that provided for by CPR45.24(2). If anything, *Williams*, adds a useful degree of discretionary flexibility. The discussion highlighted that there is a difference between judgments (where the court has to consider their consequences) and settlements (which are generally more consensual) and thus flexibility may be useful. Accordingly, the matter was noted and it was **AGREED** that no action is to be taken.

28. LSC2020/6 raises the issue of whether there is jurisdiction in a QOCS case to allow costs ordered in favour of a defendant to be set-off against costs ordered in favour of a successful claimant. It follows the judgment in *Ho v Adelekum* [2020] EWCA Civ 517 (www.bailii.org / ew / cases / EWCA / Civ / 2013 / 517.html) in which Newey LJ stated that the Civil Procedure Rule Committee may wish to consider whether costs set-off should be possible in a QOCS case and Males LJ agreed that this issue could usefully be considered because *"…there are powerful arguments on each side of the issue as to what the law should be."* In advance of the open meeting, public questions have also been raised in relation to this.

29. The LSC had also considered the 2017 Court of Appeal decision in *Howe v Motor Insurers' Bureau* (6 July 2017, unreported) which was heard by Lewison LJ, Sir James Munby P and McFarlane LJ who held that costs awarded to the claimant should be set-off against costs orders in favour of the defendant, the set-off not being limited to the damages and interest received by the claimant.

30. It was noted that permission has been granted for the decision in *Ho v Adelekum* to be appealed to the Supreme Court. As such, it is clearly a matter for the Supreme Court to decide on whether *Howe* remains good law and whether *Ho v Adelekum* was correctly

decided which may impact the existing QOCS rules. In the meantime, given the important issues these cases raise, it was **AGREED** that:

(i) The decision in *Ho v Adelekum* be referred to the Costs Sub-committee for consideration;

(ii) A watching-brief be placed on the appeal to the Supreme Court, so that the sub-committee can revisit the issues in *Ho v Adelekum* following determination by the Supreme Court and to consider what, if any, impact that decision may have on the existing QOCS rules and whether any changes are required.

31. LSC2020/8 concerns costs in the Intellectual Property Enterprise Court (IPEC), namely CPR45.31 and whether "total costs" includes VAT. In *Response v The Edinburgh Woollen Mill* 2020 EWHC 721 (www.lawtel.com/UK/Searches/2139/AC5011045) it was decided that "total costs" limit imposed by CPR45.31 in IPEC did not include VAT contrary to previous dicta judicial consideration. Some of the LSC members are not necessarily convinced that the outcome is an anomaly in general terms and as views can differ, it does merit further careful consideration.

32. The discussion also acknowledged that this was a specialist, niche, issue and on which the IPEC Users' Group should be consulted and this was **AGREED**, accordingly it was referred to the CPRC Costs Sub-committee for further review and focused consultation. **Action:** Matter to return to the full committee in due course.

Item 8 Future CPR drafting "Rules -v- PDs"

33. The Chair explained that this was an item he wanted to raise at the open meeting, but, due to the demands of C-19 it is not presently possible to air it at any length. With the rules now in their 21st year, the purpose of the item was to start a discussion on how the CPR should be constructed into the future. Some parts lend themselves to a rule and a PD and others do not. In some areas there is large duplication, which can be cumbersome. The committee's aim is that the CPR is as accessible and streamlined as possible. This is an important subject and time should be devoted to it as soon as the work programme allows. Public attendees were invited to submit any views they had for consideration.

34. **Actions:** (i) Secretariat to review the agenda for July and October and timetable it in as appropriate (ii) Any public/stakeholder views to be provided to the Secretariat by 19th June 2020.

Item 9 Public Question Forum

35. The Chair reiterated his thanks to everyone for observing the meeting and for submitted their questions. Over 50 questions had been submitted, but as many were on the same topics, the agenda had been constructed in a way to ensure the majority of public questions were covered by the earlier substantive items, specifically those concerning: the timetable for the Whiplash reforms, C-19, Statements of Truth and various Lacuna topics, including costs.

36. The following residual questions were answered in the meeting, thus:

Question 1	Disclosure generally and disclosure pilot scheme particularly. Given the Business & Property Court (B&P) disclosure pilot scheme is currently due to finish at the end of this year, is the CPRC able to give any indication at this stage – not least given the potential sea-change for practitioners in relation to a key aspect of litigation – as to the extent to

	which this pilot scheme may be continued, amended, expanded and/or incorporated permanently and, in that case, in relation to which courts and/or proceedings?
Answer 1	The Chair explained that the next update was due on this at the June meeting. The position is that the pilot has been progressing and the majority of people seem to be in favour as it is generally working well. It may be extended but it is for the B & P Court to request the extension. What is rather less likely is a more general, "roll out" for use across the wider civil litigation.

Question 2	In the event that the Brexit transition period ends with there being no agreement between the United Kingdom and the European Union, how does the CPRC envisage short term changes to the CPR being necessary to deal with the potential glut of law that may cause an increase in litigation in the medium term?
Answer 2	Mr Justice Kerr, Chair of the CPRC's Brexit Sub-committee responded by explaining that in 2018/19 a considerable amount of work was undertaken to adapt the rules in the event of a no deal Brexit and that Statutory Instrument is in place to come into effect as necessary. A glut of "new law" was not envisaged. To the extent that there is new legislation amending or removing retained EU law after the end of the transition period (currently 31st December 2020), that is something the CPRC, drafting lawyers and policy advisers will need to be ready to respond to. There may well be an increase in litigation as retained EU law is tested, or logistical or other problems arise in trade in customs control etc. which generate disputes, but those cases are likely to be claims which do not require bespoke rule or PD provision, but rather matters for the court to determine.

Question 3	For those litigants in person who may be socially excluded from technology, or in particular those who do not have access to up to date legal information, and are excluded due to costs e.g. Thompson Reuters, LexisNexis; what support is there to ensure a litigant in person (of reasonable academic background and capability) is capable of defending or representing themselves as a claimant in terms of access to key knowledge and libraries of legal advice/guidance?
Answer 3	Lizzie Iron & John McQuater, Lay Advice Sector/Consumer Affairs representatives suggested that some public library services are still available, although often the reference sources are not current. However, University libraries tend to be better resourced and it may be possible to arrange access. Professional publishers may also be able to help or sign post. It is also easier to research into specific areas of law rather than very general topics. Further options include local Law Centres, Citizens Advice and other Advice Services Alliance centres. If the person concerned can get help to access online support, "Advice Now" is an excellent web-based service, and Gov.uk also provides a wide range of information.

Question 4	Brexit: Can you provide any estimate of the likely timing of amendments to the CPR provisions on obtaining evidence for foreign courts, which will be required as a consequence of the UK ceasing to be a part of the Taking of Evidence Regulation at the end of the implementation period; and the likely timing of any other Brexit-related changes to the CPR and court forms?
Answer 4	Mr Justice Kerr referred back to the answer at 2 above as an introduction. An item was also expected at the June CPRC meeting from the Senior Master regarding the provisions on obtaining evidence for foreign courts. The intention is that the changes will be included in the July Update, but certainly in time to be in force on 31st December 2020, should that remain transition period completion day. Work on forms was ongoing.
Question 5	The following question is posed bearing in mind the following: • CPR 44.9(2); and • The inclusion of the word "proceedings" at CPR 36.13(1). In the interests of clarity, should a provision be added to CPR 36.13 which stipulates what the costs consequences are (if any) where, within the relevant period, a Part 36 offer is accepted before the commencement of proceedings?
Answer 5	Mr Justice Birss, answered as Chair of the CPRC Costs Sub-committee. He recognised that there is an apparent lack of clarity – since r36.13 may create an entitlement to recover pre-action costs, but the rule in 44.9 which deems a costs order to be made when a Part 36 offer is accepted does not apply to pre-action acceptances (by 44.9(2)). However, it is not clear if this is a real, as opposed to theoretical, problem. Even if it is unclear whether a deemed costs order is made - why does that matter? The receiving party appears to be entitled to them by r36.13. Moreover, one can see obvious snags with a deemed order when there were no proceedings in which to make a deemed order. So, the question is whether this is a real problem in practice which requires a solution. If it is then we can add it to the list of things to consider. **Action:** Matter referred to the Costs Sub-committee.
Question 6	Can the Committee give any information about the pre-action protocol for boundary disputes and the likely timescale for taking this forward? (There is already a statutory mechanism under section 73 Land Registration Act 2002 for referral of disputed land registration applications (including, for example, applications relating to boundaries or extent, or adverse possession) to the First-tier Tribunal. It would be helpful to know what is proposed in relation to a pre-action protocol, and any likely timescale; HM Land Registry would be very happy to assist in the development of such protocol.)

Answer 6	The Chair answered. The MoJ Policy Official responsible presented a paper at the last (April) CPRC meeting. Those minutes will be publicly available after today. Following an MoJ study, the conclusion was that rather than formal law reform, the best means of tackling the expensive and protracted characteristics of boundary disputes was through procedural reform. A report, published in October 2019, by the Civil Justice Council (CJC) followed, which recommended that the CPRC should be consulted as to whether the proposed protocol and other recommendations would need to be incorporated in any rule changes. It was accompanied by a guidance note to assist parties in resolving their disputes and is available on the CJC's website. Policy officials concluded that, overall, there was a case for developing a Pre-Action Protocol (PAP), but recognised that, given current circumstances, it may not be a pressing priority. When the CPRC last discussed this, it acknowledged the importance of the matter and that the voluntary status of the current industry protocol/guidance, meant that it was often limited to use by professionals and not as clear to litigants in person. An official CPR PAP could be drafted in a way that better balanced these needs and would carry more weight, thus increasing usage and introducing implications for non-compliance. It is due back before the CPRC for further consideration at the July meeting.

Item 10 Any Other Business:

37. **PAP Review:** The Chair provided an update. In March he referred to the work the Civil Justice Council is doing to review Pre- Action Protocols as to whether PAPs, generally, are fulfilling their intended purpose. This is being led by Professor Higgins. It is a significant task and it may require CPRC membership involvement. Either way, the CPRC will consider any recommendations in due course. A firm timescale is not yet known.

38. **New Solicitor Member:** David Marshall (succeeding Andrew Underwood upon completion of his six-year term) was welcomed to the committee, this being his first official meeting. Mr Marshall is Managing Partner at Anthony Gold Solicitors and has extensive experience across the civil jurisdiction, having contributed to the work of the Civil Justice Council and as a senior member of the Law Society and a past President of the Association of Personal Injury Lawyers.

C B POOLE
May 2020

Attendees:
Nicola Critchley, Civil Justice Council
Carl Poole, Rule Committee Secretary
Amrita Dhaliwal, Ministry of Justice
Alasdair Wallace, Government Legal Department
Katie Fowkes, Government Legal Department
Andy Currans, Government Legal Department
Helen LeMottee, Government Legal Department

Andy Caton, Judicial Office
Alana Evans, HM Courts & Tribunals Service
His Honour Judge Lethem
Master Dagnall
David Parkin, Ministry of Justice
Peter Farr, Ministry of Justice
Kathryn Butterworth, Ministry of Justice
41 Public Observers