

Approved Minutes of the Civil Procedure Rule Committee

Friday 6th March 2020, The Rolls Building (Royal Courts of Justice) Fetter Lane, London.

Members attending

Lord Justice Coulson (Chair)

Mr Justice Birss

Mr Justice Kerr

HH Judge Jarman QC

HH Judge Bird

Master Cook

District Judge Parker

District Judge Cohen

Brett Dixon

Masood Ahmed

Richard Viney

John McQuater

Lizzie Iron

John Dagnall

Dr Anja Lansbergen-Mills (via conference call)

Welcome and Apologies

1. Apologies were received from Richard Hutchinson (MoJ)

Minutes of the last meeting

2. The minutes of the meeting on the 06 December 2019 were approved following one point of clarification at paragraph 28.

Action Log and Matters Arising

3. The action log was reviewed and updated. The Chair announced that, given the number of completed items, the log would be presented in future with open items only.
4. Master Cook raised as a matter arising, action log item AL(20)03 Transfer of Jurisdiction to Enrol Deeds Poll. It was noted that following the last meeting, the Senior Master has joined the sub-committee at the request of the President of the Queen's Bench Division; Master Cook is also in contact with Mrs Justice Theis of the Family Procedure Rule Committee (FPRC) to ensure the work is completed in partnership. It was also explained that some wider issues have been identified which has resulted in MoJ officials, from both Civil and Family Policy, being engaged, alongside assistance from the senior drafting lawyer because the current SI is no longer fit for purpose and changes will require very careful drafting for both children and adult Deeds Poll. The FPRC has very recently met and as such, a sub-committee meeting with legal and policy officials will now be convened.

Item 2 Requests for Evidence following Brexit (CPR 34.16 to 34.20) CPR(20)05

5. Senior Master Fontaine was welcomed to the meeting and explained that it was necessary to decide how evidence from across the European Union would be processed post Brexit.
6. Section II of CPR Part 34 deals with applications for evidence for foreign courts made under the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act"), which

relates to all applications for evidence not subject to the Taking of Evidence Regulation (Council Regulation (EC) No 1206/2001).

7. In contrast to the relatively simple procedure currently under the Taking of Evidence Regulation in CPR 34.22 to 34.24, rule 34.17 requires an application for evidence under the 1975 Act to be made to the High Court, supported by written evidence and English translations.
8. Given the mixed position post Brexit, a proposed solution was aired whereby CPR rules 34.16 to 34.22 are amended to put into effect a new process whereby the procedure under rule 34.17 is discretionary rather than mandatory, but where that procedure is not followed, requests for evidence are to be made using The Hague Evidence Convention model form, where the application is made from a Hague Evidence Convention member.
9. Similar amendments would have to be made to CPR 34A PD paragraphs 6.1 to 6.8. It was also explained that Part 34 Section III and 34A PD will have to be amended in any event in time for the end of the transition period (the draft amended rule and PD has already been approved). The Senior Master said that it would be sensible to introduce any amendment to the procedure under the 1975 Act at the same time. This work can be carried out during the transition period (which ends, unless extended, on 31 December 2020) and drafting lawyer assistance would be provided.
10. Currently the Senior Master is consulting MoJ Private International Law Team on these proposals and their initial response agreed that, overall, the proposed approach is a sensible way forward. However, the position regarding fees needs to be clarified because generally fees are not charged under the Hague Convention.
11. The discussion concluded with the view that it was important to get the future approach clear so that the UK continues to serve as an international centre for business and law.
12. It was **RESOLVED** that the proposals were **AGREED IN PRINCIPLE**.

Actions:

- i. The Senior Master will raise the outstanding points concerning fees with the necessary officials at MOJ and report back.
- ii. Alasdair Wallace to lead on drafting.
- iii. The matter would return to the CPRC for final determination in due course.

Item 3 Unless Orders within the Legal Adviser (Final Charging Orders) Scheme CPR(20)12

13. District Judge Hovington (the supervising Judge and member of the Project Board) joined the meeting by telephone and Angela Carpenter was invited to contribute in person.
14. DJ Hovington explained the background before moving on to set out the rationale for this particular proposal, whereby it was requested that the CPRC approve the extension of legal advisers' powers to enable them to direct the filing of further evidence and to include an order for automatic-strike out in default (an "Unless Order"). The CPR provides that, at the stage of considering whether to make a Final Charging Order (FCO), the creditor is to file a certificate of service in relation to each person served with the Interim Charging Order (ICO), together with a statement of the amount remaining due under the judgment including any interest and costs. Where there is non-compliance with the request for the certificate of service and certificate of costs, the only option for the legal adviser is to refer the matter to a Deputy District Judge (DDJ) who may strike out the application or make an unless order, requiring the judgment creditor to lodge the papers by a specified date with the provision for the application to be struck out in default of compliance. DJ Hovington drew a distinction between striking out or dismissing an application having

considered the matter on its merits and a conditional striking out for breach of a provision of the rules. His view is that the latter is essentially a procedural exercise and thus, the making of an 'unless order' in the FCO process should not include allowing legal advisers to dismiss an application based on its merits. This would also streamline the process and reduce duplication of work.

15. This and other options were discussed in detail and included the possibility of providing an automatic sanction within the rules rather than by judicial decision, whether or not it is delegated; how this may operate in a future digital system was also aired. A more developed alternative was that legal advisers be permitted to direct the filing of further evidence, but in the event of default, the application would be referred to a DDJ to consider an order to strike out. The theoretical link to the principles in *Denton* were also raised as was the effect of the proposal in terms of its implications on the property or land under the ICO. It was, therefore, suggested that if the powers are going to be extended as requested that the drafting includes a specific timeframe by which the terms of the order are to be met, for example 21 or 28 days and a relevant provision that the ICO is discharged.
16. The Chair recognised that the success of the project thus far was the incremental way in which powers have been extended; his view was that this was the best approach to take and in doing so the views and experience of those dealing with these matters first hand adds huge value when considering further extensions. Essentially this is a request to extend the delegation of judicial powers granted to legal advisers within the FCO scheme and, therefore, the fundamental question is whether the CPRC is content with that, in these circumstances and on this occasion. If the view was that the powers can be extended, it is not an indication that any request to delegate judicial powers will be approved in the future.
17. By a majority view, it was **AGREED, subject to final drafting** that:
 18. the delegated judicial powers assigned to legal advisers operating within the FCO scheme be extended, to allow legal advisers to make "Unless Orders" so that directions can be given to file further evidence by a specified date and that unless the terms of those directions are met, the application can automatically be struck out, whereupon the ICO is duly discharged. The drafting must also make provision for automatic reconsideration by a Judge.
19. **Actions:**
 - i. DJ Hovington to produce initial drafting, for MoJ lawyer's review in the usual way.
 - ii. Secretariat to note for inclusion in the next SI, to be settled at/by the June 2020 CPRC meeting for inclusion in the October 2020 in-force cycle.

Item 4 Costs Sub-Committee: Variation of Costs Budgets and other related cost budgeting issues CPR(20)07

20. The Chair emphasised the importance of this item, saying that the issue of budget variations is and has been an issue; his gratitude to the sub-committee for their important work was duly noted. This praise was also extended to Andrew Underwood.
21. Mr Justice Birss summarised the position in that there are two main areas to this topic. First, the issue of Variations to Costs Budgets, for which the points of principle were determined at the CPRC meeting in December 2020. The second is the work which the sub-committee have carried out which results in proposals to rationalise the current arrangements so that a reduced set of provisions are introduced, which consist of the rules, a PD containing guidance and a new, Precedent T form. The rules are in CPR Part 3, a newly drafted PD3E essentially replaces the current PD3E and will not be accompanied by the existing additional Guidance Note.

22. The sub-committee have been careful to identify which elements of the current provisions and guidance note contents merit retention and where they do, whether it should be contained in a rule or a PD; where possible terminology has been retained for ease of reference and consistency of understanding and application. It is also readily acknowledged, that given the complexity of the costs regime, there is no easy answer. The sub-committee did consider only drafting rules and dispensing with guidance/PD entirely, but concluded that as this exercise was to address the issue of budget variations, it was sensible to keep the other guidance, but within the PD and not as an additional Guidance Note.
23. As such, apart from the amendments relating to the budget variation issue itself, none of the other amendments are intended to produce any change at all to the current framework. A location table was provided for ease of reference.
24. The proposed changes were discussed in detail and Alasdair Wallace contributed to answer various questions on the drafting, wherein the following was **AGREED**:
- i. The new r3.15A should be redrafted to include inverted commas either side of the text “the revising party” as at 3.15A (1) and the phrase, *without delay*, at 3.15A (2) should be replaced with the word, *promptly*.
 - ii. Remove the text in brackets, ‘(this will be inserted in the approved budget)’ from the third column of the CMC entry of the table under paragraph 10(b) PD3E.
 - iii. Re-draft paragraph 12 under ‘F. Costs management orders’ of PD3E to remove all text other than the last sentence ie to read, *When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*
25. In considering Precedent T, the Chair made the point that the rule must specify what needs to be done, rather than merely delegating that to a reference in a form, which was agreed. It was **further AGREED** to modify Tab 3 of Precedent T by removing lines 24 and 25 and to correct various typographical errors.
26. In consequence, the proposed amendments to CPR Part 3, PD3E and the introduction of Form Precedent T were **AGREED, subject to final drafting.**
27. **Actions:** Sub-Committee/Drafting Lawyers/Secretariat to finalise drafting for inclusion in the next mainstream SI and PD Update for the October 2020 in-force cycle.

Item 5 Civil Justice Council’s Report, ‘Vulnerable Witnesses and Parties within Civil Proceedings’

28. The Chair commended the Civil Justice Council’s (CJC) recent report on vulnerable witnesses and parties in civil proceedings, saying that His Honour Judge Cotter QC and his sub-committee had undertaken a huge amount of work which has resulted in an incredibly impressive document. It raises specific recommendations for the CPRC and as such there is a lot arising from the report which needs to be considered.
29. The report is viewable on line at www.judiciary.uk/announcements/civil-justice-council-proposes-better-assistance-for-vulnerable-witnesses/
30. It was **RESOLVED** to form a sub-committee; membership of which will be: District Judge Cohen (Chair), Lizzie Iron and Brett Dixon. A drafting lawyer and MoJ policy official will also serve to assist as principal points of contact. **Action:** Initial report to be prepared for the May 2020 CPRC meeting.

Item 6 Possession Claims On-Line (PCOL) Forms CPR(20)11

31. District Judge Parker opened the item by explaining that the Housing sub-committee had liaised with the Forms sub-committee to agree the proposals being presented.
32. It was explained that the request to review the wording of the 12 possession claim and defence forms and eight sets of guidance notes followed stakeholder feedback received by HMCTS. The feedback raised concern as to the wording 'Solicitor' contained in the forms and notes for guidance, raising for example, that a barrister would not be able to sign the claim form on behalf of their client. To address this issue, it was suggested that forms and related guidance refer to 'legal representative', rather than 'solicitor'. The forms and guidance notes (which include the forms for both England and Wales, as well as large print versions) are the N5 claim forms, together with the guidance notes N7, N7A & N7B; the N11M and N11R defence forms; the N119 forms and N119A guidance notes as well as the N20 particulars of claim form.
33. However, CPR 2.3 defines 'legal representative' as wider than 'solicitor' and PD22 permits a legal representative to sign the statement of truth. As such, any indication that the signatory was limited to the solicitor or the party is contrary to the rules.
34. The sub-committee were also mindful of a strong body of anecdotal evidence suggesting that many people who are assisting the conduct of litigation would misunderstand the term. Consequently, it is proposed that forms refer to a signatory who is a '*Legal Representative as defined by CPR 2.3*'. In doing so, it clearly demonstrates that the term has a specific definition within the rules.
35. A discussion ensued, which highlighted the desirability for consistency with other forms. Amending the guidance notes to refer to 'legal representatives' instead of 'solicitors' would create further inconsistency at this stage.
36. Lizzie Iron also raised a question concerning whether the forms of statements of truth needed to be produced in languages other than English and Welsh. The view was that this was not something the CPRC was required to do. It was further acknowledged that there are subtle differences in regional languages, for example North and South Wales, but only one mainstream Welsh version of court forms was provided as a matter of routine and there had not been any issues with that approach or the use of those forms.
37. Amendments relating to signposting court users to sources of advice within the guidance notes were also proposed. It was suggested that amendments be made so that the guidance notes read, [the defendant should] '*get help and advice immediately from a solicitor or advice agency*'. The discussion identified a number of concerns, not least that this description is not necessarily appropriate to describe many sources of advice, and may confuse users.
38. The Chair acknowledged the wider point regarding signposting users to sources of advice and Master Cook indicated that he had a forthcoming meeting with officials regarding the work being done on this nationally, after which he would be in a better position to provide a meaningful update on this specific tranche of work.
39. It was **AGREED** to amend said forms and guidance notes so that references to 'Solicitor' are changed to 'Legal Representative as defined by CPR 2.3' in relation to statements of truth and to include the newly extended statement of truth as included in the recent 113th PD Update, **but NOT TO APPROVE** any changes at this point with regard to signposting sources of advice. **Action:** HMCTS/Secretariat to arrange with MoJ Design to produce

the modified forms/guidance notes and communicate those changes to courts and stakeholders.

40. It was **further AGREED** that the Forms sub-committee were mandated to consider and agree, out of committee, any other forms for which the statement of truth needed to be changed pursuant to the recent (113th) PD Update which provided for the extended statement of truth. It was acknowledged that there may be a period of time before the forms *caught up* with the rule change, which is not unusual. **Action:** HMCTS to identify, in priority order, a list of the forms requiring amendment.

Item 7 Lacuna Sub-Committee CPR(20)06

41. Three issues were raised under this item by John Dagnall. Those being (LSC2019/40) on fixed costs concerning translations and counsel's opinion fixed costs and the LSC2020/01 and LSC2020/02 which are linked as they both relate to Part 36 offers and interest.
42. On LSC2019/40 the possible lacuna is whether it should be possible to recover under the fixed costs regimes the costs of interpreters during the various stages of small claims and fast track cases where Aldred v Cham [2019] EWCA Civ 1780 held they are not under CPR45.29(2)(h); as well as possible compatibility issues with s19 Equality Act 2010. This is also, possibly, extended to the question of recoverability of mandatory counsel's opinion in children's claim cases which have exited the protocols which are also not allowed by Aldred. Notwithstanding that the matter had now been referred to the Supreme Court, the CPRC view was that there is merit in considering the issues and the rules further. Following discussion, and in support of the sub-committee's recommendation, it was **AGREED** to refer the matter to the CPRC Costs sub-committee for further consideration.
43. The remaining two items were discussed together due to the connected issues; Mr Dagnall's explanation focused on the issues identified by Calonne v Dawnus [2019] EWCA Civ 754 (LSC2020/01) in which the Court of Appeal considered Part 36 Offers being made with provisions for interest following expiry of the "relevant period" for acceptance and Masood Ahmed set out the issues in King v City of London [2019] EWCA Civ 2266 wherein Lord Justice Arnold felt that the CPRC should look at whether Part 36 offers should be capable of being made exclusive of interest.
44. The discussion highlighted some inconsistencies in case law which suggests that the current drafting could be improved. The conclusion reached by the sub-committee was to recommend that both matters be referred for further consideration by the CPRC Costs sub-committee and this was **AGREED**.

Item 8 OCMC and HMCTS Courts & Tribunals Service Centres CPR(20)10

45. Kerry Greenidge was welcomed to the meeting. The item concerns two principal issues in relation to OCMC as a result of the national reform model to create Courts and Tribunals Service Centres (CTSC). The first relates to fees and the second to bulk scanning ie the method by which OCMC claims that currently exit OCMC to become paper based claims would remain within OCMC to be managed digitally. If the CPRC agree the principles, the OCMC sub-committee will draft the rules to implement the proposed change.
46. Birss J explained the position regarding fees. Currently OCMC is run from the County Court Business Centre (CCBC) as is the Money Claim Online scheme (MCOL). The MoJ's view is that when OCMC moves to be administered from one of the new CTSCs, the same fee as currently charged will be able to continue to be charged (ie the reduced fee for online claims) without any change to the Fees Order; essentially because OCMC cases are considered to be a subset of MCOL and the physical location of its operation is not a

determining factor. Although it is readily acknowledged that fees are not within the remit of the CPRC, the content of the associated PD/rules is for the CPRC, so if there is a connection between the two, then the matter requires due consideration. Following discussion, it was **RESOLVED** that the OCMC provisions should be amended to reflect the relocation to the CTSC, but that the CPRC did not see a need for a change to the Fees Order.

47. On the proposal to introduce bulk scanning, currently defendants who choose to respond to an OCMC claim on paper, telephone OCMC and are sent the paper response pack. At that point the case exits OCMC because there is no facility to operate a paper file. The response is then processed by OCMC staff and a copy provided to the claimant along with, for example, the Directions Questionnaire so that the claim can progress under the mainstream CPR in the usual way, rather than under the OCMC pilot. HMCTS now wish to retain such cases within OCMC so that they will follow the same path as digital responses, because the operating model for the new Courts and Tribunals Service Centre will function as a digital office. Ms Greenidge explained the reduced reliance of paper files and, in turn, the projected increase in efficiency. Birss J drew the comparison with how CE filing currently operates across HMCTS and as such the principle had merit.
48. However, the issue of timing was raised and discussed in the context of not wanting the pace of change to risk the successful operation of OCMC. Overall, it was seen as a rational progression of digital reform, but there were strong views that the operational move to the new CTSC should be undertaken first. By doing so, it would provide the opportunity to adjust and for the change to successfully bed in, after which further consideration could be given to the proposal of introducing bulk scanning for paper responses.
49. Consequently, at this stage, it was **AGREED in principle only. Action:** HMCTS/Secretariat to plan for the item to return to the June 2020 CPRC meeting, or at such time as it is deemed appropriate.
50. District Judge Cohen added that from his perspective at one of the new pilot courts within OCMC (Edmonton County Court) he found the scheme to be working very well and considered the project as a whole to be an exciting part of the reform programme.

Item 9 RTA Portal and the MoJ Whiplash Reform Programme CPR(20)08 & CPR(20)09

51. The Chair welcomed David Parkin to the meeting, along with drafting lawyers Helen LeMottee and Andrew Currans. In opening the item, the Chair made it clear that the full committee was not in a position to consider detailed drafting today, but that was something with which the sub-committee was actively engaged.
52. His Honour Judge Bird, as sub-committee Chair, was invited to make some preliminary points, followed by David Parkin. In doing so, reference was made to the recent Written Ministerial Statement (WMS) made in Parliament by the Lord Chancellor on 27th February 2020. The WMS announced several changes. First, that the implementation is deferred from April 2020 to 1st August 2020. It also underlined that the new Government maintained the commitment to the whiplash reform programme and that the reforms were to be implemented properly and on time. The WMS set out two further policy decisions; specifically that proposals to make alternative dispute resolution (one-way adjudication) available in the new online claims service to claimants for RTA related whiplash injuries, whether or not they were represented, was not now in scope and, in response to concerns about the position of children and protected parties under the new measures, Ministers said that RTA personal injury cases involving whiplash should, for now, be allocated to the Fast Track. Whilst it was readily acknowledged that matters of policy are not for the CPRC, the issues in relation to how rule drafting and their operation should be approached in light of these decisions, were discussed.

53. David Parkin paid tribute to the CPRC's sub-committee, indicating that he felt real progress had been made since the last appearance. With a renewed ministerial direction following the election, the main policy approach was broadly settled and although the revised implementation timetable was still demanding, it was considered to be deliverable.
54. The Chair set out various core areas of principle, which were discussed at length with contributions from across the committee; in doing so he referred to the "wider world" and to representations that had been made to him about the reforms and on which MoJ undertook to respond direct. MoJ also explained that their stakeholder engagement was continuing and includes a series of sessions across the country in order to provide as much information as possible in advance of implementation, but that this had to be balanced against a landscape in which the design and policy development was still very much ongoing.
55. The discussion also raised issues for further consideration by the MoJ and as part of the sub-committee's ongoing work. Of particular focus was the extent to which the reforms contribute to the vision of a fully digital county court and the need for the rules, their supporting Practice Directions and/or Pre-action Protocols (PAP), as well as any other material envisaged to support the service, to be as concise and user-friendly as possible. The meeting was particularly mindful of the needs of litigants in person. In order to produce the necessary provisions, it was concluded that the sub-committee should see such screens as will be necessary in order to re-draft the PAP and that any issues of significance should be highlighted as drafting notes. The meeting also decided that the sub-committee should consider the proposed new court forms.
56. It was **AGREED** that the matter would return to the CPRC at its April meeting. **Action:** the secretariat is to allocate time within the agendas for April and May 2020.

Item 10 Any Other Business

57. **PD40F Form:** Mr Justice Birss advised that until recently a revised form for collecting privacy injunction statistics in the High Court and Court of Appeal, under PD40F had not been uploaded online following the 109th PD Update. Accordingly, and for the avoidance of doubt, the revised form was duly **AGREED**. The secretary confirmed that the online rules had been updated and that Mr Justice Warby was aware. Mr Justice Kerr added that the open justice reforms under CPR Part 39 make provision for relevant orders to be sent to Judicial Office (judicialwebupdates@judiciary.uk) for publication and in doing so, data collection should be readily available in any event.
58. **Contempt Consultation:** Mr Justice Kerr updated the committee by advising that the CPRC consultation, entitled, 'Proposed rule changes relating to contempt of court; redraft of Part 81' is on course to be launched next week with a closing date of the end of April/1st May 2020. Thanks were expressed to all involved in its preparation and specifically to members of the sub-committee, Katie Fowkes and Carl Poole. The intention was to be in a position to report back at the June CPRC meeting. **Action:** Secretary to allocate time at the June and July 2020 meetings.
59. **Annual Open Meeting 2020:** The Secretary provided an update on the practical arrangements for this year's open meeting. The indicative agenda is expected to include the usual open forum for questions to the committee, together with items on the Vulnerable Parties report; Whiplash; a discussion topic concerning CPR drafting generally "rules -v- PDs" and time permitting, other items. **Action:** Secretariat to issue the usual communications to stakeholders et al.

60. **Guideline Hourly Rates:** The Chair advised that, with the agreement of the Master of the Rolls, a sub-committee of the Civil Justice Council has been established, which will report directly to Lord Justice Coulson. Given that there have not been any material changes to the rates for quite some time, the aim is that this new sub-committee will make recommendations by the end of the year, so that the rates can be updated. **Action:** Secretariat to (i) add item to the agenda planning programme schedule (ii) add an item on Costs, other than guideline hourly rates to the next meeting.

C B POOLE
March 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
Andy Caton, Judicial Office
Kerry Greenidge, HM Courts & Tribunals Service
Senior Master Fontaine (for item 2)
DJ Hovington (for item 3 by telephone conference)
His Honour Judge Lethem (from item 8 onwards)
David Parkin, Deputy Director, MoJ (for item 9)
Helen Le Mottee, Government Legal Department (for item 9)