

Approved Minutes of the Civil Procedure Rule Committee

Friday 3rd April 2020 via video conference due to the Covid-19 Pandemic

Members attending

Mr Justice Birss (in the Chair)
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
Dr Anja Lansbergen-Mills

Welcome and Apologies

1. Mr Justice Birss welcomed everyone to the first ever virtual meeting of the CPRC. He had been asked to take the Chair as Lord Justice Coulson was sitting in court on an urgent matter. Additionally, due to a technical IT difficulty, the officials due to join the meeting to speak to item 2 (on the Commonwealth Games) had been excused.
2. Apologies were, therefore, received from Lord Justice Coulson, Shanice Mahil and Louise Sutton.

Minutes of the last meeting

3. The minutes of the meeting on the 06 March 2020 were approved following minor modifications to paragraphs 46 & 47 as raised by Katie Fowkes.

Action Log and Matters Arising

4. It was noted that there were no urgent matters requiring comment on the action log. Items requiring update were noted at the end of the meeting, under Item 7.

Item 1 COVID-19 Emergency matters

5. The Chair provided a general update on activities since the Covid-19 outbreak and thanked everyone for the pace with which matters had been dealt with, out of committee. This work had resulted in three PD Updates (the 116th, 117th & 118th), with others either at an advanced stage or identified as topics requiring further work. The recent PD Updates were made in the context of procedures which may be necessary during the Coronavirus (Covid-19) pandemic with the intention of ensuring that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health and in recognition of limited court resources during the pandemic. Each would be kept under review. A summary is as follows:
 - **116th PD Update (PD51Y)** to clarify the position concerning remote hearings to ensure the Open Justice principle is not compromised.

- **117th PD Update (PD51Z)** to stay Part 55 possession proceedings and enforcement. Injunctive relief is unaffected by the stay. **Post meeting note:** PD51Z was amended for clarification purposes by way of the 120th PD Update and came into force on 18 April 2020.
 - **118th PD Update (PD51ZA)** to allow for extensions of time beyond the current 28 days.
 - **Update to PD51R Online Civil Money Claims (OCMC)** to allow for additional provisions within the existing pilot under PD51R to increase the ability of both Judges and Legal Advisers to consider Directions Questionnaires online irrespective of which court is the “preferred court” within the current pilot and to expand the general directions making powers of the court where a claim is sent out of OCMC, so that directions about the future management of the claim, rather than only directions about how the claim is to be sent out, can be made. **Post meeting note:** this formed the 119th PD Update.
 - **Insolvency PD** – it was noted that the Insolvency Rules Committee has drafted a temporary PD (supplementing the Insolvency PD) to make provision for remote working and other related matters for courts dealing with insolvency proceedings during the Coronavirus pandemic.
6. Additional topics aired and noted can be summarised as follows. The discussion highlighted that there may be further out of committee work on these and other issues:
- **Listing**, although it was noted that this should now be addressed by the, ‘Tables of Civil Listing Priorities’ approved via the Civil Executive Team and issued earlier this week by Coulson LJ in his capacity as Deputy Head of Civil Justice.
 - **Time limits** beyond those provided for within PD51ZA such as the time for the Defence. Also discussed was the ability to extend time by agreement for up to 90 days, particularly in the county courts.
 - **Enforcement** proceedings, other than possessions, as well as the procedures concerning Default Judgment.
 - **Service** / personal service / service on registered offices during “lockdown”.
 - **Statements of Truth and swearing affidavits, witnessing signatures**, for example on wills.
7. Nicola Critchley advised that since raising concerns regarding Court Funds rules, guidance had been received to advise that BACS payments were now being allowed.
8. It was also noted that the project to allow solicitors to issue county court claims online using the existing PD51S is progressing. Currently there are only four firms able to issue digitally, so the intention is to expand the number of firms quickly and in recognition of the current climate. Critical performance testing will take place before any introduction of the expanded scheme.

Actions: (i) Secretariat to circulate the article provided by Dr Lansbergen-Mills regarding the perspective of a Litigant in Person participating in a remote hearing (ii) any further suggestions for rule/PD changes to be drafted and submitted as soon as possible, via the Secretariat/officials, for initial consideration by the Chair (iii) any other topics or views as to our general approach in response to Covid-19 to be provided as soon as possible to DJ Parker for collation and discussion with the Chair.

Item 2 Birmingham Commonwealth Games CPR(20)13

9. The matter was summarised by the Chair.
10. It was noted that the Bill providing for the Birmingham Commonwealth Games 2022 was still undergoing its Parliamentary passage.
11. The Bill contains measures to protect against unauthorised association with the Games, by creating a civil offence and routes of redress for the Organising Committee, to ensure that those who financially contribute to the costs of staging the Games have their commercial rights protected. Amendments to PD63 are therefore proposed, which are similar to those put in place for the London Olympic and Paralympic Games and the Glasgow Commonwealth Games.
12. It was noted that Intellectual Property Enterprise Court (IPEC) Judge, His Honour Judge Hacon, has been consulted and responded positively to the possibility of IPEC hearing these cases, although the drafting allows for the Games' Organising Committee to pursue the Chancery Division route if desired, for example, if it is a very high-profile matter.
13. In considering the drafting options Mr Justice Kerr raised the point that, although the Bill included an 'end date' the proposed drafting options did not reflect a *sunset clause*, which would be useful and this was **AGREED** and, subject to the Birmingham Commonwealth Games Bill achieving Royal Assent, it was further **AGREED subject to final drafting** to amend PD63 as follows:
 - (i) paragraph 16.1(6) association rights, including the right of the Birmingham Organising Committee by virtue of section 3(4) of the Commonwealth Games Act 2020 to take action for breach of section 3(1) of that Act (prohibition of unauthorised association with the Games)
 - (ii) paragraph 24.1 (under the heading "Association rights") 24.2 Where the Birmingham Organising Committee applies for an order under section 6 of the Commonwealth Games Act 2020, a copy of the application must be served on all identifiable persons having an interest in the infringing goods or documents.

Action: MoJ Drafting lawyers liaise with DCMS officials to finalise drafting, to include a *sunset clause* in order that the changes be incorporated into the next mainstream PD Update for the October 2020 in-force cycle.

Item 3 Boundary Disputes CPR(20)14

14. Peter Farr explained that 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.
15. It was noted that the Property Litigation Association (PLA) protocol and mediation schemes, such as the one offered by the Royal Institute of Chartered Surveyors, are already in existence. Consequently, one short term option could be to refresh the Gov.UK web pages and alert advice agencies to the guidance.
16. The matter was discussed. In doing so, the experiences of handling such cases in court were shared. This highlighted the importance of the matter and acknowledged the

voluntary status of the current industry protocol/guidance, which is 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 with implications for noncompliance.

17. It was **AGREED** that the matter return to the July 2020 CPRC meeting. **Action:** Officials to prepare draft PAP and supporting paper for consideration.

Item 4 Whiplash Sub-committee

18. His Honour Judge Bird updated the committee to advise that officials had found the comments from members at the last CPRC to be very informative and since then the sub-committee have been working with MoJ officials in consequence of a change in drafting direction to some elements of the proposed provisions. Clearly the Covid-19 outbreak is having an impact on resources and priorities overall. The sub-committee is awaiting to hear from the MoJ whether this will change the August 2020 implementation timetable.
Post Meeting Note: On 21 April 2020, the Government laid a Written Ministerial Statement (WMS) before Parliament which confirmed that implementation was being delayed until at least April 2021, because of the impact of the Covid-19 pandemic.
19. Thanks were noted from the Chair for the enormous amount of work being undertaken by the sub-committee.

Item 5 Commission for Justice in Wales

20. His Honour Judge Jarman QC, drew members' attention to the Commission's report which is viewable on line at www.gov.wales/commission-justice-wales-report.
21. The Commission was established to review the operation of the justice system in Wales and to make recommendations for its long-term future. Its report was published in the autumn of 2019. It is an extensive, evidence based report which runs into over 500 pages, containing 78 recommendations. The report was debated by the National Assembly for Wales last month whereupon it was resolved to support the devolution of justice.
22. HHJ Jarman has discussed the report with the lead Welsh Government lawyers and they too are keen for the CPRC to consider the matter.
23. Recommendation 24 (included in chapter 6 on Administrative Justice and Coroners) proposes that it should be compulsory under the Civil Procedure Rules for all claims involving a challenge to the lawfulness of a decision of a Welsh public authority to be issued and heard in Wales. The present rules allow for a transfer procedure for such claims presently issued in London or other centres outside Wales, but it is not mandatory and some claims are still being issued outside of Wales.
24. This recommendation is one of the recommendations in the report which can be implemented without significant legislative change. If this was agreed and introduced by the CPRC then it could be the first recommendation to be put into effect.
25. A discussion ensued with HHJ Jarman answering various questions. Following which, it was **AGREED in principle** that the CPR be amended 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. **Action:** HHJ Jarman to produce the proposed drafting, with sub-committee assistance as needed. **Action:** Matter to return to the May meeting.

Item 6 Costs Rates other than guideline hourly rates

26. The Chair explained that this is a matter which requires active consideration, notwithstanding the current constraints of the Covid-19 situation. In the first instance the scope of the exercise needs to be determined, noting the natural connection with costs capping, fixed costs limits etc. Previously they were put to one side pending a review of guideline rates, but they are different matters and need to be resolved irrespective of the guideline rates issue. It was **RESOLVED** to form a sub-committee, for which volunteers were sought. **Actions:** (i) Members to contact Birss J and the Secretary as volunteers to serve on a sub-committee. **Post Meeting Note:** John McQuater to lead sub-committee. (ii) MoJ officials to contribute ex-officio.

Item 7 Any Other Business

27. **CPRC Open Meeting on 15 May 2020:** The Chair explained that with the outbreak of the Covid-19 Coronavirus pandemic, it was necessary to consider the feasibility of conducting the annual open meeting. It was noted that, due to the outbreak, the usual communication to stakeholders and application to attend has not yet been issued. Various options were considered, which, given the ongoing constraints in the interest of public health, included an option to cancel the open meeting in its entirety. However, this was not favoured and alternative solutions were discussed, as was the agenda. It was the unanimous view that the open meeting is an important feature of CPRC business and contributes significantly to the principle of transparency. It was **AGREED in principle** to conduct the May open meeting remotely by digital means. **Action:** Secretariat to arrange and issue application to attend as soon as possible.
28. **Administration Orders (CCR Order 39) Sub-committee:** John McQuater provided an oral update to advise that work to present a drafting proposal to import the former county court rules (Order 39) on Administration Orders into the mainstream CPR was progressing well. **Actions:** (i) Drafting to be sent to MoJ Lawyers for review. (ii) Matter to return to the June 2020 meeting.
29. **Tainted Acquittals - request from the Criminal Procedure Rule Committee**
30. It was explained from the Chair that following the decision in the case of *Director of Public Prosecutions v Goldsmith [2019] EWHC 3051 (Admin)* the Criminal Procedure Rule Committee (CrimPRC) requested that the CPRC consider amending CPR 77.7, the rule that sets the time limit for an application to the High Court under section 54(3) of the Criminal Procedure and Investigations Act 1996 (Acquittals tainted by intimidation, etc.) and this was discussed.
31. It was noted that although such applications are rare and it is rarer still for circumstances to arise in which the time limit set by the rule presents such an obstacle as it did in the *Goldsmith* case. However, the CrimPRC concluded that the increasing complexity in Crown Court proceedings, in particular, meant that it was increasingly likely that such circumstances would recur.
32. The proposed drafting is:

CPR 77.7

~~(4) An application for an order quashing an acquittal under section 54(3) of the 1996 Act shall not be made later than 28 days after the issue of the certificate to which section 54(2) of that Act refers.~~

~~(a) the expiry of the period allowed for—~~

~~(i) appealing (whether by case stated or otherwise); or~~

~~(ii) making an application for permission to appeal,~~

~~against the conviction referred to in section 54(1)(b) of the 1996 Act; or (b) where an appeal notice is filed or an application for permission to appeal against that conviction is made, the determination of the appeal or application for permission to appeal. (2) For the purpose of sub-paragraph (1)(b), 'determination' includes abandonment within the meaning of rules 63.8 and 65.13 of the Criminal Procedure Rules 2010⁵ or, as the case may be, rule 11 of the Crown Court Rules 1982⁶.~~

33. The discussion raised whether the drafting should be cast in the positive, for example “must/shall (etc) do by..” rather than, “shall not be later than...” whereupon, Alasdair Wallace undertook to raise the matter with the CrimPRC Secretariat. Accordingly, the proposed amendment to CPR 77.7 was **AGREED subject to final drafting**.

Action: MoJ Lawyers to finalise drafting with CrimPRC drafting lawyer/Secretary, out of committee, for incorporation into the summer SI to meet the October in-force cycle.

34. **Lacuna Sub-committee (LSC):** Master Dagnall explained that, if the agenda allows, his intention is that there will be a LSC report at the May meeting.
35. **Possession Enforcement (alignment of rules consultation) Sub-committee:** Master Dagnall confirmed that this work was ongoing, but at the present time, there was nothing material to report.
36. **PD2B Sub-committee:** Master Dagnall explained that the work of this sub-committee may require a steer from the CPRC, in which case he will look to put a paper up for the June meeting.
37. **Housing Sub-committee:** His Honour Judge Lethem provided a brief update to confirm that since the short form Housing Disrepair PAP was introduced, it has taken longer than expected to complete the exercise to produce a longer form PAP, on which a consultation was also due to take place. To this end, he had been working closely with His Honour Judge Jan Luba QC. However, given the impact of Covid-19 and overall workloads, this is regrettably having to be postponed. Thanks were nonetheless noted for the work thus far. **Action:** Secretariat to be informed when the matter is ready to return to the CPRC.

C B POOLE
April 2020

Attendees:

Nicola Critchley, Civil Justice Council
Carl Poole, Rule Committee Secretary
Amrita Dhaliwal, Ministry of Justice
Marcia Williams, 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
Peter Farr (for item 3)
Mark Nicholas, Ministry of Housing, Communities and Local Government
Mark Lambert, Ministry of Housing, Communities and Local Government