

Approved Minutes of the Civil Procedure Rule Committee

Friday 4th December 2020 (via video conference due to the Covid-19 Pandemic)

Members attending

Lord Justice Coulson (Chair)
Mr Justice Kerr
Mr Justice Trower
His Honour Judge Jarman QC
His Honour Judge Bird
Master Cook
District Judge Parker
District Judge Cohen
Brett Dixon
Masood Ahmed
John McQuater
Lizzie Iron
Dr Anja Lansbergen-Mills
David Marshall
Isabel Hitching QC
Tom Montagu-Smith QC

Item 1 Welcome, Apologies, Minutes, Action Log and Matters Arising

1. The MR Designate, The Rt Hon Sir Geoffrey Vos was present for the first part of the meeting and duly welcomed. No member apologies were recorded, other than noting Dr Anja Lansbergen-Mills would be absent for a period, due to a remote hearing.
2. The minutes of 06 November 2020 were **AGREED**.
3. The Action Log was duly **NOTED**, along with updates in relation to the following:

- **AL(19)44 – RTA Portal – Whiplash Reform Programme**

It was **NOTED** from the Chair that the MoJ has confirmed that work continues, but the matter is not ready for a substantive discussion. The Lord Chancellor remains committed to an April 2021 implementation and as such, it is expected to return to the CPRC in the New Year.

- **AL(20)97 - CPR 51.3 Emergency Rule – Final Drafting CPR(20)53**

Alasdair Wallace explained that following consultation with the Family Procedure Rule Committee (FPRC) the drafting considered at the last CPRC meeting has now been finalised. The difference between the FPR text and that agreed by the CPRC is the substitution for “on a temporary basis” of the more specific wording in (a) and (b), which more precisely reflects FPR 36.2 and which is identically worded to CPR 51.2, as such, the revised wording would more precisely mirror CPR 51.2 if adopted for the CPR. The modified drafting was duly **AGREED**.

Action: Secretariat/Drafting lawyers to incorporate in the next mainstream SI as part of the April 2021 common-commencement date.

- **AL(20)102 – Brexit**

Andrew Currans advised that an item regarding the Lugano Convention was anticipated at the February CPRC. It was **AGREED** that it may be necessary to approach the Brexit Sub-Committee initially, in January, out-of-committee before presenting to the full CPRC as a steer is likely to be required on whether amendments are included in regulations or in a free-standing set of rules.

Item 2 Business & Property Courts Witness Evidence Working Group CPR(20)54

4. Mr Justice Andrew Baker was welcomed to the meeting. The Chancellor provided a brief introduction; highlighting with thanks the extensive work undertaken by the Working Group and that the proposals represent a solution to a problem that is particular to the Business & Property Courts (BPC). Supporting the recommendations, he acknowledged the level of consultation and engagement that had been undertaken in formulating the proposals. He then handed over to Baker J as Chair of the Working Group to take the meeting through the detail.
5. The work of the BPC Witness Evidence Working Group started in March 2018. The Working Group's Final Report was produced in July 2019 and considered by the BPC Board in November 2019. The Implementation Report followed and was produced in July 2020. Baker J set out the context and rationale for the proposals which were discussed in detail.
6. The problem was explained as a disconnect experienced at trials in the BPCs, between the factual narratives set out in trial witness statements and the admissible testimony the witnesses could and would be asked to give as evidence in chief. The disconnect is experienced very regularly, so a solution is needed which provides for the realities of the litigation of business disputes in the 21st century and to target a 'shift in culture' back to a proper appreciation that the facts of the case at trial are largely told by the documents, with argument about what story they tell being left as argument rather than a matter for witnesses.
7. Broadly, there are three limbs forming the solution by way of a proposed new PD: (a) the Statement of Best Practice to be an Appendix to the PD (b) a built-in requirement to the Statement of Truth (c) a specific certification requirement upon legal representatives.
8. A new draft PD 57AC was presented. It is to supplement and complement the law and procedural rules that apply universally, but it does so the better to ensure that the law and those procedural rules are respected and implemented in a distinct area of litigation practice where presently that is too often not the case, for reasons that will not be tackled without the authoritative external intervention of a specific PD.
9. Baker J also advised that he had, very recently, received some detailed feedback from a well-known stakeholder and some drafting points from Master Dagnall, all of which required consideration. In addition, the Working Group have one unresolved point of contention and the CPRC was asked to decide whether the new PD should include a document-listing requirement, namely, paragraph 3.2 of the draft PD 57AC, which provides a requirement (as to which the Working Group was unanimous) that a trial witness statement "*must state only that which the witness claims personally to recollect about matters addressed in the statement*". The further possible requirement would go on to provide that a trial witness statement, "*must identify what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in [that] statement*". Baker J suggested that the CPRC decide whether the contentious requirement ought to be included by reference to its merits or demerits in principle, rather than on the basis of concern as to practicability. Following discussion, the view overall was that identification by way of a list of documents should be incorporated into the drafting.
10. During the discussion, some members asked whether the provisions would or should apply across the CPR as a whole. The Chancellor explained that he had discussed that with the MR and, although there may be merit for future reform more generally, the position at this stage was to respond to what is seen as a serious issue in the BPC (for use in the Rolls Building and regional BPC centres) before being considered for wider use.

11. It was **RESOLVED**:

- i. PD57AC was agreed, subject to final drafting
- ii. Statement of Best Practice (Appendix to PD57AC) was agreed, subject to final drafting
- iii. Isabel Hitching QC is appointed as the CPRC representative to work with Baker J /BCP Working Group to finalise drafting and serve as a point of liaison between the Working Group and the CPRC.

12. **Actions:** (i) any further drafting points to Ms Hitching/Baker J by 11-01-21 for onward consideration by the Chancellor/MR Designate (ii) final casting to drafting lawyers by 15-01-21 for inclusion in the next mainstream PD Update.

Item 3 Lacuna Sub-Committee (LSC) Report CPR(20)60

13. The item was opened by confirming that DJ Parker has now joined the sub-committee as the District Judge member.

14. Master Dagnall also advised that (i) Dr Lansbergen-Mills has introduced a new electronic filing system which is serving to improve overall efficiency with out-of-committee activity (ii) Notwithstanding the volume of items on the sub-committee's work programme, it was reiterated that referrals continue to be welcomed.

15. This month there were five substantive items for discussion, two of which were deferred from the last meeting. Each was presented and discussed:

- **LSC2019/5** relates to CPR52.8 and Judicial Review Appeals from High Court Criminal Matters and the issue to be considered is whether to amend CR52.8 to specifically exclude criminal causes and matters. This was **DEFERRED** due to Dr Lansbergen-Mills being unavailable to present it.
- **LSC2020/4** relates to CPR70 and in which court to enforce European Judgments Regulations judgments. The ruling in Shefenacker -v- Horvat 2020 EWHC 506 also relates. The item was considered at the last meeting, with an action to consult Senior Master Fontaine, which has now taken place. Under the present Judgments Regulation there is no registration procedure, although the Queen's Bench Division does keep a list. Accordingly, the amendment to CPR70.1(2) proposed by the LSC is still deemed appropriate. While it could be provided that the relevant court is the High Court (QBD), flexibility, for example for enforcement by third party debt order and/or charging order, would suggest the suitability of amending CPR70.1(2) to add a (c1) to provide that both the county court and High Court may enforce relevant European judgments. It was **AGREED subject to final drafting**, to add the proposed new CPR70.1(2)(c1). **Action:** Drafting lawyers and LSC to finalise in readiness of inclusion in the next SI/Update cycle.
- **LSC2020/17** relates to costs where a party has chosen not to seek a fee remission and the county court (Circuit Judge level) judgment in Ivanov v Lubbe. It was **NOTED** that the Costs Sub-Committee was also considering it and, as such, it was **AGREED to await their findings**.
- **LSC2020/5** relates to adjourned oral examination hearings, in particular of officers of judgment debtors. The possible lacunae being that an order for an oral examination in relation to a judgment debtor (CPR71) can be made against an officer or a former officer of a judgment debtor company or corporation (CPR71.2(1)(b)). But, CPR71.7 provides on an adjournment only for directions as to how notice of the new hearing is

to be served on “the judgment debtor” and without express provision for a penal notice. The CPR are silent as to what should happen on an adjournment with regard to a person ordered to attend court who is not the judgment debtor; a point was also aired as to whether the adjournment order should be in CPR 71.2 form (i.e. including a penal notice) and with expenses being offered under CPR71.4 etc. The general view was that the policy behind CPR71.7 was probably directed to the court having flexibility as to how the person to be examined was to be served with the fixed hearing date notice. However, CPR71.7 does not state that and CPR71.3, 71.4, 71.5 and 71.8 could be said to require some modification to cover expressly the situation of an adjournment. The discussion also ventilated the view that the form of the adjournment order and notice was less important from a CPR perspective as it is a matter for the court’s discretion. It was **AGREED** to:

- i. amend CPR71.7 by replacing “*judgment debtor*” with “the person ordered to attend court”.
- ii. not to amend otherwise.

Action: Drafting lawyers/Secretariat to include in the next SI/Update cycle.

- **LSC2020/23** relates to Leasehold Reform and PD56, in that paragraph 14.6 of PD56 is wrong as it refers to repealed legislation and this was highlighted in GR Property v Safdar [2020] EWCA Civ 1441 (paragraphs 13 to 21). Master Dagnall explained that the Leasehold Reform (Housing and Urban Development) Act 1993 provides for some types of dispute to be dealt with by the county court and others by the Tribunal (formerly the Leasehold Valuation Tribunal (“LVT”) in England and Wales, and now the LVT in Wales and the First-Tier Tribunal or Upper Tribunal in England. However, changes as to which was the appropriate dispute resolution body for relevant types of dispute were effected by the Commonhold and Leasehold Reform Act 2002 and by the Transfer of Tribunal Functions Order 2003 and by the Transfer of Tribunal Functions Order 2013 and which created a new Section 176A of the 2002 Act and also by paragraph 3 of Schedule 12 of the 2002 Act. Given that the CPR should accurately reflect the law, it was **AGREED** to amend paragraphs 14.6 and 6.1 of PD56 to refer to the correct legislation and process. **Action:** Drafting lawyers and LSC to finalise in readiness of inclusion in the next PD Update cycle.
- **Welsh Lacunae.** It was **NOTED** that HHJ Jarman QC had identified some Welsh lacunae requiring consideration and would therefore be referring them to the LSC for review. **Action:** HHJ Jarman to LSC items to Master Dagnall.

Item 4 Breathing Space (Debt Respite Scheme) CPR(20)56

16. The item was opened by acknowledging that DJ Cohen was the CPRC member assigned to work with officials and drafting lawyers since it was last before the CPRC at the October meeting; he also serves on the HMCTS Breathing Space Project Board. Helen LeMottee, lead Drafting Lawyer was welcomed to the meeting to present the proposed drafting. Samantha Toyn (MoJ Policy) and Shannon Cochrane (HM Treasury) were also present.
17. A draft short new rule (r.70.7) and a draft new PD (70B) were being proposed in order to give effect in the CPR, to the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020. The Regulations come into effect on 04 May 2021. It was explained that the basis of the proposals is to rely on the procedure set out in the Regulations and existing general provisions under CPR Part 23 (General rules about applications & court orders).

18. The drafting was discussed in detail. Of particular note were the following points in relation to the proposed draft PD:

- Paragraph 1.1 – (i) insert “(England & Wales)” into the title of the Regulations, so that the full title is reflected in the first sentence (ii) remove the second sentence (iii) remove the text after, “Regulations” from the final sentence.
- Paragraph 2.1 – in the first sentence (i) the reference to, “appeal” in the first sentence is accurately reflected in the singular because there is only one type of appeal (ii) insert an open bracket after “Part 23” in the first sentence and insert the text, “where a claim has not already been issued)” after “apply”.
- Throughout – ensure specific regulatory references are accurate.
- Paragraph 3.4 – replace, “should” with, “must”. It is also understood that this will be of particular help to the court administration in monitoring auto-generated obligations within the *Caseman* IT system.

19. It was **AGREED** to introduce:

- i. a short new rule, CPR 70.7 as drafted
- ii. a new PD 70B subject to final drafting
- iii. consequential amendments to Form N244 (Application Notice) to be finalised out-of-committee in consultation with DJ Cohen.

20. **Action:** Drafting Lawyers/Policy Officials and DJ Cohen to finalise drafting in readiness of inclusion in the upcoming common-commencement date SI/PD Update.

Item 5 Next SI/PD Update & Pilot Practice Directions Requiring Review:

21. The Chair opened the item by confirming that the laying date for the next mainstream SI was scheduled for 08 February 2021. Together with the mainstream PD Update, this represents the April 2021 common-commencement date set of rule and PD changes. Officials are working hard to prepare said instruments for signing before the Christmas recess, but this may need to happen early in the New Year. The following points were raised:

- **Vulnerable Parties** - The MR Designate had considered the resolutions of the last meeting (where it was decided to (i) amend the Overriding Objective i.e. rule 1.1 (ii) introduce a new rule 1.6 to provide for a new, bespoke PD, (iii) introduce a new PD, i.e. PD 1A (iv) amend rule 44.3 (i.e. assessment of costs) and that he agreed with the decision that further consultation was not required. Accordingly, the reforms can be included in the next set of rule changes. This was duly **NOTED**. **Action:** Drafting lawyers/Secretariat to include in the next mainstream SI & PD Update.
- **PD2E** – a minor correction was required at section 5 of the schedule to PD2E where there is a reference to rule 6.15(2) and which should be rule 6.15(1) (i.e. the power to permit service of a claim form at a place not otherwise authorised). This had been raised by DDJ Hovington having conducted recent training at the County Court Money Claims Centre. This was **AGREED**. **Action:** Drafting lawyers/Secretariat to include in the next mainstream PD Update.

22. The following pilot PDs also required review in readiness of inclusion in the next Update cycle. Each was discussed in turn:

- **PD51O – Electronic Working (CE Filing) Pilot Scheme CPR(20)57**

Master Cook provided an update on the programme which plans to add additional jurisdictions to those although covered by the pilot scheme for electronic filing, but the impact of the pandemic, among other pressures had delayed the project slightly and for which consultation with the various jurisdictions was ongoing. The expectation is that additional jurisdictions will join the pilot from July 2021.

It was **AGREED** to extend the current Pilot PD for a further year, until 06 April 2022 and the matter be scheduled to return to the CPRC in February for an update and drafting so that any additional jurisdictions can be added to the PD and included in the summer PD Update.

Action: HMCTS Project Officials, Legal and Secretariat to prepare for the item to return to the February 2021 meeting.

- **PD51V – Video Hearings Pilot Scheme**

The Chair explained that HMCTS had requested that this specific pilot lapse and the PD expire. This is due to a very low usage and a changing landscape in consequence of the pandemic as well as possible wider future reforms concerning video hearings generally, for which greater consultation and consideration is required.

It was **AGREED** that **PD51V will expire on 31 March 2021.**

- **PD51X – Costs for Summary Assessment Pilot Scheme CPR(20)58**

David Marshall confirmed that although the Costs Sub-Committee had received some helpful feedback from practitioners as part of their review of the pilot PD, it had not been possible to hold a substantive meeting and thus only preliminary views on possible future reforms to this voluntary scheme had been formed.

It was **AGREED to extend PD51X** in its current form, for a further year, until 31 March 2022 and schedule the matter in for further discussion in the New Year. **Actions:** (i) Drafting lawyers/Secretariat to include in the next SI/Update cycle. (ii) Secretariat/Sub-Committee to prepare for the item to return to the February meeting if ready.

Item 6 PD55C Covid Temporary PD - Possession Proceedings Post Stay CPR(20)59

23. Mr Justice Robin Knowles, Chair of the MR's Working Group on Possession Proceedings was welcomed to the meeting. Robin Knowles J provided some background by reiterating that PD55C was introduced as part of the response to and recovery from the Covid pandemic, specifically to manage the resumption of possession cases following the lifting of the stay. PD55C is considered to have made a vital contribution to the management of possession proceedings in the context of the pandemic. The Working Group's 'Overall Arrangements' are bedding in and the (court) system is currently stable. Cross-sector engagement remains crucial. The aim is to continue every effort towards making things work and work more smoothly, including with the arrangements for advice and encouraging compromise and increasing understanding of priorities, ahead of anticipated higher volumes in 2021.

24. PD55C provides (at paragraph 1.1) for temporary modification of CPR Part 55 for an interim period, ending 28 March 2021. One of those modifications was to require a reactivation notice in claims that had been subject to the stay of all claims between March and September 2020 and where a reactivation notice was not filed and served by 29 January 2021 the claim would be stayed again (although individually, and an application could be made to lift that stay). When this was set, the CPRC expressly recognised that it should become much clearer, by the autumn, as to whether it should remain in place and for how long.

25. It was explained that the next months are important and that there are particular pressure points ahead in the first quarter of 2021. Accordingly, it is very important to provide stability and continuity for some time yet, including continuity of the vital contribution made by PD55C as a whole. The Regulations last week affecting evictions will have an impact when they end. The easing of regulatory guidance on mortgage possessions is another example of a step that may create sudden volume. Moreover, the January 2021 end date for reactivation notices is itself a date that may create an avoidable pressure point by pushing activity ahead of time. It was also relevant that, as things have transpired, for regulatory reasons most mortgage lenders have not been able to reactivate within the period originally set.
26. The MR's Working Group had met on 24 November 2020 and the unanimous view was that PD55C should be extended.
27. A discussion ensued, within which it was also acknowledged that the Review hearings are primarily to assist the parties, not the court, so as to promote a compromise culture.
28. HHJ Lethem confirmed that the CPRC Housing Sub-Committee had considered the proposals and supported them.
29. It was **AGREED** to:
- i. extend the end of the interim period under PD55C from 28 March 2021 to 30 July 2021 (para 1.1 of PD55C); and
 - ii. alter the end date for filing and service of a reactivation notice (and related requirements) to 30 April 2021 (para 2.6 and 5.3 of PD55C).
30. Robin Knowles J answered various other questions before the Chair closed the item with praise to everyone involved and acknowledged the gratitude of the regional judiciary who appreciated the Working Group seeking their input. The Chair regarded this work as a good example of the civil judiciary working very well, nation-wide, and that the need for stability in the system was an integral part of this work.
31. **Action:** Drafting lawyers/Secretariat to include in the next mainstream PD Update.

Item 7 Any Other Business & Closing Remarks

32. **Online Rules:** The Secretary advised that the online rules will be moving from www.justice.gov.uk to www.gov.uk on a phased basis. Each jurisdiction will continue to have its own dedicated web pages. The CPR is provisionally set to migrate in January/February 2021. The CrimPR have successfully migrated, the FPR will follow shortly, with the CPR relocation completing the exercise. This was duly **NOTED**.
33. **Judicial Review CPR Part 54 - Court of Appeal Judgment in *Dolan and others -v- Secretary of State for Health and others* Neutral Citation Number: [2020] EWCA Civ 1605:** Mr Justice Kerr drew attention to this recent judgment (specifically paragraphs 116, 118-121). The Court of Appeal, the constitution of which included the Lord Chief Justice, invited the CPRC to look at an issue regarding CPR Part 54 on Judicial Reviews. It is an issue that Kerr J has had in mind for some time and mentioned during the contempt reforms as something that needed to be considered. It was also noted that the Government has commissioned a wider review of judicial review under Lord Faulks, which is ongoing; but it was **RESOLVED** that, although very important, the *Faulks Review* was separate and much wider than the specific procedural issue identified in the judgment. Accordingly, it was **AGREED** to form a CPRC Sub-Committee; the work of which is

considered to be as important as the recent Contempt work and thus anticipated to occupy a considerable amount of time and on which a consultation is likely.

34. **Action:** Volunteers to join the sub-committee should email the Secretary (by 11 December) for discussion with the Chair.

Valedictory for The Rt Hon Lord Justice Coulson

35. This being Coulson LJ's last CPRC meeting, Kerr J proposed a vote of thanks, which was wholeheartedly and unanimously endorsed, in recognition of his term of office as Deputy Head of Civil Justice (DHCJ) and de facto Chair of the CPRC. Providing an overview of his judicial career, it was acknowledged that his contributions to the CPRC and civil justice in general were significant, having served on the CPRC for around a decade, firstly as a High Court Judge member and then as DHCJ. Developments of national importance include the digital revolution, through which his personal style had provided a down to earth, robust and at times, fearsome reputation, ensuring that the rule committee was kept grounded and focused on serving its many and varied users. His record of service to the course of civil justice was held in very high regard.
36. The Chair responded by saying that he has thoroughly enjoyed his term of office and the many years of service on the CPRC; it had been a pleasure and a privilege. In closing the meeting, he paid tribute to all members and officials – past and present – for their hard work, patience and good humour. A successor is yet to be appointed, but due to be announced shortly.

C B POOLE
December 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
Alana Evans, HM Courts & Tribunals Service
His Honour Judge Lethem
Master Dagnall
The Chancellor (Items 1 & 2)
Mr Justice Andrew Baker (Item 2)
Helen LeMottee, Government Legal Department (Item 4)
Samantha Toyn, Ministry of Justice (Item 4)
Shannon Cochrane, HM Treasury (Item 4)
Stephen Manger, HMCTS Project Delivery (Item 5)
Mr Justice Robin Knowles CBE (Item 6)
Mark Lambert, Ministry of Housing, Communities & Local Government (Item 6)
Mark Nicholas, Ministry of Housing, Communities & Local Government (Item 6)
Simon Qasim, Family Procedure Rule Committee Secretariat