

Approved Minutes of the Civil Procedure Rule Committee

Friday 9th October 2020 (via video conference due to the Covid-19 Pandemic)

Members attending

Lord Justice Coulson (Chair)
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
Masood Ahmed
Richard Viney
John McQuater
Lizzie Iron
Dr Anja Lansbergen-Mills
David Marshall

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

1. No apologies were recorded, other than noting that Dr Anja Lansbergen-Mills was required to attend a short remote court hearing and would accordingly be absent for part of the meeting.
2. The Chair welcomed three new members, in advance of their terms of office commencing officially at the November meeting:
 - **Mr Justice Trower** is the new Chancery Judge member. Previously served as a member of the Insolvency Rules Committee
 - **Isabel Hitching QC** specialises in, predominantly, commercial and construction law. Member of the Attorney General's Treasury Panel from 2015 to 2019. Previously non-stipendiary lecturer in law, Christ Church Oxford. Member of the Bar Council International Committee with special focus on South East Asia.
 - **Tom Montagu-Smith QC** specialises in arbitration and international commercial litigation, including commercial fraud, banking, and insurance. Since 2017, a Judge to Astana International Financial Centre Court, an international common law court established by Kazakhstan. Experience of drafting procedural rules for courts and tribunal/s in Dubai.
3. The minutes of the 03 July 2020 meeting and 21 August 2020 extraordinary meeting were, respectively, **AGREED**. The following items were raised as matters arising from the 03 July meeting:
 - **Re Item 2, (Covid Recovery, Resumption of possession proceedings)** wherein a Reactivation Notice for possession proceedings (under the new PD55) was agreed, however, it was decided that no new or revised forms were being introduced. It was **NOTED** that the MR's Working Group have designed a template for public use if desired which HMCTS host on <https://assets.publishing.service.gov.uk/>. However, as it is not an officially prescribed CPR form it is not listed in the PD under CPR Part 4 - Forms.

- **Re Item 3 (Enforcement of possession orders) The Civil Procedure (Amendment No.3) Rules 2020.** The SI inadvertently omitted the writ of restitution provision (r83.13 (5)) to retain the court's permission to issue a writ of restitution in aid of a writ of possession whether or not permission was required for the writ of possession. It was **NOTED** that this will have to be included as an amendment in the next SI to reinstate that provision. **Action:** Secretariat & lawyers to reflect in the next available SI/Update.
4. The Action Log was duly **NOTED**, along with updates in relation to the following:
- **AL(20)18 Forms requiring updated Statements of Truth:** The Secretary advised that, in consultation with Master Cook (as Chair of the Forms Sub-Committee) the work to update all civil forms with the revised Statement of Truth (pursuant to changes in the last two updates and approved by the CPRC for action out of committee) is progressing in earnest and in collaboration with HMCTS. This work had been slightly delayed due to more urgent work on possession and contempt forms. However, of the 60 plus forms requiring change, 15 are complete and will be uploaded in the usual place (<https://www.gov.uk/government/collections/county-court-forms>) shortly. The remaining forms will be released in batches as and when they are finished. All the forms will also be translated into Welsh.
 - **AL(19)86 N5B/N11B issue:** His Honour Judge Lethem reported that various errors had been identified (during the summer) in the N5B possession claim form and the N11B defence form. However, they have now been addressed and re-issued. Given the stay on possession proceedings, the risk factor is considered low. Nonetheless, training by the Judicial College in August and September 2020 has mentioned the issue and suggested a pragmatic solution using CPR 3.10 in appropriate cases. Thanks were expressed to all involved in remedying the situation, especially for District Judge Parker's contributions.

Item 2 RTA Portal (Whiplash) CPR(20)33 & CPR(20)34

5. The Chair opened the item by reiterating the background, explaining that this has been a lengthy project, which was last before the CPRC in March and then paused by the Justice Secretary due to Covid-19. Ministers have now instructed officials to continue the work in line with the Government's implementation date of April 2021.
6. David Parkin was welcomed to the meeting to speak on behalf of the Ministry of Justice (MoJ) and His Honour Judge Bird explained that the sub-committee had prepared a schedule setting out issues of principle for which a steer was required. It was agreed to work through that schedule. The MoJ's report was duly **NOTED** and given that there was an ongoing and constructive dialogue between the sub-committee and MoJ, it was decided that some of the items in the sub-committee's schedule did not require consideration in committee at this point. However, a detailed discussion on the other points ensued, which included:
- **Timescales and screens:** The CPRC emphasised the importance of the sub-committee receiving unfettered access to the screens. Drawing on extensive experience as part of the On-line Civil Money Claims (OCMC) Pilot, it was explained why and how this was critical to service delivery, as well as demonstrating that those responsible for the rules must be satisfied that the portal screens lawfully reflect the PAP/PD/rules. HHJ Bird added that it was

the portal that will take the user through the system, rather than expecting the user to constantly cross refer between the portal and the rules. Nonetheless, the PAP/PD were necessary procedural records as part of the CPR and as such both portal and rules must be aligned. At this stage, the portal/screens were not complete, because the rules were not yet complete. OCMC has also shown that the design and approval process can be very dynamic and there are often periods after screens have been created/seen that adjustments need to be made. Likewise, OCMC demonstrates that collaboration builds confidence, but it is resource intensive. In response to the Chair's question, HHJ Bird, confirmed that he could not envisage a situation where the sub-committee would be in a position to recommend approval without seeing all the screens. As such, there was a significant risk to the current timetable, unless this issue was resolved. The MoJ set out an indicative timetable which provided for the build to be complete before the December meeting.

- **Governance:** It was **NOTED** that HHJ Lethem has been nominated by the sub-committee to take a lead in working with the MoJ on a framework for governance, reporting back to the CPRC in due course. **Action:** MoJ to timetable discussions with HHJ Lethem in advance of 04 December meeting
- **The link between the portal and court proceedings:** Following the decision to remove One Way Adjudication (OWA) from the design, the system and thus the rules need to allow for the potential that a claim could move to and from portal and court more than once. The CPRC's view is that, should parties leave the portal because part of their claim requires judicial determination, then a claim form should be produced, given that the technology exists to do so. It was confirmed that the system was being designed with the litigant in person very much in mind, but it was not clear at this stage whether the specific request to automatically produce a claim form would be deliverable within the current implementation timetable, however, work was ongoing.
- **The scope for settling non-whiplash claims:** The MoJ sought a steer on this and whether the drafting and the design should expressly allow for the settlement of a non-whiplash PI claim without the need for a medical report. HHJ Bird explained the legislative background, in that it is a regulatory offence to settle whiplash claims without a medical report, but non-whiplash claims can be settled without a report. The CPRC's view was that the portal should not be misleading.

7. The item closed with thanks for the huge amount of work being done by all concerned.

8.Action: Matter to return to the CPRC on 06 November for a discussion on the drafting.

Item 3 Business & Property Courts Disclosure Pilot Update CPR(20)35

9. Lord Justice Flaux, Chair of the Disclosure Working Group (DWG), was welcomed to the meeting. It was explained that the Working Group has produced various proposed changes to the Disclosure Pilot, PD51U, in response to user feedback and the findings of Professor Mulheron's latest report. PD51U, came into force on 1 January 2019. Flaux LJ explained that since its inception, the pilot has been the subject of careful monitoring by Professor Rachael Mulheron (Queen Mary University) in close consultation with members of the DWG. The proposals include a number of interim changes to PD51U and the Disclosure Review Document (DRD), the substance of which was considered by the wider DWG in June 2020 and it was agreed that they should be submitted to the CPRC for its consideration.

10. The proposed changes are, in summary, as follows:

- Clarifying when known adverse documents are required to be produced;
- Making the obligation to serve document preservation notices less onerous and likewise modifying the requirements relating to Initial Disclosure;
- Providing much needed guidance on how to draft Lists of Issues for Disclosure and Model C requests for disclosure.
- Removing the obligation to complete the DRD if the parties have agreed that Extended Disclosure is to be restricted to non-searched based Models (ie Models A and B).
- Shortening and simplifying the DRD and making it clearer that some sections do not need to be completed at all for cases where the disclosure exercise is likely to be relatively straightforward.
- Removing the explanatory notes to the DRD from the DRD itself.

11. Professor Mulheron's report identified that parties and their advisors have plainly struggled to get to grips with the requirement to produce a List of Issues for Disclosure – far too many issues are being drafted (in one case over 130). Some users have also approached Model C in a way that was not intended by the DWG – treating it as if it were akin to a Redfern Schedule (with multiple and lengthy requests) rather than in the narrow and focused way provided for by the PD. The DWG believes that these are two key areas that can and should be addressed through further guidance.

12. Other areas for change may also be identified as the pilot continues and incremental improvements can be made. However, the DWG consider these interim proposals as requiring immediate action, in response to the feedback received.

13. It was noted that, with the agreement of the Chair, Professor Mulheron's report and simultaneously the DWG's draft proposals for change were published last month, explaining the rationale behind them and making it clear that the proposed changes were subject to review by the CPRC and as such had no formal status. Normally announcements setting out proposed reforms would not take place before the CPRC had considered them, but as they were responsive to user feedback detailed in Professor Mulheron's Third Interim Report it was felt prudent to do so.

14. Following discussion and subject to a typographical error at paragraph 6.2 within the DRD Explanatory Notes, to insert the words, 'number of' between 'limited' and 'documents' in the first line, the interim changes were **AGREED** en bloc:

- revised PD (albeit that the pilot itself had already been extended (in its current form) at the June 2020 CPRC meeting, for a further year until 31st December 2022, as per the 122nd PD Update).
- revised Disclosure Review Document (DRD)
- revised notes to the DRD
- Professor Mulheron's Third Interim Report was duly **NOTED**

15. **Action:** Drafting lawyers and Secretariat to include the amendments in the next available PD Update.

Item 4 Contempt Sub-Committee:

- **Feedback following Contempt Webinar (AL(20)54)**

16. The Chair noted the success of the Contempt Webinar which took place on 08 October 2020, which was hosted by the Law Society, for which thanks were conveyed to Brett Dixon and all who participated. Over 180 delegates joined the live stream seminar, which also included a Q&A session; initial feedback has been very positive. As such, it is something to be considered in the future when major reforms are being introduced.
17. Mr Justice Kerr added his thanks to the sub-committee, the secretariat, drafting lawyers and officials for their collective efforts which enabled the reformed Part 81 and specifically the introduction of five new bespoke forms, to be published on time.
18. **Post Meeting Note:** A recording of the event is available via this link: <https://www.youtube.com/watch?v=hoBGZOa86fw>

- **Amendments Consequential on new CPR Part 81 (DJ Powers CPR(20)36 & Other Consequentials CPR(20)37)**

19. This item has two parts. Kerr J opened by acknowledging that the national lockdown may have restricted responses to the consultation, which ran from 09 March to 01 May 2020. At the July CPRC, certain consequentials were deferred so as to not delay the substantive reforms. Additionally, since the reforms were published and came into effect on 01 October, other consequentials have been identified and the sub-committee will consider each of them.
20. The most pressing issue concerns the powers of District Judges (DJs) to deal with contempt proceedings in cases involving Anti-Social Behaviour Injunctions (ASBIs). Kerr J explained the position and the extent to which it was discussed as part of the consultation. When the reformed Part 81 was introduced, the jurisdiction previously exercised by DJs had been removed by the new rule 81.3(2).
21. It was observed that if this is considered to be an issue of policy rather than rule making then it may fall to the senior judiciary, rather than the CPRC, to determine which judges should determine which types of contempt proceedings. The Chair added that he had discussed the matter with the MR and was also aware that it was of particular concern to Designated Civil Judges, who were troubled that if DJs did not retain these powers then the work would fall to be dealt with by the civil Circuit Judges and this was not the most efficient use of court resources.
22. Following discussion, it was **AGREED** that the former jurisdiction of DJs to determine contempt proceedings in ASBI and similar cases should be restored and as a matter of urgency. A discussion as to drafting solutions ensued, wherein it was **RESOLVED** to amend rule 81.3(2) as follows:

“(2) If the application is made in the High Court, it shall be determined by a High Court judge of the Division in which the case is proceeding. If it is made in the county court, it shall be determined by a Circuit Judge sitting in the county court, unless under a rule or practice direction it may be determined by a District Judge.”
23. DJ Cohen raised whether express provision was required for Deputy DJs. The Chair's view, which was shared by other members, was that it was not necessary because when a DDJ is sitting they are empowered to fulfil the full remit of a DJ.

24. **Action:** (i) Secretariat to make enquiries with the relevant authorities for permission to lay an urgent standalone SI and report back the Chair out of committee (ii) Drafting Lawyers to prepare the SI for circulation and signature out of committee.
25. Kerr J raised the following, less urgent, consequentials, some of which also include provisions drawn to the sub-committee's attention as candidates for amendment, but where the sub-committee recommend no change. Each was discussed:
26. PD25A deals with interim injunctions. Paragraph 6.1 states that "[a]n example of a freezing injunction is annexed to this practice direction". Form F.1 "Draft Freezing Injunction" is a standard form freezing injunction used as a template which contains a penal notice. The sub-committee do not think it is for the CPRC to standardise all penal notices because they may vary in tone and content in different jurisdictions for good reasons. They also may need adapting to an individual case. If a change was being recommended then it may be necessary to consult interested parties such as the Commercial Court and the Commercial Bar Association. There could be impacts on the content of court guides such as the Chancery Guide and Commercial Court Guide; the CPRC does not determine the content of those guides. The definition of a penal notice in the new rule 81.2 is deliberately generic. Accordingly, it was **AGREED not to change Form F.1.**
27. Drafting lawyers highlighted that the definition of a penal notice in the new rule 81.2 concludes with the text, "...or other punishment under the law." and this is something that the Joint Committee on Statutory Instruments (JCSI) have picked up on in the context of the Family Procedure Rules, observing that the narrative should be more specific. However, it does not seem to have attracted comment in the context of CPR drafting. This was duly **NOTED.**
28. PD 27. Paragraph 5.1 provides for recording and transcribing. Paragraph 5.2 cites section 9 of the Contempt of Court Act 1981 (which deals with the unauthorised use of tape recorders in court) and to the PD (Sup Ct: Tape Recorders in Court) [1981] 1 WLR 1526 (Lord Lane LCJ sitting with Lord Denning MR and others). It deals with the forbidding of homemade tape recordings in court, except at the discretion of the court, which is rarely exercised and only for good cause. Given that it merely refers to statute law which is still in force and thus, consistent with the new Part 81, as it was with the old Part 81, the sub-committee do not recommend any change. Accordingly, it was **AGREED not to change PD27.**
29. It was **NOTED** that other consequentials are yet to be considered and thus will return to the CPRC at the next available opportunity.

Item 5 Renting Homes (Wales) Sub-Committee CPR(20)38

30. Richard Viney was welcomed to the meeting and set out the background, reiterating that this matter was aired at the CPRC in July and is now ready for a review of drafting proposals in consequence of the Renting Homes (Wales) Act (The Act), which is intended to make it simpler and easier to rent a home in Wales. It also provides a single legal framework which replaces current legislation in respect of tenancies and licences, subject to a limited number of exceptions and with significant change in terminology and process. Accordingly, amendments to CPR Part 55 are proposed in order to reflect the Welsh provisions. This involves the addition of new sections IV and V to Part 55. This meeting is only concerned with the proposed rule changes; a draft of the relevant amendments to PD 55A is to follow at a later meeting.
31. The Welsh Government wish to bring The Act into force in October 2021. Implementation will require drafting of digital and paper forms. The intention is that the drafting changes

will be settled by spring 2021 for inclusion in the summer SI, to commence in October 2021.

32. The proposed amendments and associated drafting notes were reviewed and discussed in detail. It was also **NOTED** that:
- there may be possible, 'Breathing Space' (Item 11) implications and this is still being considered.
 - Various changes to replace, 'will be' with 'is to be' and, 'shall be' replaced by, 'are to be' and, 'shall' by 'must' in recognition of the JCSI's views, was also noted.
 - The sub-committee understand that PCOL will be available for Renting Homes possession claims.
 - Implementation overall will also require drafting of digital and paper forms.
33. Thanks were conveyed to Lizzie Iron for her assistance in casting subtle changes in language for accessibility reasons.
34. Master Dagnall enquired as to whether a signpost to the list of county court areas can be provided. HMCTS confirmed that the IT system automatically identifies the correct court.
35. The revised CPR PART 55 was **AGREED, subject to final drafting** and incorporation of the following points:

IV -RENTING HOMES WALES – GENERAL RULES

- 55.30 (c) – remove the word, 'in': '...~~in~~the Human Rights Act '
- 55.30 (e) – remove the word, 'extended': "an ~~extended~~ possession order" means...'
- 55.31 (1) – keep the sign post. Notwithstanding that the JCSI have queried the use of signposts in the past, this is similar to the one in CPR55.2(1) and should be retained.
- 55.31 (2) (b) – remove in its entirety
- 55.32 – signpost to PD55A is to be retained.
- 55.32 (3) – remove
- 55.32 (4) – replace, 'set out' with, 'specified'.
- 55.34 – remove signpost
- 55.35 – Title to be changed for accessibility reasons to read, 'Defendant's response and ~~joinder of adding~~ sub-holder as a party'
- 55.35 (4) – replace, 'join' with, 'add'.
- 55.36 – remove signpost
- 55.37(1) – change for accessibility reasons to read, 'When the court decides the track for a Renting Homes possession claim the matters ~~to~~ which it must ~~have regard include~~ consider

V - RENTING HOMES WALES – ACCELERATED POSSESSION CLAIMS FOR DWELLINGS LET ON A STANDARD CONTRACT

- 55.42 (1) (a) – replace, 'set out' with, 'specify'.
- 55.45 (2) – remove because the court IT system (PCOL) does it automatically
- 55.45 (3) – in the first line, move, 'that' to immediately after, 'either'.
- 55.46 – leave as is.

36. **Actions:** (i) Matter to return in December (ii) Drafting lawyers to check (a) drafting convention concerning the use of capital letters when reciting, 'rule' and, 'Practice Direction' (b) drafting is gender neutral throughout (iii) Secretariat to note for summer 2021 SI (to be finalised at June 2021 meeting) for an in-force date of October 2021.

Item 6 Civil Reform & Online Civil Money Claims (OCMC) Sub-Committee Update

37. Mr Justice Birss provided a general update, which was duly **NOTED**.
38. In relation to PD51S (Unspecified Money Claims Pilot for use by Legal Representatives), it was explained that the expansion of this service in April 2020 has been very successful which now has some 400 law firms using the online service, with around 15,000 claims having now been issued. Thanks were conveyed to Brett Dixon for suggesting it.
39. Building on the success of this private beta, work is continuing on the digital end to end service. Plans include the ability to progress a digitally issued claim to completion of Directions Questionnaires before the service then returns to paper. It is hoped that draft rules can be considered by the sub-committee before the end of this year for the service to be introduced by the end of April 2021.
40. Turning to PD51R (OCMC Specified Money Claims Pilot), it was explained that, with the agreement of the Project Board and the senior judiciary, there is to be a temporary pause to any further enhancements of the OCMC scheme. Because OCMC was introduced at the early stages of reform, technical and connectivity work is required to bring the system in line with the common components platform, which is now used across the wider reform programme. Nonetheless, OCMC continues to work very well across the 19 pilot courts, delivering significant time savings compared with the paper-based system.
41. The Chair endorsed these comments, reiterating that the Pilots were critical, 'cornerstones' of a *Digital County Court*, and thus a most important part of civil reform.

Item 7 Private International Law Committee: Service Out proposals CPR(20)39

42. Mark May was introduced and welcomed to the meeting.
43. It was explained that this is a recommendation from the Lord Chancellor's Advisory Committee on Private International Law (PIL), of which Lord Mance is co-Chair. It concerns service out in relation to Brexit and revisions to CPR Part 6 (Service) and consequentials to Part 12 (Default Judgments), PD6 and Form N510.
44. The PIL Committee has recommended that the 'service out' rules for England and Wales (E&W) should be amended so that permission is not required in any cases where an applicant is seeking to rely upon an E&W Choice of Court Agreements or "COCA" and where the 2005 Hague Convention does not apply. The proposals take the approach of removing gateway 3.1(6)(d) from PD6B and changing it into a new rule 6.33(2C), permitting service out without permission of the court. The drafting reflects the definition of relevant choice of court agreements from the gateway in PD6B rather than modelling it on Article 25 of the Brussels IA Regulation (Regulation (EU) No 1215/2012), which contains various conditions and would be narrower in scope.

45. The purpose of the changes is that it will give significant reassurance to the legal profession and wider business community and instil confidence in businesses to continue to choose COCAs in favour of the courts of E&W, by eliminating a preliminary step which adds cost and delay. It would remain possible for defendants to challenge the court's jurisdiction at a later stage.
46. It was also explained that CPR Part 6 Section IV has been amended by the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) and those amendments are due to come into force on Implementation (IP) completion day (i.e. at the end of the Transition Period, at 11.00 p.m. on 31 December 2020).
47. The drafting proposals and associated suggested options were discussed, during which, Master Cook referred to an email he had received from the Senior Master in which she expressed her support but offered some comments as to drafting. In response to a question of jurisdiction from Birss J (as to whether there is a gap in terms of Scotland and Northern Ireland), Alasdair Wallace undertook to check. In reviewing the new r.6.33(2C), an alternative approach, was offered whereby it would be merged with the existing paragraph (2B); the Chair's preference to leave r.6.33(2B) as is and then add (2C) in.
48. The proposed changes to CPR Part 6 were **AGREED, subject to final drafting**, together with any consequentials to Part 12 and PD6B
49. Form N510 (Notice of Service out of the Jurisdiction) will also require updating to reflect (i) the amendments to CPR 6.33 already made by the EU Exit SI 2019/521 (when those changes come into force on IP completion day) (ii) the above changes (iii) to consider the inclusion of a box/alternative relating to claims under r.6.33(2B) (2005 Hague Convention claims) and this was duly **NOTED**.
50. **Actions:** (i) Drafting lawyers (a) check the extent of the jurisdiction (b) review SM Fontaine's drafting points (c) finalise drafting for inclusion in an SI/Update (ii) officials to draft updated Form N510 in consultation with the CPRC (out-of-committee).

Item 8 The Competition Act Warrants PD post Brexit CPR(20)40

51. Alasdair Wallace explained, with contributions from the lead Government Department (Department for Business, Energy and Industrial Strategy) that this is an urgent matter which needs to come in before the end of the Implementation Period (IP) (31st December 2020) and thus requires a standalone Update. The vires for doing so, was the usual PD making vires.
52. The amendments provided are to be substituted for the amendments to the Practice Direction 'Application for a Warrant under the Competition Act 1998', currently contained in the 107th CPR Update and which reflect both competition and (previous) State Aid EU Exit policy. The 107th Update is due to come into force at the same time as the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/521) (i.e. on IP completion day).
53. The State Aid (EU Exit) Regulations 2019 have not been enacted and will not now be enacted; they have been withdrawn. Consequently, the amendments to the PD due to enter into force on 31st December 2020 need to be altered to remove the redundant references to the Regulations which have been withdrawn. The amendments are not intended to interfere with amendments reflecting competition policy.

54. Kerr J explained that the Brexit Sub-Committee have had sight of the amendments and were agreeable in principle, but had not had the opportunity to produce a paper on the matter. The sub-committee also sought reassurance that the request has nothing to do with the controversy concerning the Internal Market Bill and does not involve any breach of international law.
55. The Chair took the view that the committee was not in a position to agree the amendments at this stage, but, conscious of the urgency, he was prepared to consider them out of committee when furnished with the necessary additional information and clarify on the proposals. It was **RESOLVED** to adjourn the matter until the November meeting, unless the issue was satisfactorily resolved out of committee in the interim. **Post Meeting Note:** the matter was further considered and approved out of committee on 21 October 2020. **Action:** Drafting lawyers and Secretariat to prepare a standalone, 'Brexit related' PD Update at the earliest opportunity.

Item 9 Lacuna Sub-Committee Report CPR(20)41

56. The Chair explained that the last substantive report from the Lacuna Sub-Committee (LSC) was back in May. It had not been possible to accommodate further LSC items due to the weight of Covid-19 related and other work. However, this remained an important topic and would appear on the agenda in November as the first substantive item, with a one-hour slot.
57. Master Dagnall explained that currently, the LSC has in the region of 35-40 matters before it (some of which only relate to minor points of wording or updating, others are more significant). One new issue likely to require consideration in November concerns the provisions on Default Judgments and their operation in the Admiralty jurisdiction.
58. This month there are five items for consideration, each was explained and discussed:
- LSC2020/9 concerns a drafting infelicity in PD3A Striking Out a Statement of Case, whereby two drafting proposals are offered to correct paragraph 5.1 of PD3A to refer to what PD23A actually says. Following discussion, it was **AGREED** to make no changes, because the current drafting provides a useful steer to the user, but the matter is duly noted.
 - LSC2020/10 is in relation to the effect on injunctions of strike-out due to non-payment of fees and CPR25.11. The issue being whether it applies to counter claims as well as claims. It is unsure whether this actually presents a problem in practice, although the LSC can see why it would and this was discussed. The proposal is to extend CPR25.11 to apply to strike-out of counterclaims, but not to affect injunctions obtained by the party not being struck-out. It was **AGREED** that a drafting solution should be prepared for further consideration. **Action:** Master Dagnall and drafting lawyers to prepare drafting and in liaison with the Secretariat to re-schedule the matter before the CPRC at the next available opportunity.
 - LSC2020/11 is a matter referred to the LSC by DJ Parker and concerns recordings of small claims hearings. The LSC propose to extend CPR39.9 to small claims hearings by removing PD27 paragraph 5.1; and extend paragraph 5.2 of PD27 to all types of recording; and consider updating the CPR regarding modern technology. In discussing the matter, Kerr J confirmed that the Part 39 reforms did not intend to exclude small claims and thus the open justice principles and CPR 39.9 should apply. It was **AGREED** that a drafting solution should be prepared

for further consideration. **Action:** Master Dagnall and drafting lawyers to prepare drafting and in liaison with the Secretariat to re-schedule to matter before the CPRC at the next available opportunity.

- LSC2020/12 was raised by QB Master Sullivan. Master Dagnall explained the drafting infelicities in PD2F Court Sittings. PD2F deals with Court sittings and Paragraph 2 with Vacations in the High Court. Paragraph 2.1 provides that an order is required (usually) for a matter to be heard in a Vacation. However, paragraph 2.2 provides that “The directions in paragraph 3.1 shall not apply in relation to [matters outside the Royal Courts of Justice and thus in District Registries]. Paragraph 2.3(2) provides that except with the permission of a Judge (or as may be permitted by arrangements outside the RCJ), appeals to a Judge will be limited to “the matters set out in paragraph 3.5 below” and applications of real urgency. Paragraph 2.4 provides that there is no distinction between term time and vacation for Chancery Masters. Paragraph 2.5(1) provides that an application notice can be issued before a (QB) Master in August for one of twelve purposes, one of which is for a “garnishee order”. Paragraph 2.5(2) provides for a Master to give permission for a Master to hear an urgent application in August. The LSC conclude that it is likely that the various infelicities arise from previous alterations to the PD and the rules. The LSC has identified three and the following was **AGREED**:

- (i) the reference in Paragraph 2.2. to “paragraph 3.1” is incorrect as no such paragraph number exists. It should be changed to read “paragraph 2.1”
- (ii) the reference in Paragraph 2.3(2) to “paragraph 3.5 below” is incorrect as no such paragraph number exists. It should be changed so that it reads “paragraph 2.5(1) below”
- (iii) the reference to “garnishee order” in Paragraph 2.5(1) is no longer correct. It should be changed to “third party debt order”.

Action: Drafting Lawyers/Secretariat to include in the next mainstream SI/PD Update as part of the April 2021 in-force cycle.

- LSC2020/13 is another item referred to the LSC by DJ Parker. This relates to the Register of Judgments, Orders and Fines Regulations 2005 (the Regulations), which set up a register of judgments (“the Register”). However, under Regulation 9(c) most judgments are only registered once the judgment creditor has taken one of various steps. Regulation 9(c)(v) provides that one such step is an application “for a certificate of judgment under rule 8 of CCR Order 22 in Schedule 2 to [the CPR]”, but that was repealed by The Civil Procedure (Amendment) Rules 2014 and replaced by CPR40.14A. Accordingly, it should be amended. However, the CPRC has no power to change the Regulations. The LSC therefore recommends that this be drawn to the attention of the MoJ and this was **AGREED**. **Action:** MoJ to note the need to amend the Register of Judgments, Orders and Fines Regulations 2005 to alter Regulation 9(c)(v) to refer to CPR40.14A.

Item 10 Costs Sub-Committee

59. Birss J provided a general oral update on the sub-committee's work programme. It has in the region of 12 ongoing items, many being referrals from the Lacuna Sub-Committee (LSC). Two topics relate to Part 36 Offers following the Court of Appeal's judgment in Calonne v Dawnus [2019] EWCA Civ 754 where it considered Part 36 Offers being made with provisions for interest following expiry of the "relevant period" for acceptance and the issues in King v City of London [2019] EWCA Civ 2266 where Arnold LJ felt that the CPRC should look at whether Part 36 offers should be capable of being made exclusive of interest. The sub-committee require a steer from the full committee on possible drafting options and on whether to consult and if so the nature/extent of any consultation.
60. It was **RESOLVED** to consider the issues more fully at the November meeting, with the aid of fully cast drafting options. **Action:** matter to return to the 06 November CPRC meeting.

Item 11 Breathing Space (Debt Respite Scheme) CPR(20)42

61. Helen LeMottee (drafting lawyer) was welcomed to the meeting, along with Shannon Cochrane (lead policy official from HM Treasury).
62. It was explained that this was last before the CPRC in July, at which point it was unclear on the scale of any changes needed to the CPR. Now that the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (the Regulations) have been laid, the view from drafting lawyers is that the impact on the CPR is not as great as first anticipated. The restrictions imposed are similar to those imposed by the Debt Relief Order provisions in Part 7A of the Insolvency Act 1986 (inserted by the Tribunals, Court and Enforcement Act 2007) (section 251G), for which no rule changes were considered necessary. Accordingly, other than some potentially modest changes within the Debt PAP and OCMC PD, wide-scale amendments are not anticipated. The proposal is to rely on the procedure set out in the Regulations and existing general provisions under CPR Part 23 (Applications) and PD 52D (Statutory Appeals and Appeals subject to special provision).
63. The Regulations are due to come into effect 04 May 2021. They provide for a 60-day moratorium for people suffering with problem debt (including joint debts), during which fees, charges and certain interest on debts are frozen and enforcement action from creditors is paused.
64. The Chair welcomed the proposal in principle, but highlighted the provisions in the Regulations (eg Regs 8, 9 & 10) concerning time limits, observing that users would expect to find reference to time limits in the CPR. Additional points were also raised by other members and included possible implications for (i) The Insolvency Rules (ii) Appeals (iii) the county court in reference to Regulation 19 and (iv) plans for parallel IT changes in the High Court (it being noted that IT enhancements are being made to the county court's Caseman IT system).
65. DJ Cohen serves on the HMCTS Project Board and undertook to maintain a 'watching brief' (with drafting lawyer assistance) on how this develops and on any consequences for the CPR.
66. **Actions:** (i) Drafting lawyers and officials to review the points raised (ii) Secretariat to re-list the item, thus: if CPR/PD changes are required it will need to return no later than 04 December meeting, for consideration of inclusion in the Winter SI/PD

Update (for in-force in April 2021) alternatively it can return to the 05 February CPRC meeting.

Item 12 Any Other Business:

- **PD63 Intellectual Property Claims**

Birss J advised that HHJ Richard Hacon (Presiding Judge of the Intellectual Property Enterprise Court) has identified an issue with PD63 regarding European counter claims & the European Union Intellectual Property Office (EUIPO), at paragraph 21 of PD63 concerning the article numbers for the related Regulations. However, it does not appear to be causing any material problem in practice and it is unlikely to be feasible to correct the references before it needs to be deleted and addressed as a result of Brexit. Drafting lawyers have been consulted and agree that no immediate action is required, explaining that paragraphs 21.1 to 21.5 of PD63A are revoked by the Brexit Update, and while this is transitional, it is only for cases that begun before exit day (to be amended to implementation period completion day), so the notification provisions should not be activated, or if they do, the EU Regulation will apply directly, so the requirement will be there. According, the position was duly **NOTED**.

- **TBD v Simons [2020] EWCA Civ 1182 - Imaging Orders**

Birss J drew attention to the Court of Appeal's judgment in *TBD v Simons* concerning imaging orders. The court asks that two things be done: (i) the rule committee to look into it, and (ii) all concerned to do something in the meantime. The Chancellor of the High Court has asked Mr Justice Meade and Mr Justice Birss to look into what to do initially because some issues in practice have developed which need considering. The aim is to draft a standard form Imaging Order. It was highlighted that a sub-committee might be needed in due course, but the Chair took the view that, if urgent matters arose, they could be considered out of committee and without the need for Birss J's direct involvement, given that his CPRC term of office is coming to an end. **Action:** (i) Birss J to update Meade J (ii) Secretary to plan in an item, as necessary, for either the November or December meeting/s.

- **Transfer of Functions Order in consequence of the merging of the Foreign & Commonwealth Office & Department for International Development**

It was **NOTED** from the Chair that this Transfer of Functions Order came into effect on 30 September 2020. It changes various elements of the CPR (and other rules of court), where it referred to the now above mentioned defunct Government Departments. The new Department is the Foreign, Commonwealth and Development Office. The MR was consulted and approved the relevant changes out-of-committee. The CPR amendments are set out in paragraph 11 of the Schedule to the SI, which can be viewed online at: <https://www.legislation.gov.uk/ukSI/2020/942/contents/made>.

Action: Secretary to email all members.

- **Civil Justice Council Report on Anti-Social Behaviour and the Civil Courts**

Nicola Critchley advised that the above report had now been published. Some of the recommendations at pages 134 onwards require consideration by the CPRC and are summarised at page 140, paragraph 516. The report is available online via this link: <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/anti-social-behaviour-injunction-asbi-working-group/>

Action: Secretary to allocate a short item on the next agenda (06 November) to consider next steps and formation of sub-committee, which HHJ Bird has volunteered to join.

Closing Remarks – Thanks to Mr Justice Birss

67. With this being Mr Justice Birss' last official CPRC meeting, the Chair recorded the committee's collective gratitude for his exceptional work over the last six years. He was the first Chancery Judge to serve two terms on the CPRC and will be missed enormously, not only for the significant contributions to rule committee business, but also in general, for his willingness to be involved and for his breadth of knowledge and good humour. His appointment as a Lord Justice of Appeal was announced in the summer and will take effect in due course.

C B POOLE
October 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
Mr Justice Trower
Isabel Hitching QC
Tom Montagu-Smith QC
David Hamilton, Ministry of Justice
David Parkin, Ministry of Justice (Item 2)
Jayne Bowman, Ministry of Justice (Item 2)
Andrew Parker, Beachcroft Legal (Item 2)
Jonathan Scarsbrook, Irwin Mitchell (Item 2)
Andrew Underwood (Item 2)
Lord Justice Flaux (Item 3)
Mark May, Ministry of Justice (Item 7)
Thomas David, Department for Business, Energy and Industrial Strategy Legal (Item 8)
Helen LeMottee, Government Legal Department (Item 11)
Shannon Cochrane, HM Treasury (Item 11)