Note of the UKSC/JCPC User Group Meeting

Held on Friday 28 June 2013 at 11am in the Lawyers' Suite at the UKSC

Present:

Lady Hale	}	
Jenny Rowe (JR)	}	UK Supreme Court
Louise di Mambro (LdiM)	}	
Ian Sewell (IS)	}	

Michael Fordham QC	Blackstone Chambers
Andrew Arden QC	Arden Chambers
Derry Moloney	Alan Taylor & Co
Richard Todd QC	1 Hare Court, Temple
Hannah May	Royds LLP
Jan Luba QC	Garden Court Chambers
Lee John-Charles	TSols
Henry Hickman	Harcus Sinclair
Louise Fisher	Ashurst
Daniel Waller	Matrix Law
Steven Durno	Law Society
Nicola Gare	Baker & McKenzie LLP
Nigel Fisher	Norton Rose
Robin Tam QC	Temple Gardens Chambers
Lucy Barbet	11KBW
Nigel Pleming QC	39 Essex Street
John Almeida	Charles Russell LLP
Camilla Hart	Charles Russell LLP
Jacqueline Harris	Pinsent Masons LLP
William Rose	Sharpe Pritchard
Mark West	Radcliffe Chambers
James Turner QC	1KBW

Ailsa Carmichael QC joined the meeting by telephone from Scotland.

1. Welcome and apologies

Lady Hale welcomed everyone to the meeting, particularly anyone attending for the first time.

The apologies (which were not read out) were as follows:

Karen Quinlivan QC	Bar Council, Northern Ireland
Alexander Shirtcliff	Blake Lapthorn
Richard Clayton QC	4-5 Gray's Inn Square
David Miles	Blake Lapthorn
Jonathan Crow QC	4 Stone Buildings
Nicole Curtis	Penningtons
Timothy Fancourt QC	Falcon Chambers
Timothy Brennan QC	Devereux Chambers
Julia Staines	Charles Russell LLP
David Pannick QC	Blackstone Chambers

2. Matters arising from the meeting held on 25 January

Jenny Rowe updated the meeting on two issues:

(i) **IT issues.** She explained that the issues raised by Henry Hickman at the previous meeting had been discussed at a Justices' meeting. The Justices were content with the proposal that for the electronic bundle there should be a blank page at the end of each written case to cope with additional material. The Justices also emphasised the importance of having an accurate index at the front of the electronic bundle.

She also reported that there was no further update on the pagination proposals put forward by Ailsa Carmichael at the last meeting.

(ii) **Supply of core volumes to legal libraries**. JR explained that, as some of those attending the meeting were aware, since the last meeting she had corresponded with the Chancery Bar Association, the Faculty of Advocates and Lincoln's Inn Library. She had also sought further advice from Treasury Solicitors and advice from the Information Commissioner's Office (ICO). The advice from the ICO had been received on 20 June and had made clear their view that the UKSC files did form a relevant filing system for the purposes of the Data Protection Act. Urgent thought was now being given to the implications of this, but it was likely that JR would be writing to the Libraries concerned indicating that if they wished to continue receiving sets of case papers we would have to look to them to finance a resource to enable the necessary checks to take place. JR explained that she could not risk having a heavy fine imposed by the ICO. She also explained that, in due course, a full set of all core papers would be transferred to the National Archive and would be publicly accessible.

3. Revised Practice Direction 13

Louise di Mambro introduced this item, supported by Ian Sewell. She explained that, on the move from the House of Lords, we had not taken a fundamental look at costs issues in the way the current draft attempted to do. She clarified that we had not taken account of the majority of the changes brought about by the Jackson Review. In particular cost budgeting and cost management were not really relevant to the UK Supreme Court. The current draft did, however, incorporate some provisions of the new Civil Procedure Rules such as those enabling the Court to limit the costs of an appeal. She pointed out that the Court would be hearing further argument on costs

issues in a case which had returned from Europe. This would be heard on 22 July and she hoped that general guidance would be issued as part of the judgment in that case.

She went on to point out that costs in some UKSC cases could be very high and that some of the Justices did not think respondents should be able to claim any of their costs on a PTA application.

Other points she made were:

- There was a new, simplified, form of bill contained in the Practice Direction.
- We were still getting to grips with recent legal aid changes.
- In looking at the guideline rates we have been conscious that the Costs Judges felt hourly rates were not helpful because they rewarded those who were slow/long winded.
- A note from counsel about the guideline rates, and if they should be departed from, could add context which was very useful in terms of provisional assessments.

In the subsequent discussion the following points were made:

- The Civil Procedure Rules did not apply in Scotland and the approach to costs was different. Usually costs were negotiated and the law accountants needed clarity. The discussions which took place in Scotland could be very different from the approach adopted in England and Wales. **(Action – Ian Sewell to have a discussion with Jacqueline Harris and Ailsa Carmichael, along with anyone else they thought relevant. Northern Ireland colleagues should also be consulted.)**
- Pro Bono Costs. Robin Tam QC had produced a short note, to which he spoke at the meeting. It was agreed that his idea was worth pursuing but we needed information about how many orders were made against private individuals; and it was worth checking the parliamentary debates about the introduction of the provisions on pro bono costs to see what reference had been made to gift aid. Lucy Barbet reported that their chambers were aware of an order for costs made in a judicial review case and which might have been against an individual. (DN – it subsequently became clear that the order had been against a Local Authority and not an individual.)

  (Action: LdiM to try and find figures.)

- Jan Luba QC said he was grateful for the opportunity to make an input into a revised Practice Direction 13. He had a number of drafting points which he would give to Ian Sewell outside the meeting. He then raised the following points:

  Paragraph 6.7(b). He asked for clarification that if a legal aid provider had given the appropriate authorisation there would be no question of "discretion" and that the Costs Officers would allow the fee.

Paragraph 9.1(c). A decision needed to be made as to whether the figure was £50K or £75K.

Paragraph 11.2. It would be helpful if a PTA panel could give an appropriate signal on this issue.

Paragraph 12.7. It would be helpful if the single Justice could give reasons for their refusal to re-open the decision.

Paragraph 15.6 onwards. He questioned whether it was sensible to continue with the structure of rates adopted in the tables at that and subsequent paragraphs. In particular he was not sure that the structure reflected current practice. He pointed out that civil (non-family) work funded by legal aid was almost entirely governed by hourly rates. If the structure proposed in PD13 was retained then this would cause difficulty.

The following points were then made in response to the issues raised by Jan Luba:

- The provision at paragraph 11.2 was an old provision and might need to be redrafted. It was pointed out that a permission application might raise a point of public importance but it might be refused for other reasons. IS said that in practice it did not arise a great deal, particularly on provisional assessments. Lady Hale noted that there might be further work required on the drafting of the PTA form and paragraph 11.2 would need to reflect that. LdiM mentioned PD3 now contained a warning about costs not being recoverable where the Panel considered that the on an unhelpful PTA application was not of great assistance.

- John Almeida questioned whether respondents should be penalised for objecting to a permission application.

- Ailsa Carmichael QC asked that there should be some input from Scotland to the guideline fees. She said that the UKSC guideline fees were a welcome tool for Scottish lawyers doing legal aid work.

- Robin Tam QC said that he did most of his work on hourly rates which had their advantage as between lawyer and client; but for the purposes of assessing how much one party should pay to another, guideline rates for the total amount payable for a particular item of work could be a more useful guide to what the paying party should expect to have to pay. He agreed that there was a question mark, however, over whether the breakdown of the guidelines was appropriate for modern conditions.

- LdM suggested having a separate fee for the written cases with which most people were content. Louise and Ian also clarified that in the last four years only three cost assessments had been referred to a single Justice and in those instances reasons had always been given.

Action by all – any comments on Practice Direction 13 should be received by the end of July at the latest. We hope to reflect any changes in the JCPC costs Practice Direction. It was noted slightly in relation to paragraph 9.1(c) that the figure of £75K would be adopted.

4. Interveners

Lady Hale briefly introduced this item. A number of those present thought it would have been helpful to have had statistics on how many interventions were given permission for written only submissions and how many were oral submissions. JR/LdiM explained that it was not possible to determine this from the material recorded on the current case management system but that we would look at this for the future. Lady Hale also pointed out that, it would be wrong for anyone to think that Justices did not read written interventions. (Michael Fordham's article says that a "written-only intervention is easily overlooked, and can be buried among the papers".)

The following points were made in discussion:

- Nigel Pleming QC said that in one case he had been given permission to make written submissions only. He had, however, attended the hearing just in case there had been an opportunity/reason to speak. He thought this might be a third option which could be considered as a matter of course i.e. permission was granted for a written submission but counsel for the intervener could have the option of turning up for the case and applying to the Court on the day, providing they had sat through the case and listened to all the arguments, for permission to make a short oral intervention. In response Lady Hale said that this had been done in the past where a lawyer acting for an intervener had come to Court but the Court could not guarantee that they would ask questions of counsel and allow them to speak.

(**Action: to consider amending the guidance on interveners to allow for this possibility**).

- Problems could be created when a timetable had been fixed and interventions came in late. LdiM said she did bear this possibility in mind when listing decisions were taken, although it could be a problem when listing urgent cases involving children.

- In Michael Fordham's article one of the observations was that it would be helpful for potential interveners to know what cases were coming up where interventions might be useful. This might be less of a problem now that the Court put so much factual information on the website. The Court might now feel able to expect any applications to intervene to be made in good time.

- Timetabling could be difficult and it was suggested that the Court be stricter with interveners on timings. If they could be asked to respond at the same time as the appellant it would be more helpful for respondents. In response Lady Hale said that a PTA Panel could give timetabling guidance when considering applications to intervene.

  (**Action: UKSC to give further consideration to the order of submissions**).

- Lady Hale asked for views on those who were technically not parties but who wrote in with observations on PTA applications. Thus far the Court had taken a relatively relaxed view about these and papers were included in the bundles considered by PTA Panels. The number of these varied from case to case but in one case there had been twelve.

- Nigel Pleming QC pointed out that the relevant rule indicated that only those interventions/writers "in support" of the application were catered for. Some counsel, including him, had given negative advice to those who wanted to write to oppose the grant of permission on the basis of that rule. If the Court's practice is to receive observations opposing permission, this ought to be made clear.

(**Action: UKSC to look at the wording of Rule 15; the overall subject of interveners and court practice to be considered at the next Justices' meeting**).

- Robin Tam QC suggested that if it was agreed to limit writers-in to those supporting the application perhaps the observations could be routed through the applicants. This could reduce the problem of such observations arriving late and interfering with the timetable for a decision on the application.

- Michael Fordham QC said the real value of interventions was the way they were responsive: to be able to react to what is said or shown to, or raised by, the Justices at the hearing. The UKSC was good at listening and giving interveners a slot. He agreed that oral interventions needed to be properly managed and the sequencing of written cases was important. If an intervener was at risk of repeating what a party had said then that party should go first. It should be possible to strip out from an intervener's case what had already been dealt with so the intervener only presented additional points.

- He was not in favour of page limits for interveners' written cases. Sometimes, for example, if the UNCHR was the intervener, it was helpful to have comparisons from around the world.

- He was in favour of interveners being given a slot in the timetable for oral submissions but for this to be treated as provisional so that the Court at the hearing could review whether and what time for oral submissions was appropriate.

5. Procedure for dealing with draft JCPC Judgments

The general feedback from those at the meeting was that approach was helpful and went a long way to avoiding the risk of errors in judgments. Louise di Mambro reported on her discussions with the Privy Council Office about the timing of signing Orders in Council.

A problem had arisen in a case where although the Board's judgment had been given and was published on the website, the order had not been signed and so the court below refused to proceed without the order. In all cases where an Order in Council was required, the Board's advice had to be submitted to, and approved at, a meeting of the Privy Council. Only after that had been done, would the Clerk sign the order. In order to save time, LdiM said that if the parties were able quickly to agree the draft order, then it could be submitted at the same time as the Board's advice was submitted for approval. The Clerk would then sign the order immediately after the meeting. Given that meetings are only held about once a month (excluding August and September) this should speed things up considerably.

6. Time Limits

Jenny Rowe distributed a copy of Robin Tam's note. It was agreed that this would be put on the agenda for the next meeting in January 2014.

7. Amendments to JCPC Practice Directions

John Almeida raised four points:

(i) Proposal R.14 (2) - to be amended to require an appellant to file with his PTA the application, all supporting documents required for the use....."

(ii) R.18 - number is missing from text!

(iii) R.23 - deadline for filing A's and R's Case does not correlate with amended PDs (ie 5/6 week). Rule 23(1)(2) describes deadlines as 5 and 3 weeks. However Practice direction 6.3.9 and 6.3.10 states as 6 and 4 weeks as amended in September 2012. When is the Rule to be amended? This has caused problems in the past especially with Agents not use to the Court.

(iv) Finally, there is a growing trend of Appellants replying to Notices of Objection - there is no provision for this in the Rules.

- There was some concern about the first proposal, including the risk of waiting to file a PTA and finding that a case was due to be heard in the court below within a short timescale (something which had happened earlier that day).

(**Action: LdiM to look at this in more detail and for it to be brought back to the next meeting**).

- LdiM pointed out that the rules referred to 'at least 5 or 3 weeks and there was scope for the PD to specify the time.
- Rule 18 had been missed from the text and this would be attended to as a matter of urgency. Parties were expected to use their common sense and not deluge the Court with correspondence especially in view of the overriding objective of the Rules.

(**Action: LdiM and Website Manager**).

- If an appellant did reply to a notice of objection the papers were included in the material that went to the Panel.

- A point was made that, whilst those who attended User Group meetings, and received minutes, were aware of the flexible approach adopted by the Registry, others might not be so aware.

(**ACTION: UKSC/JCPC to consider how best to deal with this**).

8. UKSC policy on religion/belief and making accommodation available

The policy was noted and welcomed by the User Group.

9. Any Other Business

- Jenny Rowe reminded attendees of the Summer Exhibition which would be in place from the end of July and which would cover the centenary of the building.

- Jan Luba QC said it was very helpful to receive information, for example, about Lord Hope's valedictory and hoped that the Court would continue to circulate such information to the User Group. (**DN information circulated about Lady Hale's Swearing In).**

JENNY ROWE
Chief Executive
August 2013