



DRAFT COURT RULES FOR COLLECTIVE PROCEEDINGS

In November 2009 a Civil Justice Council working group chaired by Robin Knowles QC was established, as a consequence of the recommendation contained in the Government's response to the Civil Justice Council's report on improving access to justice through collective redress (the Government's response), in order to prepare draft court rules for collective proceedings (the draft rules).¹

The government has indicated that it does not support the introduction of a generic collective action. However, the government's response took the view that the ability to bring collective proceedings should be considered and, where found appropriate, introduced on a sectoral basis, with the responsibility for enabling legislation defining the scope of collective proceedings falling to the relevant Government Department. The working group's aim was to prepare a set of generic court rules of sufficient flexibility that they could be used for any different model of collective proceedings that primary legislation might permit.

¹ <http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf> at [53].

Members of the working group were drawn from the Civil Procedure Rules Committee (CPRC), the Ministry of Justice (MoJ), the Civil Justice Council (CJC) and other lawyers, nominated by the CJC, with particular knowledge and expertise in this area. Membership of the working group was as follows:

Chair, Robin Knowles QC – CJC

Professor Rachael Mulheron – CJC

Master Fontaine – CPRC

William Featherby QC – CPRC

Qasim Nawaz – CPRC

Charles Dhanowa – Registrar, Competition Appeal Tribunal

Stephen Wisking - Herbert Smith

John Sorabji – Legal Secretary to the Master of the Rolls

Steve Uttley – MoJ Policy

Michael Anima-Shaun – MoJ Policy

Helen Hall – MoJ Legal

The working group met on several occasions between November 2009 and January 2010. The purpose of this note is to provide some background to the thinking of the working group which lies behind the draft rules. The draft rules and a draft practice direction are attached to this note.

2 February 2010

1. GENERAL APPROACH TO DRAFTING

(a) Terminology and Structure

The Financial Services Bill² was published just as the working group commenced its work. This Bill contains provisions for collective proceedings in relation to specified financial services claims. The working group adopted the general language and structure used by Parliamentary Counsel in drafting the Bill – for example, in the use of “collective proceedings”, “collective proceedings order” and “authorisation” of the representative.

There are two points on which the draft rules differ from the terminology or structure of the Financial Services Bill:

- (i) The court rules generally refer to a “class” – a term that has been avoided in the Bill. However, the Bill was introduced into Parliament on the basis that it provides for “class” actions, and the working group considered that this is a useful description to use in the court rules.
- (ii) The rules refer to a “class representative” (whereas the Bill uses only “representative”) in order to distinguish the person approved to act in respect of a collective proceeding from any person appointed under rules 19.6 or 19.7.

(b) Legislation or court rules?

At several points in the draft rules the working group had to choose between leaving a provision to be fleshed out in the relevant enabling legislation or providing detail in the draft rules. This occurs, for example, in relation to the definition of the “common issues” (rule 19.16(2)(e)) and, more generally, in relation to the criteria for certification of the collective proceedings (rule 19.20) and approval of the class representative (rule 19.21).

² <http://www.publications.parliament.uk/pa/cm200910/cmbills/049/10049.1-7.html>

The working group adopted an approach that aimed to include as much generic detail in the draft rules as possible. The draft rules are intended to provide a self-contained framework, which could be applied without amendment to any collective proceedings introduced by primary legislation. However, at every point there is always the possibility that any sector may choose to include in the relevant enabling legislation additional criteria to any provision in the court rules.

(c) Reference to existing court rules

At a few points, the draft rules refer to existing court rules which would apply in any event. Such repetition is strictly unnecessary. The working group included these references in order to highlight the relevance and importance of specific extant rules; rules which if they were not already applicable to all proceedings would have required specific provision in the draft rules. The repetition thus emphasises the importance of the existing court rule and explains why no specific rule is needed.

For example:

- (i) In rule 19.18(5) there is a requirement that the court should consider staying the proceedings for ADR at the first case management conference. Encouraging the parties to use ADR is something that the court is required to do under its general case management powers in any event. However the working group considered that a specific pointer to this requirement was a useful tool as it stands in place of any requirement that the parties undertake mandatory ADR (see further below).
- (ii) In rule 19.20(1) there is a reference to the overriding objective. The working group felt that this was important because it stands in place of any more specific criteria that might have been included as a condition of certification, and draws attention to the fact that matters such as “proportionality” will pervade all the court’s decision making on authorisation.

2. PROCEDURE: AUTHORISATION OR CLAIM FORM FIRST?

The Financial Services Bill requires that the class representative obtains the court's authorisation "to bring" collective proceedings. The working group interpreted this provision to mean that authorisation must be obtained before the claim form in collective proceedings is issued. The draft rules therefore adopt this approach.

However, the working group noted that a possible alternative procedure would be to require that the claim form must be issued first, and an application for the authorisation made at the same time. The working group preferred this approach, because several issues, such as those relating to limitation, jurisdiction, and the position of foreign parties, depend on the issuing of the claim form. The working group concluded that, given the terminology of the Financial Services Bill, it is not possible to adopt this procedure in relation to financial services claims. However, the working group offer this alternative approach for consideration by other sectors which may enact legislation in relation to collective proceedings. A draft of the relevant rule (rule 19.18) showing how this alternative approach would work is attached to this note.

3. CRITERIA FOR AUTHORISATION OF THE COLLECTIVE PROCEEDINGS

(a) Criteria for certification of collective proceedings

The main criteria for certification are set out in rule 19.20(2) and are that "the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues".

The three most important points to note here are why specific gateway criteria, which might have been expected, have *not* been included in the court rules:

- (i) *There is no requirement for mandatory ADR***

In contrast to the recommendation made by the Government in its response to the CJC Report, the working group concluded that mandatory ADR should not be a condition for certification. This decision was reached on the basis that it is not appropriate that the courts should force parties to mediate at any one particular point in time.

However, the working group very much recognised the importance of encouraging ADR and the draft rules cater for it in three different ways.

- First, in its application for a collective proceedings order the applicant must state, verified by a statement of truth, whether or not ADR has been used (rule 19.18(3)(b)).
- Secondly, at the first case management conference, the court will consider staying the proceedings for ADR (rule 19.18(5)).
- Thirdly, whether ADR has been attempted will be one of the circumstances that the court considers in deciding whether collective proceedings are appropriate (rule 19.20(2)(c)).

(ii) There is no specific merits criterion to be applied automatically in every case

The working group noted that the CJC recommended that there should be a preliminary merits threshold included as one of the criteria for certification and that in its response, the government agreed that a legal merits test was likely to form part of the certification criteria.

However, after lengthy deliberation, a majority of the working group concluded that a threshold merits test should not be included as a condition for certification, automatically applicable in every case. The working group noted that merits tests have caused difficulty when they have been adopted in other jurisdictions because they have resulted in a mini-trial at the application stage and satellite litigation over the exact height of the threshold. The working group did not want to impose this expense in every case, even where a merits argument at this early stage may not be

relevant. Instead, the draft rules allow for the merits of the claim to be taken into account in three ways.

- First, the applicant is required to state in its application, verified by a statement of truth, that it believes that the claim has a real prospect of success (rule 19.18(3)(c)).
- Secondly, where appropriate, the respondent can apply for SJ or strike out at the application stage, as if the claim form had already been issued (rule 19.20(4)).
- Thirdly, the court will have regard to “all the circumstances” when deciding whether to certify (rule 19.20(2)(c)). At this stage, it would be open to the respondent to argue that the case is particularly weak (although not so weak that it could be struck out) and that therefore either (a) the collective proceedings mechanism should not be used at all; or (b) if collective proceedings are appropriate, should only be permitted to proceed on an “opt in” basis.

The minority members of the working group favoured following the position advocated by the CJC. They took the view that a legal merits test was an essential feature of the certification criteria; essential as a means to safeguard against unmeritorious litigation and the dangers that posed. They also took the view that as a matter of principle those bringing such claims should satisfy the court that the claim they wished to bring within collective proceedings had merit. While they acknowledged that a merits test produced a mini-trial in many cases, this was accepted as a valid means of ensuring that only meritorious cases could proceed using a specialist form of procedure which could often in and of itself generate large costs. They took the view that the fear regarding litigation over the test’s standard could be allayed by utilising the well-known and understood summary judgment test. If the approach of the minority members of the working group is preferred, and a decision taken that a preliminary merits test should be imposed, the working group suggest that a new paragraph is inserted as rule 19.20(2)(a)(iv)

“(iv) have a real prospect of success;”

(iii) *There is no reference to the cost of distributing an award in comparison to the value of the award*

The working group concluded that the court should not be required to undertake a specific costs and benefits analysis as part of the certification criteria. However, notice is taken of the costs and benefits of the collective proceedings, because the court is asked to take these into account when deciding whether to certify (rule 19.20(3)(a)); a requirement that is also subject to the overriding objective. The wording is deliberately broad to permit the court to take into account not only the particular costs and benefits of the court case itself, but also the broader costs and benefits to society of any collective proceedings.

(b) Criteria for approval to act as the class representative

(i) An appropriate person

Unless the relevant legislation designates a person as one who is permitted (with or without the court’s approval) to act as the class representative, the main criteria for approval are that the proposed representative either has a claim which falls within the collective proceedings or is considered by the court to be “an appropriate person” (rule 19.21(3)).

The working group has deliberately left it to the court’s discretion to determine who might be an “appropriate” person. There was concern expressed by some members of the group that the class representative should not be a law firm or a body created specifically for the purpose of acting as a class representative, as outlined in the CJC’s report. The working group therefore spent a considerable time looking at more specific hurdles – such as that the representative was a body whose objects were linked to the subject matter

of the proceedings; or that the representative was not a special purpose vehicle (SPV) created solely for the purpose of bringing the proceedings.

This approach was however rejected for two reasons. First, it was decided that whatever formulation was used, the representative would always be able to find a way of getting round the criteria. Secondly, any chosen formulation was likely to be open to different interpretations and would therefore give rise to litigation over its meaning.

The working group did not want to draft a rule which could be avoided by manipulation and would give rise to satellite litigation, when the real issue before the court was whether the proposed representative was an “appropriate” person. In a particular case, if it is not appropriate for a SPV or law firm to act as the class representative, then the court will not permit it to do so. However, where a law firm or SPV meets the other criteria laid down in rule 19.21, then the court may consider it appropriate to act.

(ii) The defendant’s costs

Further criteria for approval are laid down in rule 19.21(2)(b). These include that the class representative will be able to pay the defendant’s recoverable costs if ordered to do so (rule 19.21(2)(b)(iv)). The working group wanted to draw a balance between stifling meritorious claims and the possibility of so-called blackmail suits. This has been achieved by adapting the existing mechanisms available to the courts with respect to costs. The representative must show that it can pay any costs which may be ordered against it, but the defendant’s recoverable costs may be limited by any cost capping order made. In addition, provision is made to permit the defendant to apply for a security for costs order if it becomes apparent, after a collective proceedings order has been made, that the representative is not likely to be able to meet any costs order (via a new sub-rule 25.13(2)(h)).

As a more general point, the working group noted the recommendations in relation to collective proceedings made by Lord Justice Jackson in his Review of Civil Litigation

Costs.³ In the event that his recommendations in relation to costs shifting are accepted by the Government and introduced in any particular area, at that time consideration will need to be given to the question whether this should also be introduced in relation to collective proceedings. As well as the importance of general case management in relation to collective proceedings, the working group noted the importance of costs management, either under existing powers contained in the CPR or under any new provisions following Lord Justice Jackson’s recommendations. With this in mind, the draft Practice Direction provides that a costs judge may be appointed to a particular case.

(iii) The class representative’s costs and funding

Whether the proposed class representative has sufficient backing to bring the collective proceedings may clearly be relevant to the question whether it is an appropriate person to act. However, the working group wanted to reflect the current balance that is drawn in the CPR between what information the claimant is and is not required to disclose to the defendant in relation to its costs and funding. This is achieved by the reference to the costs estimate ordered under paragraph 6 of the Costs Practice Direction (rule 19.21(4)(b)), which does not require the applicant to disclose any “additional liability” in respect of its funding arrangements

4. OPT-IN OR OPT-OUT PROCEEDINGS

When the court makes a collective proceedings order, it must indicate whether the case is to proceed on an opt-in or opt-out basis (rule 19.22(1)(f)). The applicant will have indicated its preference when making the application (rule 19.18(3)(f)). The working group considered whether it would be useful to provide some guidance to the court as to the factors to take into account when making this decision. However, it came to the conclusion that the matter was best left to the court to decide at large. It is intended that the rules could be applied to a broad range of collective proceedings which may cover many different types of claim. The size and composition of any potential class could vary

³ Jackson, *Review of Civil Litigation Costs*, (TSO, 2009), chapter 33.

broadly. The group anticipated that guidance would be built up over the first few cases in any one particular area.

5. NON-DOMICILED CLASS MEMBERS

Class members who are not domiciled in England and Wales will only be able to join an “opt-out” action if they give notice to the class representative that they want to opt-in to it (rule 19.16(2)(g)). This reflects the similar provision in the Financial Services Bill relating to persons not domiciled in the UK. It is intended to avoid any arguments in relation to national sovereignty which might arise if the provisions purported to assert jurisdiction to decide cases for foreign domiciliaries who have taken no active part in the proceedings.

6. APPEALS

The draft rules do not permit a represented person to bring an appeal against a judgment or order relating to the common issues (rule 19.40). The working group considered that in permitting the class representative to act on their behalf (and obtaining the advantages that this brings), the represented persons had effectively handed over authority to the representative in respect of the running of the case and this included the question whether to appeal. The working group felt that many of the benefits brought by the use of a collective procedure would be lost if individual represented persons were permitted to appeal. The remedy for represented persons who consider that the class representative is not acting in their best interests is to seek to replace the representative (rule 19.28).

7. COUNTERCLAIMS

The working group considered what provision should be made to cover the possibility that a defendant might wish to bring a counterclaim against the class representative. In any particular case, the court would need to decide whether it was appropriate for the defendant’s claim to proceed by way of counterclaim at all, and, if so, whether the class

representative should be authorised to defend the counterclaim on behalf of the represented persons (rather than the individuals being added as parties). The working group concluded that the court already has sufficient discretion under the general case management provisions to decide whether it was appropriate for the counterclaim to proceed. Where this is permitted, rule 19.31(5) gives the court power to authorise the class representative to defend the claim. This would involve reconsidering whether the authorisation criteria are met in respect of the counterclaim.

8. REGISTER OF APPLICATIONS FOR COLLECTIVE PROCEEDINGS ORDERS AND REGISTER OF REPRESENTED PERSONS

The working group considered that it was vital that a central record of applications for a collective proceedings order should be kept and made accessible (rule 19.25(1)). In addition, it considered that the defendant should be able to find out the likely number of represented class members in any collective proceedings (rule 19.25(3)). However in both cases it recognised that consideration will need to be given to any data protection requirements.

9. THE CLASS REPRESENTATIVE'S COSTS

The draft rules require that the representative's fees agreements should be approved by the court (rule 19.42). On two points the working group decided not to make any specific provision, which it felt might be best considered as part of the more general review in relation to costs to be undertaken in response to Lord Justice Jackson's Report. These were first, whether incentive fees should be banned; and secondly whether the successful class representative should be permitted to recover from the award made any costs reasonably incurred over and above costs paid by the defendant.

10. PRACTICE DIRECTION

Because relevant provisions in relation to collective proceedings are already spread over several different pieces of legislation (the enabling legislation, regulations made under the enabling legislation and court rules), the working group took the view that as much detail as possible should be included in the court rules themselves, rather than moved into a practice direction. The group has also drafted a short practice direction to supplement the rules. This contains detail largely relating to the giving of notices to class members.

Draft Court Rules on Collective Proceedings

Part 19

IV Collective Proceedings

19.16 Scope and interpretation

- (1) This section contains rules about collective proceedings.
- (2) In this section—
 - (a) “class member” means a person falling within the class specified in the collective proceedings order;
 - (b) “collective proceedings” means proceedings which by virtue of any enactment may be brought by a representative on behalf of persons whose claims raise common issues and in respect of those common issues;
 - (c) “collective proceedings order” means an order authorising the class representative to bring the collective proceedings;
 - (d) “class representative” means a person who is authorised to bring the claims in collective proceedings and includes a sub-class representative;
 - (e) “common issues” means the same, similar or related issues of fact or law, unless otherwise defined in the relevant enactment;
 - (f) “opt-in proceedings ” means collective proceedings brought on behalf of class members who notify the class representative in accordance with these rules that their claim should be included in the collective proceedings;
 - (g) “opt-out proceedings” means collective proceedings brought on behalf of class members except—
 - (i) those who notify the class representative in accordance with these rules that their claim should not be included in the collective proceedings; and
 - (ii) in the case of class members not domiciled in England and Wales, those who do not notify the class representative in accordance with these rules that their claims should be included in the collective proceedings;
 - (h) “represented person” means a class member who, in accordance with rule 19.24,—
 - (i) has opted in to opt-in proceedings;
 - (ii) is domiciled in England and Wales and has not opted out of opt-out proceedings; or

(iii) is not domiciled in England and Wales and has opted into opt-out proceedings.

- (3) Sections 41, 42, 45 and 46 of the Civil Jurisdiction and Judgments Act 1982 apply for the purpose of determining whether a person is regarded as domiciled in England and Wales for the purposes of this section.

19.17 General

- (1) These rules are without prejudice to the court's general powers of case management where there are multiple claims, including its power to consolidate proceedings, make a GLO or try two or more claims on the same occasion.
- (2) Permission of the court must be obtained under rule 19.18 to bring a claim in collective proceedings.
- (3) A class representative must not in the collective proceedings bring different claims or bring claims against different defendants to those specified in the collective proceedings order.
(Provision is made in rule 19.26 for a party to apply to the court for a variation of the collective proceedings order.)

19.18 Application for a collective proceedings order

- (1) This rule applies where an application is made to the court under any enactment for a collective proceedings order.
- (2) Before a collective proceedings claim form is issued, the proposed class representative must file an application notice under Part 23 for a collective proceedings order.
- (3) The application notice must be supported by a written statement which—
 - (a) identifies the proposed class representative;
 - (b) states whether the parties have used an alternative dispute resolution^(GL) procedure;
 - (c) includes a statement that the applicant believes that the claim has a real prospect of success;
 - (d) provides a description of the proposed class;
 - (e) provides an estimate of the number of class members and the basis for that estimate;

- (f) states whether the applicant wishes to bring opt-in proceedings or opt-out proceedings and the basis for this decision;
 - (g) states whether the applicant has checked the register of applications for collective proceedings orders and notified the class representative, or proposed class representative, of any collective proceedings that relates to the same or similar subject matter of this application;
 - (h) sets out the material on which the applicant intends to rely to satisfy the criteria for certification and approval in rules 19.20 and 19.21; and
 - (i) has attached a copy of the draft collective proceedings claim form and draft particulars of claim.
- (4) As soon as practicable after the filing of the application notice, the applicant must serve on the respondent a copy of—
- (a) the application notice;
 - (b) the evidence filed by the applicant in support of the application;
 - (c) the draft claim form and draft particulars of claim;
 - (d) a draft collective proceedings order; and
 - (e) a draft notice as notice as referred to in paragraph 19.23.
- (5) As soon as practicable after filing an application for a collective proceedings order, the court will hold a case management conference and either—
- (a) give directions and set a timetable for the defendant to respond to the application and the hearing of the application; or
 - (b) order a stay^(GL) while the parties attempt to compromise the case by alternative dispute resolution^(GL) or other means.
- (6) A respondent who opposes an application under this rule does not, by doing so, lose any right that the defendant may have to dispute the court's jurisdiction.

19.19 Determination of the application for a collective proceedings order

- (1) The court may make a collective proceedings order if—

- (a) it certifies the proceedings as appropriate for collective proceedings in accordance with rule 19.20;
 - (b) it approves the applicant to act as the class representative in accordance with rule 19.21; and
 - (c) it is satisfied that any conditions required by any enactment for authorisation have been met.
- (2) If the court makes a collective proceedings order it will give such directions as it thinks fit, having considered, in particular,—
- (a) whether the collective proceedings should be opt-in or opt-out proceedings;
 - (b) directions for the filing of an acknowledgement of service and defence;
 - (c) directions regarding any class member who is a child or person who lacks capacity within the meaning of the Mental Capacity Act 2005; and
 - (d) it may attach such conditions to the order as it considers fit.

19.20 Certification of the proceedings as suitable for collective proceedings

- (1) The court may certify the proceedings as appropriate for collective proceedings where to do so would further the overriding objective.
- (2) In deciding whether to certify the proceedings as appropriate for collective proceedings the court—
 - (a) must be satisfied by the applicant that the claims in the proceedings—
 - (i) are brought on behalf of an identifiable class of persons;
 - (ii) raise common issues; and
 - (iii) are of the kind which by virtue of any enactment may be brought in collective proceedings; and
 - (b) must be satisfied by the applicant that the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues; and
 - (c) will have regard to all the circumstances.

- (3) In determining whether the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues for the purposes of paragraph (2)(b), the court will take into account, amongst other things,—
- (a) the costs and the benefits of the proposed collective proceedings;
 - (b) the availability of alternative dispute resolution and any other means of resolving the dispute; and
 - (c) the size and the nature of the class.
- (4) At the hearing of the application for a collective proceedings order, the court may hear an application by the respondent for strike out under Part 3 or summary judgment under Part 24 as if the claim form in the collective proceedings had already been issued.

19.21 Approval of the applicant to act as class representative

- (1) Subject to paragraph (2), the court must approve the applicant to act as the class representative if the applicant satisfies the court that the applicant is designated under any enactment as a person who may act as the class representative in respect of claims of the kind brought in the proposed collective proceedings.
- (2) The court may approve the applicant to act as the class representative if the court is satisfied by the applicant that—
- (a) the applicant either—
 - (i) is designated under any enactment as a person who may, if approved to do so by the court, act as the class representative in respect of claims of a kind brought in the proposed collective proceedings; or
 - (ii) satisfies the criteria in paragraph (3); and
 - (b) the applicant—
 - (i) would fairly and adequately act in the interests of the class members;
 - (ii) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members;
 - (iii) if there is more than one person seeking approval to act as the class representative in respect of the same claims, would be the most suitable person to act as such; and

- (iv) will be able to pay the defendant's recoverable costs if ordered to do so.
- (3) The criteria referred to in paragraph (2)(a)(ii) are that the applicant either—
 - (a) has a claim which falls within the proposed collective proceedings; or
 - (b) is considered by the court to be an appropriate person to act as the class representative.
- (4) In determining whether the applicant would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(b)(i), the court will take into account—
 - (a) whether the applicant has prepared a plan for the collective proceedings that satisfactorily includes—
 - (i) a method for bringing the proceedings on behalf of the class members and for notifying class members of the fact and progress of the proceedings; and
 - (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and
 - (b) any estimate of costs which the court orders that the applicant must file under paragraph 6 of the Costs Practice Direction.

19.22 The collective proceedings order

- (1) A collective proceedings order must authorise the class representative to bring the collective proceedings and must—
 - (a) state the name and address for service of the class representative;
 - (b) state the name of the defendant;
 - (c) describe or otherwise identify the class;
 - (d) describe or otherwise identify the common issues for the claims which the class representative is authorised to bring;
 - (e) state the remedy sought;
 - (f) state whether the collective proceedings are opt-in or opt-out proceedings;

- (g) state the manner and the date (the “specified date”) by which—
 - (i) in the case of opt-in proceedings, a class member must opt in; and
 - (ii) in the case of opt-out proceedings, a class member who is domiciled in England and Wales on a particular date (the “domicile date”) must opt out and a class member who is not domiciled in England and Wales on the domicile date must opt in;
 - (h) approve the draft claim form; and
 - (i) order the publication of a notice to class members in accordance with rule 19.23.
- (2) A collective proceedings order may include any other provision the court considers appropriate.
- (3) In describing or otherwise identifying the class for the purposes of paragraph (1)(c), it is not necessary for the order to name or specify the number of the class members.

19.23 Notice of the collective proceedings order

- (1) The class representative must give notice of the collective proceedings order to class members in a form and manner approved by the court.
- (2) The notice referred to in paragraph (1) must—
- (a) incorporate or annex the collective proceedings order;
 - (b) include a statement explaining that any judgment on the common issues for the represented persons or any sub-class of represented persons will bind the represented persons, or those within the sub-class, as the case may be; and
 - (c) give such other information as the court directs.

19.24 Opting in and opting out of collective proceedings

- (1) A class member may on or before the specified date and in the manner specified in the collective proceedings order—
- (a) in the case of opt-in proceedings, opt into the collective proceedings;
or
 - (b) in the case of opt-out proceedings, either—
 - (i) opt out of the collective proceedings; or

- (ii) if not domiciled in England and Wales at the domicile date, opt into the collective proceedings.
- (2) A class member who does not opt-in or opt-out in accordance with paragraph (1) may not do so after the specified date, except with the permission of the court.
- (3) The court may grant permission under paragraph (2) if it is satisfied that—
 - (a) the delay was not caused by the fault of that class member; and
 - (b) the defendant would not suffer substantial prejudice if permission were granted.
- (4) A class member who has already brought a claim that raises the common issues set out in the collective proceedings order may not be a represented person unless, before the specified date, the class member discontinues or applies to stay that claim.

19.25 Register of applications for collective proceedings orders and register of represented persons

- (1) The Central Office at the Royal Courts of Justice will maintain a publicly accessible register of applications for collective proceedings orders.
- (2) Any person who pays the prescribed fee may, during office hours, search the register referred to in paragraph (1).
- (3)
 - (a) Once a collective proceedings order has been made, the class representative must establish a register on which it will record the names of those class members who, in accordance with rule 19.24, opt in or opt out, as the case may be, of the collective proceedings.
 - (b) The class representative must, on request, make such register available to the defendant.

19.26 Applications to vary the collective proceedings order

- (1) A party may apply to the court for a variation of the collective proceedings order.
- (2) If the court varies the collective proceedings order so as to alter the description or identification of class members, it may also make any other

orders that it considers appropriate, including an order relating to the specified date.

19.27 Staying the collective proceedings

- (1) Subject to paragraph (2), if at any time after a collective proceedings order is made, it appears to the court that the conditions for authorisation are no longer satisfied with respect to the proceedings, the court may, on an application by a party or of its own initiative, make an order staying (GL) the collective proceedings.
- (2) Where a claimant who has been approved to act as the class representative under rule 19.21(3)(a) ceases to be a class member but otherwise continues to satisfy the criteria in rule 19.21, that person may continue to act as the class representative.
- (3) If the court makes an order under paragraph (1), the order may also make further provision including that the proceedings should continue between different parties and, for that purpose, the court may—
 - (a) order the addition, removal or substitution of the parties;
 - (b) order the amendment of the claim form; or
 - (c) make any other order that it considers appropriate.

19.28 Substitution of the class representative

If at any time after a collective proceedings order is made, it appears to the court that the class representative is not fairly or adequately representing the interests of the represented persons, the court may, either of its own initiative or on the application of a represented person or party,—

- (a) substitute another person who satisfies the criteria for approval in rule 19.21 as the class representative; or
- (b) make any other order it considers appropriate.

19.29 Applications for withdrawal by the class representative

- (1) A class representative may only withdraw as a party to the collective proceedings if the court gives permission for the withdrawal.
- (2) The court will only give permission for the withdrawal under paragraph (1)—

- (a) if it is satisfied that the class representative has given notice of the application to withdraw to represented persons in a form and manner approved by the court; and
 - (b) on conditions as to costs that the court considers just.
- (3) If the court gives permission for the class representative to withdraw from the proceedings and no substitute class representative is approved, the court will give directions for the future conduct of the proceedings which may include provision that the proceedings should continue as one or more proceedings between different parties.

19.30 Sub-classes

If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the court may approve a person who satisfies the criteria for approval in rule 19.21 to act as the class representative for that sub-class.

19.31 Case management of the collective proceedings

- (1) The court may give directions at any time for the case management of the collective proceedings.
- (2) The directions referred to in paragraph (1) may, in particular, order that—
 - (a) the common issues for the class be determined together;
 - (b) the common issues for a sub-class be determined together; or
 - (c) issues that are relevant only to certain individual represented persons (“individual issues”) be determined in further hearings.
- (3) If the court directs that the participation of individual represented persons is necessary in order to determine individual issues, the class representative must give notice of the further hearings to those individual represented persons in a form and manner approved by the court.
- (4)
 - (a) The court may give directions for the procedures to follow in the further hearings referred to in paragraph (2)(c).
 - (b) Such directions may include—
 - (i) dispensing with any procedural step that the court considers unnecessary;

- (ii) authorising any special procedural step that the court considers appropriate; and
- (iii) setting a time within which individual represented persons may make claims in respect of the individual issues.

(5) If the defendant makes a counterclaim against the class representative the court may give directions for the case management of such counterclaim and such directions may include authorising the class representative to defend the counterclaim.

19.32 Disclosure

On an application by a class representative or a defendant under Part 31, the court may order a represented person to give disclosure.

19.33 Notices generally

If a class member or represented person does not receive, or fails to respond to, a notice, this does not affect a step taken, order made, or judgment given, in the collective proceedings, unless the court orders otherwise.

19.34 Judgments and orders

- (1) A judgment on the common issues for the represented persons or a sub-class of represented persons will bind the represented persons, or those within the sub-class, as the case may be.
- (2) The class representative must give notice of any judgment or order to those represented persons who are bound by it in a form and manner approved by the court.
- (3) The notice referred to in paragraph (2) must—
 - (a) incorporate or annex the judgment or order;
 - (b) if it relates to a judgment on common issues in favour of represented persons, include a statement—
 - (i) explaining that represented persons may be entitled to individual remedies;
 - (ii) stating the steps that must be taken to claim that remedy; and
 - (iii) stating the consequences of failing to take those steps; and

- (c) give such other information as the court directs or as required by or under any enactment.

19.35 Aggregate awards

- (1) The court may at any point in the proceedings specify a date by which the class representative must indicate whether a claim is to be made that the court should make an aggregate award of damages under the provisions of any enactment.
- (2) If such a claim is made, the court may hold a case management conference at which it may give such directions for the management of the claim for an aggregate award as it considers appropriate.
- (3) Before making any aggregate award of damages, the court must provide the defendant with an opportunity to make submissions to the court in relation to the award.

19.36 Application of undistributed award

If the court makes an order under the provisions of any enactment that an award (or part of an award) of damages which has not been paid to represented persons must be applied for other purposes, the class representative must, within 7 days of receipt of the order, send a copy of the order to the person to whom the court orders that the money should be paid.

19.37 Compromise or Discontinuance

- (1) Subject to rule 19.39, a class representative may not compromise or discontinue all or part of a claim in collective proceedings without the permission of the court.
- (2) The application for permission made under paragraph (1) must—
 - (a) set out the form and manner by which the class representative proposes to give notice to the represented persons of intention to compromise or discontinue all or part of a claim in the collective proceedings; and
 - (b) in the case of an application to compromise—
 - (i) set out the terms of the proposed compromise; and
 - (ii) be accompanied by an opinion on the merits of the compromise by counsel or solicitor acting for the class representative.

- (3) On receipt of an application made under paragraph (1), the court will—
- (a) set a date for a hearing to determine whether to approve the compromise or discontinuance; and
 - (b) give directions for the giving of the notice referred to in paragraph (2)(a).

19.38 Hearing to determine approval of compromise or discontinuance

- (1) Any represented person who objects to the compromise may, with the permission of the court, be omitted from the compromise.
- (2) At the hearing to determine the application for permission to compromise or discontinue the court may—
 - (a) approve the compromise or discontinuance on terms it considers to be appropriate;
 - (b) refuse to approve a compromise unless the compromise provides an opportunity for represented persons to notify the class representative that they are to be omitted from it and sets out the manner and time by which that notification is to be made; or
 - (c) order that represented persons be given an opportunity to notify the class representative that they are to be omitted from a compromise and the manner and time by which that notification is to be made.
- (3) A compromise approved by the court binds every represented person, or every represented person within the sub-class, as the case may be, except—
 - (a) those who have obtained permission of the court under paragraph (1) to be omitted from it; and
 - (b) those who have notified the class representative, in accordance with paragraph 2(b) or (c), that they are to be omitted from it.
- (5) If the court approves the compromise or discontinuance, the class representative must give notice of its approval, in a form and manner approved by the court, to the represented persons.

- (6) If one or more of the represented persons are to be omitted from the compromise, the court may permit the proceedings to continue as one or more claims between different parties and, for that purpose—
- (a) order the addition, removal or substitution of parties;
 - (b) order the amendment of the claim form; or
 - (c) make any other order that it considers appropriate.

19.39 Compromise of the individual claim of class representative

A class representative may, with the court's permission,—

- (a) compromise the class representative's individual claim in whole or in part at any stage of the collective proceedings;
- (b) withdraw as class representative in accordance with rule 19.29.

19.40 Appeals

An appeal, or an application for permission to appeal, from a judgment or order relating to the common issues for a class or sub-class in collective proceedings may only be made by a class representative or a defendant.

19.41 Costs

- (1) Subject to paragraphs (2) and (3), costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative.
- (2) If the court has approved the appointment of a class representative for a sub-class, costs associated with the determination of the common issues for the sub-class may be awarded to or against that person, and not the class representative for the whole class.
- (3) Costs associated with the determination of individual issues in accordance with rule 19.31 may be awarded to or against the relevant individual represented persons.
- (4) If the court varies the collective proceedings order so as to substitute another person as the class representative, costs associated with the collective proceedings incurred before the date of substitution may not be awarded to or against that person, unless the court orders otherwise.

19.42 Agreements in relation to fees and disbursements payable by the class representative

- (1) An agreement in relation to the fees and disbursements payable by the class representative in respect of the collective proceedings must be in writing and must—
 - (a) state the terms under which fees and disbursements are to be paid;
 - (b) give an estimate of the expected fee and state whether or not that fee is conditional on success in the collective proceedings; and
 - (c) state the method by which payment is to be made, whether by lump sum or otherwise.
- (2) An agreement in respect of fees and disbursements payable by the class representative is not enforceable unless approved by the court.
- (3) If an agreement is not approved by the court, or if the amount due under an approved agreement is in dispute, the court may—
 - (a) determine the amount in respect of fees and disbursements; or
 - (b) make any order it considers appropriate.

AMENDMENTS TO OTHER PARTS OF THE CPR

Part 25 Security for Costs

The insertion of a new paragraph 25.13(2)(h)

25.13(2)(h) the claimant has been authorised to act as the class representative in collective proceedings under rule 19.19 and there is reason to believe that the claimant will be unable to pay the defendant’s costs if ordered to do so.

Part 38 Discontinuance

In Rule 38.2(1) before “A claimant may discontinue all or part of a claim at any time” insert “Subject to rule 19.37”.

DRAFT PRACTICE DIRECTION ON COLLECTIVE PROCEEDINGS

PRACTICE DIRECTION 19D – COLLECTIVE PROCEEDINGS

This Practice Direction supplements Part 19

Contents of this Practice Direction

Title	
Application of this Practice Direction	Para 1
Case Management	Para 2
Notices	Para 3
Register of Applications for Collective Proceedings Orders	Para 4

Application of this Practice Direction

1

This practice direction applies to collective proceedings authorised under Section IV of Part 19.

Case Management

2.1

A judge (the “managing judge”) will be appointed for the purpose of the collective proceedings as soon as possible. The managing judge will assume overall responsibility for the management of the collective proceedings.

2.2

Applications for permission to compromise or discontinue all or part of a claim in collective proceedings will be heard by the managing judge, unless the court orders otherwise.

2.3

A Master or district judge may be appointed to deal with procedural matters in accordance with any directions given by the managing judge.

2.4

A costs judge may be appointed and may be invited to attend case management hearings.

Notices

3.1

In addition to the notices that must be given in accordance with the rules on collective proceedings contained in Part 19, the court may at any other time order any party to give notice of any matter to such persons as the court directs is necessary in order to protect the interests of any class member or party or to ensure the fair conduct of the collective proceedings.

3.2

Any notice which must be given by a class representative of a judgment or order must state whether the class representative intends to appeal the judgment or order in whole or in part and must state the date by which it is necessary to file an application for permission to appeal if none has been filed.

3.3

The court may order that notice be given by:

- (1) personal delivery;
- (2) post;
- (3) publishing or leafletting;
- (4) press advertisement, radio, television, or on-line broadcast;
- (5) individually notifying a sample group within the class; or
- (6) any other means or combination of means that the court considers appropriate.

3.4

The court will order when and by what means notice is to be given, having regard to:

- (1) the cost of giving notice;
- (2) the subject matter of the notice;
- (3) the value of the individual claims of the persons to whom notice is to be given;
- (4) the number of persons to whom notice is to be given;

- (5) the presence of sub-classes;
- (6) the residency of the persons to whom notice is to be given; and
- (7) any other relevant matter.

3.5

The court will not order that notice be given personally to each class member or represented person unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

3.6

The court may order that notice:

- (1) be given to different persons by different means;
- (2) be given by any party; or
- (3) be dispensed with if, having regard to the factors set out in paragraph 3.4, the court considers that it is appropriate to do so.

3.7

The court may make any order it considers appropriate as to the costs of any notice, including an order apportioning the costs between the parties.

Register of Applications for Collective Proceedings Orders

4.1

Before making an application for a collective proceedings order, the solicitor acting for the proposed class representative should consult the register of applications for collective proceedings orders in order to obtain information about other proceedings relating to the same or similar subject matter.

4.2

On making an application for a collective proceedings order, the proposed class representative must give notice of the application to the class representative, or proposed class representative, of any collective proceedings that relates to the same or similar subject matter.

Draft Rule 19.18 – Alternative procedure requiring the claim form in the collective proceedings to be issued prior to the collective proceedings order being made

19.18 Application for a collective proceedings order

- (1) This rule applies where an application is made to the court under any enactment for a collective proceedings order.
- (2) When a collective proceedings claim form is issued, the claimant must file an application notice under Part 23 for a collective proceedings order.
- (3) The application notice must be supported by a written statement which—
 - (a) identifies the proposed class representative;
 - (b) states whether the parties have used an alternative dispute resolution^(GL) procedure;
 - (c) includes a statement that the claimant believes that the claim has a real prospect of success;
 - (d) provides a description of the proposed class;
 - (e) provides an estimate of the number of class members and the basis for that estimate;
 - (f) states whether the claimant wishes to bring opt-in proceedings or opt-out proceedings and the basis for this decision;
 - (g) states whether the claimant has checked the register of applications for collective proceedings orders and notified the class representative, or proposed class representative, of any collective proceedings that relates to the same or similar subject matter of this application; and
 - (h) sets out the material on which the claimant intends to rely to satisfy the criteria for certification and approval in rules 19.20 and 19.21.
- (4) As soon as practicable after the claim form is issued, the claimant must serve on the defendant a copy of—
 - (a) the application notice;
 - (b) the evidence filed by the claimant in support of the application;

- (c) the claim form;
 - (d) a draft collective proceedings order; and
 - (e) a draft notice as notice as referred to in paragraph 19.23.
- (5) As soon as practicable after filing an application for a collective proceedings order, the court will hold a case management conference and either—
- (a) give directions and set a timetable for the defendant to respond to the application and the hearing of the application; or
 - (b) order a stay^(GL) of the proceedings while the parties attempt to compromise the case by alternative dispute resolution^(GL) or other means.
- (6) When a claim form in proposed collective proceedings is issued, the defendant need not, before the hearing of the application under this rule, file an acknowledgement of service or a defence.
- (7) A defendant who opposes an application under this rule does not, by doing so, lose any right that the defendant may have to dispute the court's jurisdiction.