

## Approved

### Minutes of the Civil Procedure Rule Committee

Friday 3<sup>rd</sup> December 2021 (via video conference due to the Covid-19 (Omicron) Pandemic)

#### Members attending

Lord Justice Birss, Deputy Head of Civil Justice (Chair)

Mr Justice Kerr

Mr Justice Trower

His Honour Judge Jarman QC

His Honour Judge Bird

Master Cook

District Judge Parker

Brett Dixon

Lizzie Iron

Dr Anja Lansbergen-Mills

John McQuater

Isabel Hitching QC

Tom Montagu-Smith QC

David Marshall

#### Apologies

Members: District Judge Cohen and Masood Ahmed; Officials: Katie Fowkes (MoJ Legal).

#### Item 1 Welcome, Minutes, Action Log & Matters Arising

1. The Chair opened the meeting with apologies for the need to revert to a fully remote setting given the changing public health situation. The intention remains to return to in-person meetings when it is safe and practicable to do so.
2. The minutes of the meeting on 5<sup>th</sup> November 2021 were **AGREED**.
3. As a matter arising, the Chair reminded everyone that the Civil Justice Council's Interim Report on PAPs, is out for consultation: <https://www.judiciary.uk/announcements/civil-justice-council-launches-consultation-on-pre-action-protocols/>. Masood Ahmed is a member of the CJC's Working Group and would, in particular, welcome any comments on the draft General PAP (an appendix to the report) which he drafted. The draft General PAP should be read in light of the general principles being suggested to underpin PAPs. The deadline for comments is 10am on 24<sup>th</sup> December 2021. The Chair was also willing to receive any internal comments.
4. The Action Log was duly **NOTED**. The following update was provided:
  - **District Judge Member to the Housing Sub-Committee (ref AL(21)80)**. The Chair was pleased to advise that District Judge Kevin Harper has agreed to join the Sub-Committee. DJ Harper has been active within HM's Association of District Judges for some time and is currently the Vice President. Prior to becoming a judge, he was a litigation solicitor with a strong housing based practice.

#### Item 2 Small Claims Paper Determination Pilot CPR(21)59

5. Her Honour Judge Clarke, co-opted Chair of the Sub-Committee, was welcomed to the meeting and presented the matter. His Honour Judge Bird also serves on the Sub-Committee, along with District Judge Lynda Nightingale, as an additional co-opted member. Consultation with the County Court Business Centre at Salford has taken place

and this was duly **NOTED**. The Chair thanked all involved in this important project, to which he added his support.

6. It is proposed to introduce a pilot PD under CPR Part 51, for paper adjudication of some small claims, by enabling the court to direct that a small claim will be determined on paper (i.e. without a hearing) without requiring the agreement of all parties, as is currently required under r. 27.10.
7. The scope of the pilot excludes certain personal injury small claims and housing disrepair matters, because the Sub-Committee consider them as being too factually complex to be suitable for paper determination. It will also apply to claims which have transferred into a pilot court at a later stage of proceedings and to claims which have been directed to be heard on paper in a pilot court but are later transferred out to a non-pilot court.
8. The pilot courts are proposed as: Bedford and Luton, which have a large number of airline delay small claims; Guildford, as a typical mid-size county court and Manchester, with its very large volumes of small claims and multiple District and Deputy District Judges. HHJ Jarman QC, raised the possibility of Cardiff being included in the pilot, to extend the scope of the PD to England and Wales. The Chair was supportive, as was the Designated Civil Judge (DCJ).
9. HHJ Clarke highlighted, in particular, the following key points (i) that the proposed PD is not prescriptive about what type or value of small claim falls within the pilot, because it is considered better left to judicial discretion of the District/Deputy DJ considering the papers on allocation. However, the PD does provide some guidance such as financial threshold for airline delay and parking ticket claims and to accord with anticipated Civil Justice Council thinking on small claims more generally (ii) the potential for overlap between the proposed pilot and the Online Civil Money Claims (OCMC) pilot was aired and is to be discussed further with the Damages and Money Claims (DMC) Committee (iii) training and implementation thinking indicates that specific judicial training should not be required because some experience already exists; DJ Nightingale has been giving this very careful thought and some examples of summary notes of reasons have been collated to make available to judges in the proposed pilot courts on roll-out (iv) open justice principles.
10. A detailed discussion ensued, on each of these points. Suitability rather than monetary value alone was seen as important, accordingly the proposed value of £500 did not offer sufficient flexibility and should be increased. Vulnerability issues and the needs of litigants in person required central focus, on which the Vulnerable Parties Sub-Committee can offer input. It was observed that the OCMC pilot may offer answers on some aspects of drafting, for example how to address methods of challenge/re-consideration. The desire for better data on the context and outcome of airline claims was also raised. A collection of examples were cited to demonstrate that some derogation to open justice principles already exists. For example, in relation to small claims by r.27.10 and by the European Small Claims procedure, which only rarely involves determination after a hearing. Additionally, current practice such as striking out or giving summary or default judgment on paper allows for final decisions without a hearing. For these reasons, the proposed pilot was not considered to require any further mitigation. However, public interest in and access to decisions was a very important point of principle and options such as publishing orders online via the judiciary website should be considered further.
11. The Chair emphasised the pilot nature of the proposed scheme, concluding that, overall, many points largely concerned implementation and evaluation. As such, they did not require express provision within the pilot PD itself.
12. Consequential revisions to the Small Claims Directions Questionnaire (DQ) (Form N180), have been discussed with the lead judge at Salford, who is supportive of adapting the current form, rather than introducing a new standalone DQ. The proposed revisions

include an additional section asking the parties to indicate by ticking 'yes' or 'no' whether the claim is suitable for paper determination, and if not, to state why not. The guidance notes notify the parties that in pilot courts, even if they indicate they do not consider it is suitable, a judge may direct that it is determined without a hearing.

13. It was **RESOLVED** that the Small Claims Paper Determination Pilot PD be **AGREED, SUBJECT TO FINAL DRAFTING and settling the following points:**

- County Court at Cardiff be added to the list of pilot court centres including Bedford, Luton, Guildford and Manchester;
- drafting for parking claims;
- open justice provisions (r.39.2 implications viz publication and judge's power to dispense with publication);
- re-determination provisions, to consider adopting the OCMC model and incorporate provision for re-consideration via letter i.e. not a re-determination which attracts a fee;
- max value of claims within the pilot to be revised from £500 up to £1,000;
- duration of pilot;
- court form N180 (Directions Questionnaire (Small Claims)) revisions to be co-ordinated, if practicable, with the work of the Vulnerable Parties Sub-Committee (arising in consequence of the Domestic Abuse Act) so that publication of all the related form changes are aligned; forms to be translated into Welsh.

14. It was **FURTHER RESOLVED:**

- CPR r.27.10 to be reviewed in more detail in due course;
- HHJ Clarke and Birss LJ to discuss, out-of-committee, how the pilot is to be reviewed.

15. **Actions:** (i) In consultation between the Sub-Committee and the DMC Committee, the pilot PD drafting be settled for inclusion in the next mainstream PD Update, as part of the April 2022 common-commencement cycle (ii) In consultation with the Vulnerable Parties and Forms Sub-Committees, MoJ/HMCTS produce revised forms and Welsh translations (iii) HMCTS to facilitate operational implementation and communication.

### **Item 3 Commercial Court Forms & Consequential Amendment to PD4 CPR(21)68**

16. Master Cook explained that, as Chair of the Forms Sub-Committee, he had been contacted by the respective lead judges, Mrs Justice Cockerill and His Honour Judge Pelling QC, raising the need for a suite of Commercial Court form revisions, to bring them up to date.

17. Given the different way the Commercial Courts are described and organised, there are three sets of revised forms, one set for the Commercial Court (suffix "CC"), one set for the London Circuit Commercial Courts (Suffix "LCC") and one set for the Regional Circuit Commercial Courts (suffix "RCC"). Following consultation, the form changes have been approved out-of-committee, by the Forms Sub-Committee (pursuant to its delegated authority) and this was duly **NOTED**.

18. In consequence, a collection of drafting amendments to PD4 were proposed, as well as a suite of other revisions to PD58, PD59 and PD23A to bring them up to date. Each was discussed in turn, wherein it was observed that gender neutral language is to be used throughout and wherever possible, drafting had been cast so as to avoid terminology becoming outdated. It was resolved that the amendments to PD4 (Forms); PD58 (Commercial Court); PD59 (Circuit Commercial Courts) and PD23A (Applications), were **AGREED, SUBJECT TO FINAL DRAFTING**.

19. **Actions:** (i) MoJ/HMCTS to produce and implement revised forms (ii) Drafting Lawyers and Secretariat to include in the upcoming mainstream PD Update as part of the April 2022 common-commencement date cycle.

#### Item 4 ASBI Sub-Committee CPR(21)60

20. His Honour Judge Bird introduced the matter by explaining that the Sub-Committee was made up of various co-opted members to whom thanks were conveyed: District Judge Talog Davies; Robin Denford from Bristol City Council and Harriet Bosnyak from Shelter.
21. This matter was last before the CPRC in October 2021, having commenced in response to the Civil Justice Council's (CJC) 2020 report.  
<https://www.judiciary.uk/announcements/anti-social-behaviour-and-the-civil-courts/>
22. The proposed draft Pre-Action Protocol (PAP) is taken from the CJC report and given that it was arrived at as a result of careful consideration by a large working group representing all relevant interests, the Sub-Committee propose only small drafting revisions. HHJ Bird has also discussed the matter with Mr Justice Cotter (as he now is) who led the CJC Working Group.
23. The following revisions, material in nature albeit modest in drafting terms, were explained and discussed:
- i. the legacy paragraph 1.8. has been removed, because, where the respondent is under the age of 18, the application must be made to the Youth Court and not the High Court or the County Court.
  - ii. a requirement for applicants to explain what they have done to comply with paragraphs 1.7 to 1.9 has been included at paragraph 1.10.
  - iii. paragraph 2.5 has been added to, in particular by expanding sub-paragraph (ii) regarding sources of advice.
  - iv. paragraph 3.2 is revised to add in a requirement to make reference to accommodation options if the application includes an "ouster" provision (ref paragraph 166 of the (above) CJC report).
24. HHJ Bird also explained that the Sub-Committee had considered moving Part 3 of the PAP, headed, 'Procedure', to a rule or PD, but on reflection and because Part 3 mainly requires confirmation of pre issue steps taken by the Applicant, is has left it in the PAP.
25. Isabel Hitching QC observed the need to use gender-neutral text throughout the PAP, for example by changing the, "his/her" text at paragraph 1.8 to, "their" and this was **AGREED**.
26. District Judge Parker offered to provide some modest drafting points out-of-committee.
27. HHJ Bird updated the Committee as regards the previously aired issue concerning the dual route of appeal. In the absence of legislative change to create a single appeal route (possibly via a direction by the Lord Chancellor under s.56 of the Access to Justice Act 1999), CPR revisions may be desirable. The aim of any such reform to the CPR would be to explain the dual route of appeal, but make it clear that the Court of Appeal may send an appeal to the appropriate lower court. The Sub-Committee, therefore, presented preliminary proposals for revisions to PDs 52A and 52D which were discussed, but considered to require further work and consultation with the Registrar/s and this approach was **AGREED**.
28. The CJC report also raised the issue of legal advice. HHJ Bird presented proposed amendments to CPR Part 65 which were discussed.

29. The first amendment provides for the application to include a statement, “that the respondent is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test”. This would introduce a new sub-rule (d) thus CPR 65.43(2)(d) and mirrors CPR 81.4.
30. The second amendment requires the court at the first hearing to, “take appropriate steps” to ensure the respondent is aware of their entitlement to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test. This being an addition to CPR 65.18.
31. It was **RESOLVED, SUBJECT TO FINAL DRAFTING** to:
- approve the PAP, “Pre-Action Protocol in relation to Applications for Injunctions under the Anti-Social Behaviour, Crime and Policing Act 2014”. In-force date to be settled out-of-committee and recommend to the MR to make the PAP;
  - approve amendments to CPR 65, as drafted (CPR 65.43(2)(d) and CPR 65.18);
  - proposals as to possible CPR revisions regarding dual route of appeal to return when ready, following consultation with the Registrar/s.
32. **Actions:** (i) In consultation with the Sub-Committee and HMCTS, Drafting Lawyers/MoJ to finalise drafting of PAP and settle in-force date; Secretariat to arrange promulgation. (ii) Drafting Lawyers/Secretariat to include CPR 65 amendments in the next mainstream PD Update, as part of the April 2022 common-commencement cycle. (iii) HHJ Bird to conduct focused consultation (with Registrar/s) regarding amendments concerning dual route of appeal.

## **Item 5 Section 2(7) Sub-Committee**

### **5(a) CPR Part 7 How to Start Proceedings & Part 8 Alternative Procedure CPR(21)61**

33. Mr Justice Kerr presented the next suite of proposals to simplify the CPR; these concerned Part 7 and its PDs and Part 8 and its PDs. The July 2021 CPRC meeting noted the proposed reforms, but did not consider them further at that stage.
34. A detailed discussion on the following ensued:
- i. amend CPR rule 7 and PD 7A. The reforms were considered to be relatively modest, including some tidying up and linguistic improvements, such as changing, “make provision for” to, “permit” or “require” and replacing, “pursuant to rule x” with, “under rule x” in the interests of plain language. Modernising electronic service provisions if fax is no longer needed was also raised. The proposed deletion of paragraph 2.8 (concerning civil jury trials) in PD7A was found to merit retention, but to consider a more suitable location, possibly within Part 8.
  - ii. future state, if any, of PD7B (Consumer Credit Act); PD7C (Production Centre at Northampton) and PD7D (Tax recovery) as to whether any or all should continue as PDs supplementing Part 7 among generic procedural provisions, whether they remain fit for purpose and if they are to be retained to what extent, if at all, they may need amendment. Overall, the view was that they essentially concern specialist claims and focused consultation is required in the first instance.
  - iii. amend CPR Part 8. It was felt that the nine rules in Part 8 are, rightly, generic in nature and largely without need of amendment. However, the proposed revisions aim to improve clarity that the Part 8 “alternative procedure” is for claims unlikely to involve substantive disputes of fact. Some concern was ventilated as to

mandating the Part 8 procedure by way of express provision which was duly **NOTED**; accordingly, the terms of the consultation would be determined out-of-committee in consultation with the Chair.

- iv. dispense with PD8A, because it gives unnecessary detail of specific types of claims. However, the discussion identified that certain elements merit retention due to their operative provision and as such the consultation could be framed in the context of re-locating and streamlining, rather than a formal proposal to dispense with the PD in its entirety.
- v. to retain, unchanged, PD8B which deals with low value personal injury claims and this was **AGREED**. It was also **NOTED** that PD8C deals with certain planning matters and the Committee has already resolved to move its content to PD54D (planning court claims), together with other measures, to consolidate in one place the rules of procedure in planning cases.

35. It was **RESOLVED** to:

- **agree in principle** the revised CPR Part 7 and PD7A, subject to consultation via the online “rolling consultation” facility. The precise timetable for which will be settled out-of-committee.
- **conduct a preliminary focused consultation** on PD7B, PD7C, and PD7D, prior to release for wider consultation as part of the online “rolling consultation” facility. The precise timetable for which will be settled out-of-committee.
- **agree in principle, subject to final draft drafting**, the revised CPR Part 8 PD8A. To be subject to consultation via the online “rolling consultation” facility. The precise timetable for which will be settled out-of-committee.

36. **Actions:** (i) Kerr J to produce final consultation material (in tracked and clean versions) (ii) In liaison with the Sub-Committee, Secretariat to (a) facilitate publication of proposed reforms via the online rolling consultation facility (b) allocate time for final proposed drafting, post consultation, to return for final determination.

#### **5(b) CPR Part 10 Acknowledgment of Service & Part 12 Default Judgment CPR(21)62**

37. Isabel Hitching QC set out the background. This was last before the CPRC in July 2021. At that meeting, the proposed revisions to CPR Parts 10 and 12 (which are of a non-substantive nature), together with the proposed deletion of PD10 and PD12, were agreed in principle, subject to consultation and final drafting.

38. The consultation took place via a new online “rolling consultation” facility and was launched on 5<sup>th</sup> October 2021 for six weeks, closing on 12<sup>th</sup> November 2021. Thanks were conveyed to everyone who took the time to respond. Ms Hitching also expressed thanks to Katie Fowkes (MoJ Legal) for providing detailed comments and this was duly **NOTED**. 11 responses were received and all respondents welcomed the s2(7) review project. The Forum of Insurance Lawyers (FOIL) was particularly supportive of the removal of PDs and the inclusion within the rules themselves of necessary material currently contained therein. Another individual respondent passed on thanks for what was viewed as important work.

39. All comments have been carefully considered by the Sub-Committee in formulating the final draft proposals, which were discussed in detail.

40. Ms Hitching explained that not all comments had been adopted and set out the rationale in each instance. In some cases, for example in the isolated proposal to introduce a financial fixed penalty and automatic entry of default judgment for non-compliance with

time limits, it was considered to go too far and represent wholesale substantive policy change. This was also considered to be out of kilter with the treatment of time limits in other provisions of the CPR. Other issues required further consideration and in the context of the s.2(7)'s overall programme. At r.12.5, the Association of District Judges requested the express provision of "rate" be removed, but it remains in the interests of wider clarity. However, at CPR 10(3) the word, "must" is proposed for adoption by MoJ Legal, because the alternative of, "should" is seen as having advisory connotations and this was **AGREED**.

41. FOIL's helpful comments concerning the provisions of PD10 paragraphs 4.2 – 4.5 and acknowledgements of service, being in a rule, require further consideration; the preliminary view is that Part 22 may be more appropriate and this was **AGREED in principle**.
42. Tom Montagu-Smith QC observed that there are aspects under r.12.11 (4) including the new sub-rule (4A), that will require further review following the work of the Service Sub-Committee and this was **AGREED**.
43. It was **RESOLVED** to:
  - **agree, subject to final drafting**, the reformed CPR Part 10 and Part 12;
  - **delete in their entirety** PD 10 and PD 12 from the CPR
44. **Actions:** In consultation with the Sub-Committee, Drafting Lawyers and Secretariat to include amendments in the next mainstream PD Update, as part of the April 2022 common-commencement cycle.

### **5(c) PD3C Civil Restraint Orders (CRO) CPR(21)63**

45. Mr Justice Kerr explained that this matter was last before the CPRC in October when there was support in principle for the proposal, subject to judicial consultation which has now taken place satisfactorily.
46. The Sub-Committee highlighted that while Article 6 European Convention on Human Rights requires reasonable access to court, experience shows some vexatious litigants are using the current two year period to make repeated applications for permission to proceed by way of exception to the CRO, while awaiting expiry of the two year period.
47. It is, therefore, proposed to increase the maximum duration of an extended civil restraint order (ECRO) and a general civil restraint order (GCRO) from two years to three years.
48. Given that CPR rule 3.11(c) provides that a PD may set out the consequences of the court making a CRO, there did not appear to be any constitutional objection to it. MoJ Policy considered that it seemed to be a proportionate response to a particular problem.
49. It was **RESOLVED** to amend PD3C to increase the maximum duration of an extended civil restraint order (ECRO) and a general civil restraint order (GCRO) from two years to three years.
50. **Action:** Drafting Lawyers and Secretariat to incorporate the amendment into the next mainstream PD Update, as part of the April 2022 common-commencement cycle.

### **Item 6 TBD-v-Simons [2020] EWCA Civ 1182: Imaging Orders CPR(21)64**

51. Mr Justice Meade was welcomed to the meeting. It was explained that in the above judgment, the Court of Appeal said there was a distinction between Imaging Orders and Search Orders, given the wide variety of possible circumstances. Accordingly, the matter

has been looked at by a Sub-Committee. Mr Justice Meade, an intellectual property specialist in the Business and Property Courts was asked to take this forward, in liaison with Mr Justice Calver of the Commercial Court. Input also came from other High Court judges and others including the Commercial Fraud Lawyers' Association and LexisNexis, to whom the Committee was grateful.

52. A new example form of Order, which can be modified in individual cases has been drafted, along with a related amendment to PD25A to modify paragraph 7.11 to meet the observations in TBD -v- Simons (and the last sentence of which, provides consistency with the position on Freezing Orders and practice in the Commercial Court). It was **RESOLVED:**

- **approve the proposed new Imaging Order**, to be annexed to PD25A, this being a model form of Order and not a prescribed form under PD4.
- **amend PD25A, paragraph 7.11** thus:

*An example of a Search Order ~~is~~ and an example of an Imaging Order are annexed to this Practice Direction. ~~This example may be modified as appropriate in any particular case. Any modification to the standard form by an applicant should be expressly referred to the Judge's attention at the application hearing.~~*

53. **Action:** Drafting Lawyers and Secretariat to incorporate the amendment into the next mainstream PD Update, as part of the April 2022 common-commencement cycle.

## Item 7 Costs Sub-Committee

### 7(a) PD51X: Statement of Costs for Summary Assessment Pilot CPR(21)65

54. Mr Justice Trower explained that this has been before the CPRC on several occasions before, most recently in May 2021, when it was agreed to conduct an online consultation regarding the pilot scheme under PD51X.

55. The consultation ran for circa six weeks and concluded on 30<sup>th</sup> July 2021; there were 15 responses which have been carefully considered. A collated set of the questions and responses were tabled and duly **NOTED**, along with thanks to all who submitted comments.

56. Overall, the pilot scheme has had very little take up and the comments submitted during the consultation are consistent with the views previously expressed. The Sub-Committee have concluded that there is insufficient evidence to justify continuing the pilot and this was discussed. However, there is merit in considering some focused revision to costs form N260 to improve usability, which is supported by Master Cook who chairs the Forms Sub-Committee.

57. It was **RESOLVED:**

- PD51X is not to be renewed following its expiry on 31<sup>st</sup> March 2022.
- costs form N260 to be considered further and any proposed revisions to return to the CPRC in the New Year.

58. **Actions:** (i) Drafting Lawyers to include any necessary provision in the upcoming mainstream PD Update (ii) Secretariat to update web team regarding discontinued PD51X (iii) Secretariat to allocate time for Form N260 to return to the CPRC in the New Year, when ready.



## **7(b) PME -v- Scouts [2019] EWHC 3421 QB: Authorised Costs Officers CPR(21)66**

59. David Marshall explained that this matter stems from a public question at the annual open meeting. The issues highlighted by *PME -v- Scouts [2019] EWHC 3421 QB* and *PME -v- Scouts [2019] EWHC B10 (Costs)* have also been considered, as well as any wider points on possible conflicts of language with the term, 'Costs Officer' and the usual shorthand for an 'ACO'.

60. The query arises from a case in which the receiving party was dissatisfied with elements of a provisional assessment carried out under CPR 47.15 by an Authorised Court Officer (ACO) in the Senior Courts Costs Office (SCCO). Before Master Leonard it was argued that the CPR did not give the power to ACOs to conduct provisional assessments at all. An appeal to Mr Justice Stewart followed. On appeal the point was limited to an argument that an appeal from an ACO under CPR 47.21 was a rehearing of all the issues determined at the provisional assessment on the papers, rather than only the more limited points determined at the subsequent oral hearing held under CPR 47.15(7). Stewart J dismissed the appeal, holding that a party is entitled only to (a) an oral determination of those issues they have identified and (b) an appeal by way of re-hearing of the decision in relation only to those issues.

61. Having considered the issues and consulted with the Senior Costs Judge, the Sub-Committee recommends, in summary, that some clarificatory amendments be made to CPR 47.14(1) and PD47, so that they read more happily with the PME decision. The Senior Costs Judge agrees with the proposed amendments and no other amendments in relation to ACOs were raised.

62. Following discussion, it was **RESOLVED**:

- there is no need to amend the definition of 'Costs Officer' in CPR 44.1, notwithstanding the unfortunate potential confusion of the term with the usual shorthand for an 'ACO' in the SCCO. There is no obvious alternative synonym, the definition is clear and is now well-established;
- amend CPR 47.3 as drafted, with regard to the powers of an ACO by extending the prohibition on their exercising sanctions to include a sanction under CPR 47.14 (1);
- amend PD 47 as drafted (textual amendments to paragraphs 14.3, 14.4(2) and 14.20), so that it is expressly consistent with the interpretation placed on it by Stewart J with regard to appeals from provisional assessments.

63. It was further **NOTED** that Stewart J pointed out that the SCCO Guide (at paragraph 13.1) could also be similarly amended, but this is outside the CPRC's remit.

64. **Action:** Drafting Lawyers and Secretariat to incorporate the amendment into the next mainstream PD Update, as part of the April 2022 common-commencement cycle.

## **7(c) Best -v- Luton: Detailed Assessments (AL(21)39 review of LSC2021/9) CPR(21)67**

65. Isabel Hitching QC explained that this was raised by the Lacuna Sub-Committee (LSC) in April 2021.

66. Where a costs detailed assessment takes place, CPR 47.20(4) permits Part 36 Offers, but according to *Best-v-Luton* (<https://www.bailii.org/ew/cases/EWHC/Costs/2021/B2.html>) this does not apply to subsequent assessments.
67. An article in Practical Law by the Association of Costs Lawyers, suggested therefore that a lacuna exists within the rules. Accordingly, the Costs Sub-Committee have carefully considered the points raised in the Article, the judgment itself, reviewed the provisions and consulted the Senior Costs Judge. In summary, he and the other costs judges he has consulted, consider that the decision in *Best* is probably correct for the reasons given and that there is no good reason for CPR 47.20 to be amended. It is not considered that there is a problem in practice and extending the Part 36 regime to the costs of the detailed assessment process itself, 'would complicate matters hugely'. He also considers it would be a departure from the initially intended scope of the Part 36 regime, which, he recalls, was not intended to address the costs of the detailed assessment process.
68. The Costs Sub-Committee concludes that the gap in the rules is a deliberate one, not a lacuna and recommends no change and this was duly **AGREED**.

#### **7(d) Fixed Recoverable Costs (FRC) Update:**

69. It was **NOTED** that the Forum of Insurance Lawyers (FOIL) have written to the Costs Sub-Committee and MoJ Policy regarding the FRC reforms. The points therein are being duly considered as part of the work on extending FRC.

#### **Item 8 Civil Procedure Amendment Rules SI and PD Update Content**

70. The Chair provided an overview of the timetable for the next mainstream CPR SI & PD Update. The intention being that drafting will be finalised for the requisite signatures to be obtained and submission to the MR in January for onward referral to the Minister by the end of January. The SI is to be laid in Parliament on 3<sup>rd</sup> February 2022, at which point it will be published publicly. Unless expressly stated otherwise, the amendments will enter into force inline with the April 2022 common commencement date cycle.
71. The following matters were considered:

#### **8(a) PD51O Electronic Working CPR(21)69**

72. Master Cook spoke to the proposal put up by HMCTS to extend the operation of the pilot scheme under PD51O for a further 12 months, to 6<sup>th</sup> April 2023, to allow for final rollout and to conduct a re-draft of the final (post pilot) PD and this was **AGREED**. It was also **NOTED** that a Sub-Committee will be required, in due course, to conduct the drafting exercise for the ultimate (post pilot) PD. **Action:** Drafting Lawyers and Secretariat to incorporate the amendment into the next mainstream PD Update, as part of the April 2022 common-commencement cycle.

#### **8(b) Small Claims Track Limit for non-RTA PI Claims CPR(21)71**

73. Rachel Powell (Ministry of Justice) introduced the matter. It was explained that on 26<sup>th</sup> April 2021, the Government's commitment to increase the Small Claims Track limit for non-RTA personal injury claims, to account for inflation, from £1,000 to £1,500 with effect of 6<sup>th</sup> April 2022 was communicated in Parliament via a Written Ministerial Statement.
74. In consequence, a suite of CPR amendments were proposed and discussed.
75. Although not strictly part of the RTA PI (Whiplash) Sub-Committee remit, HHJ Bird and the Sub-Committee have been consulted, to whom MoJ expressed thanks.

76. The Sub-Committee found no objections to the proposed amendments, that are, in essence, housekeeping revisions to bring the CPR up to date.

77. Andrew Currans (MoJ Legal) raised the possible need for a further amendment, to PD7A and to r.16.3(3) for RTA PI claims where the claimant falls within r.26.6A and this was discussed. The Chair ventilated the need for a drafting solution to be as simple as possible and Brett Dixon raised whether the guidance note, produced to support the Part 26 Whiplash related reforms, could be revised to cover the point.

78. It was **RESOLVED to amend, SUBJECT TO FINAL DRAFTING:**

- CPR Parts 16 (Statements of Case), 26 (Case Management), 27 (Small Claims) and 45 (Fixed Costs);
- Practice Direction 7A (How to Start Proceedings – The Claim Form)
- Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and the Pre-Action Protocol for Resolution of Package Travel Claims.
- Consequential changes to the titles of and text within prescribed forms, together with any related amendments to the forms Practice Direction, PD4.

79. **Actions:** Drafting Lawyers and MoJ to finalise drafting (including court forms) as part of the mainstream, April 2022, CPR Update cycle.

#### **8(c) Online Notice of Change of Solicitor CPR(21)70**

80. Following the resolution at the last (5<sup>th</sup> November 2021) meeting on this topic more broadly, like amendments are proposed to PD51ZB (Damages Claims Pilot) to provide for on-line notices of change of legal representative.

81. Andrew Currans (MoJ Legal) explained that Mr Justice Johnson and the CPRC members who are also on the Damages and Money Claims Committee and His Honour Judge Lethem, have been consulted on the proposed revisions.

82. It was **RESOLVED to amend** paragraph 8.7 of PD51ZB, as drafted. **Action:** Drafting Lawyers and Secretariat to incorporate the amendment into the next mainstream PD Update, as part of the April 2022 common-commencement cycle.

#### **Item 9 Any Other Business & Closing Remarks from the Chair**

83. **PD57AC Witness Evidence in the Business & Property Courts:** Master Dagnall explained that he had consulted the Chancellor, Mr Justice Swift and Mrs Justice O'Farrell on the referral from the Government Legal Department (GLD) regarding PD57AC and Judicial Review. Essentially the point GLD raised, as an active example from practice, is whether PD57AC applies to witness statements served in JR proceedings which are transferred to the Technology and Construction Court and wondered if there should be some express provision for cases of this nature. The judicial views expressed during consultation was that the PD was sufficiently clear and did not require revision and this was **AGREED**.

84. **PD75 Traffic Enforcement:** It was **NOTED** from the Chair that regulations are due to be laid (by the Department for Transport) in December to come into effect in February 2022. If they are, some non-controversial amendments to PD75 to replace old legislation with new, are envisaged.

85. **PD5B Communication and Filing of Documents by email:** The Chair explained an issue concerning the availability of an HMCTS list of specified documents, to which the PD refers. Enquiries are being made with HMCTS and others to clarify its whereabouts and whether any PD amendments need to be considered. **Action:** HMCTS and Drafting Lawyers.
86. **PD23A & PD25A – linguistic reforms for a digital age:** Master Dagnall has received and further identified various other references to now outdated forms of communication (for example express provisions to, “disk” and “fax”). The option of updating such references to better reflect current and future electronic working was raised and discussed. It was **RESOLVED** that Master Dagnall be mandated to cast amendments with drafting lawyers, out-of-committee, for inclusion in the upcoming PD Update, if ready. **Action:** Master Dagnall & Drafting Lawyers/Secretariat.
87. **January 2022 Meeting:** The Chair advised that, to avoid clashing with the Civil Justice Council’s quarterly meeting in January, the CPRC’s provisional meeting date to consider any urgent business was revised to 14<sup>th</sup> January 2022.
88. **Close:** The Chair closed the meeting by recording thanks to the following three esteemed members, for whom it was their last CPRC meeting. All present endorsed the sentiments:
- **District Judge Parker** has been an outstanding member of the Committee, having been hugely active both in and out of committee and across a wide range of issues. Most notably on housing possession matters and reviewing court forms, where his expertise and focus on detail has been invaluable. DJ Parker commented on how fascinating the work is and greatly valued his time on the Committee.
  - **Brett Dixon and Masood Ahmed** have served on the Committee, respectively, since 2016 and have now reached their maximum terms of office. Lasting contributions have been made by each of them. Both have been involved in the development of OCMC and civil procedure generally. Mr Dixon’s work with the Whiplash reforms and Vulnerable Parties Sub-Committee is particularly noteworthy, as is Mr Ahmed’s input to the Lacuna Sub-Committee and other CJC initiatives, such as the PAP review referred to above.

C B POOLE  
December 2021

**Attendees:**

Carl Poole, Rule Committee Secretary  
Nicola Critchley, Civil Justice Council  
Master Dagnall, Chair, Lacuna Sub-Committee  
Amrita Dhaliwal, Ministry of Justice  
Alasdair Wallace, Government Legal Department  
Andy Currans, Government Legal Department  
Luke Classen, Government Legal Department  
Andy Caton, Judicial Office  
Faye Whates, HM Courts & Tribunals Service  
Angela Carpenter, HM Courts & Tribunals Service  
Flora Freeman, HM Courts & Tribunals Service  
Robin Denford, Bristol City Council (Item 4)  
Harriet Bosnyak, Shelter (Item 4)  
Steve Chapman, HM Courts & Tribunals Service (Item 8(c))