

## Approved

### Minutes of the Civil Procedure Rule Committee

Friday 7<sup>th</sup> October 2022, conducted in a hybrid format, namely, at The Rolls Building (Royal Courts of Justice), Fetter Lane, London and via Video Conference.

#### Members attending

Lord Justice Birss (Chair)  
Mr Justice Kerr  
Mr Justice Trower  
Master Cook  
His Honour Judge Jarman KC (for item 6)  
His Honour Judge Bird  
Lizzie Iron (until item 5)  
David Marshall  
Dr Anja Lansbergen-Mills  
Isabel Hitching KC  
Tom Montagu-Smith KC (from item 5)  
District Judge Clarke  
Ben Roe

#### Apologies

Members: District Judge Cohen, Virginia Jones. Non-members: Lord Justice Singh (Item 3), Mr Justice Chamberlain (Item 3), Brett Dixon (Item 6), Helen Devery (Item 6), Master Sullivan (Item 8), Her Honour Judge Hilder (Item 8)

#### Item 1 Welcome and introductory remarks

- 1. The accession of HM King Charles III.** The Chair observed that this was the first meeting of the CPRC since the accession of HM King Charles III. In consequence of the change in Sovereign, various CPR related amendments were necessary; some have already been put into effect and others are still in motion (see below at Item 2). The Chair was present at the Accession Council meeting, in his capacity as a Privy Counsellor. During that meeting, the King made various orders; one such order confirmed that the use of the existing court seal continues until such time as another seal is prepared and authorised by His Majesty the King. A link to copies of all the Accession Council Orders was published on the CPR homepage <https://www.justice.gov.uk/courts/procedure-rules/civil> along with the CPRC's out-of-committee resolution concerning the updating of CPR approved court forms. Thanks were conveyed to Master Cook, the Secretary and all concerned for expediting this.
- 2. Valedictory for Lizzie Iron.** The Chair was joined by all members and officials in expressing thanks to Lizzie Iron for her meritorious contribution as the principal representative of the lay advice sector over the past six years. Having reached the maximum term permitted, this was Ms Iron's last meeting. The Chair noted that Ms Iron joined the Committee in 2016 and has made an outstanding contribution to the CPRC and wider civil justice work, by bringing a truly independent view to discussions. Her contributions and sensible questions have sought to make the rules understandable for the non-lawyer and in turn have influenced positive change. In recognition of her service to civil justice, Ms Iron was invited to attend a Royal Garden Party in 2019. Her input will be much missed. Ms Iron was very grateful for the remarks and had thoroughly enjoyed her time on the CPRC; commenting on whether any legacy would be left, Ms Iron encouraged members to ask, "what would Lizzie say" during Committee deliberations.

3. **Minutes:** The Chair reiterated his thanks to Mr Justice Kerr for chairing the meeting in his absence. The minutes of the meeting on 1<sup>st</sup> July 2022 were **AGREED**.
4. **Matters Arising: PD 6B Service out of the jurisdiction** – it was **NOTED** that (i) Form N510 amendments have been APPROVED out-of-committee and following consultation with the Senior Master (ii) following the publication of the 149<sup>th</sup> PD Update, correspondence from a practitioner has identified some additional points regarding service and they will be considered as part of the Service Sub-Committee’s ongoing work.
5. **Action Log** - the following were duly **NOTED**:
  - **AL(22)09 PD 4 consequentials - replacement list of prescribed forms** a new web page has been created to replace the definitive list that was annexed to PD 4 (which has been dispensed with as part of the s.2(7) simplification work, pursuant to the 149<sup>th</sup> PD Update). The web page is now live on gov.uk: [www.gov.uk/government/publications/civil-procedure-rules-court-forms](http://www.gov.uk/government/publications/civil-procedure-rules-court-forms)
  - **AL(22)29 Vulnerable Parties** – this follows the report at the April CPRC meeting and specifically in relation to the work to introduce the Domestic Abuse Protection Order (DAPO)s Pilot. MoJ advised that the intention is to pilot DAPOs in 2023 for two years, followed by national roll out in 2025. The pilot Police force areas, have been shortlisted following an expression of interest exercise. The final list is subject to consultation with the Senior Presiding Judge (SPJ) and officials are also working with the SPJ to agree membership and chairing arrangements for the new DAPO Cross-Jurisdictional Group. Once draft CPR proposals are ready, they will come back before the CPRC. MoJ Policy’s intention is to align any necessary changes with the FPR proposals, as far as possible, and it is, therefore, likely that draft proposals may be presented to the CPRC after the FPRC considerations have started to take shape.
  - **AL(22)54 Open Justice (PD 51Y)** – this is due to return at/by the December CPRC meeting.
  - **AL(22)62 Court Officer Delegation PD Update** – Thanks were expressed to His Honour Judge Bird for working on the drafting. The in-force date has been revised and is now anticipated to be 1<sup>st</sup> December 2022.

## **Item 2 King’s Bench Division etc consequentials**

6. The Chair advised that, in consequence of the change of Sovereign, the Queen’s Bench Division (QBD) is now officially the King’s Bench Division (KBD) of the High Court. It was also **NOTED**, with thanks, that Drafting Lawyers are assembling the necessary CPR amendments for approval. Alasdair Wallace (MoJ Legal) advised that the Interpretation Act (s.10, which applies also to Statutory Instruments by virtue of s.23) takes the weight of having references which are to the Sovereign of the day construed as being to any successive Sovereign. However, it fails to make textual amendments, so the words “Queen’s Bench” will continue to appear, but fall to be construed as “King’s Bench”. Second, the Interpretation Act provision does not apply to Practice Directions. Accordingly, the plan is to incorporate the necessary textual amendments to both the rules (made via Statutory Instrument) and the PDs into the next routine (Winter) CPR Update. **Action:** Drafting Lawyers and Secretariat to include in the next SI and PD Update.
7. However, revisions to Court Forms and Writs have been agreed, under delegated powers, and a communication published online; MoJ/HMCTS Design are working through the High Court Writs as a priority and other forms thereafter and are publishing the updated versions in earnest.

### Item 3 Judicial Review & Courts Act 2022: proposed amendment to r.54.7A Judicial Review of decisions of the Upper Tribunal CPR(22)48 and CPR(22)49

8. Liam Walsh (Ministry of Justice) was welcomed to the meeting.
9. Mr Justice Kerr introduced the item. It was explained that the Judicial Review and Courts Act 2022 (“the Act”) came into force on 14<sup>th</sup> July 2022 and necessitated consideration of implications for the CPR in consequence.
10. It was **NOTED**, with thanks, from the Chair, that Lord Justice Singh and Mr Justice Chamberlain had, along with Mr Justice Kerr, considered the position in advance of the meeting and produced a preliminary drafting proposal, by way of a new, and shorter, version of CPR 54.7A.
11. Currently, CPR 54.7A(3) contains special procedural provision giving effect to the limitations contained in the Supreme Court decisions in *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] AC 663 and provides for a special short time limit, of 16 days, in which “Cart JRs” are to be made.
12. Section 2 of the Act removed the *Cart* route of JR by removing a person’s ability to judicially review a decision of the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal, except in very limited circumstances. The provision flowed from a recommendation made by the Independent Review of Administrative Law, chaired by Lord Faulks KC.
13. The Act essentially reverses the decision in *Cart* and substitutes an entirely new test for the very limited circumstances in which JR will now be permitted where the Upper Tribunal has refused permission to appeal.
14. As the majority of *Cart* JRs concern Immigration and Asylum cases, MoJ have been in liaison with the Home Office. The policy position proposes retaining the current expedited time limits for *Cart* JRs, because they do not consider there to be any policy or legal reasons to change the time limit, considering it to be in the interests of all parties to continue to deal with any such claims speedily. However, the preliminary drafting proposal was cast on the basis that the shorter time limit is no longer needed, because it was particular to the procedural apparatus in accordance with the decision in *Cart*. MoJ, following liaison with the Home Office, suggested that the expedited time limit could be retained for a trial period and reviewed after one year. This was discussed. Some views ventilated concerns with adopting the shorter time limit, from the perspective of natural justice, if it limited the capacity to prepare the case. If it did, the option of a trial, did not offer a safeguard, because it would be difficult to ascertain whether that was preventing cases from being pursued, particularly given the relatively low volumes. In contrast, the experience in practice suggested that the Immigration Bar were not deterred by a shorter time limit. It was **RESOLVED**:
  - in principle, to retain the 16 day expedited time limit (and reviewed after one year);
  - a revised drafting proposal for a new r.54.7A, Judicial Review of decisions of the Upper Tribunal, incorporating the expedited time limit of 16 days, be presented for resolution at the next meeting;
  - subject to the revised draft rule being approved, the position regarding time limits be reviewed after one year;
  - MoJ to check whether any form/s and/or guidance require updating and to report back at the next meeting.

15. **Actions:** (i) Kerr J, in consultation with Singh LJ and Chamberlain J, to produce a revised draft rule 54.7A, by 21<sup>st</sup> October to be followed by the usual review by Drafting Lawyers and MoJ in readiness of the 4<sup>th</sup> November meeting, (ii) MoJ Policy and the Secretariat to programme in a review after one year following inception of the revised r.54.7A (iii) MoJ Policy, in liaison with HMCTS et al, to review any consequential updating to forms/guidance (including Court Guide/s) by 21<sup>st</sup> October, for reporting to the CPRC meeting on 4<sup>th</sup> November 2022 (iv) MoJ Policy to update the Committee with findings after the one year review.

**Item 4 Costs Sub-Committee: Extending Fixed Recoverable Costs (FRC); Qualified One-Way Costs Shifting (QOCS) and Vulnerability.**

16. This item comprises the above three elements and follows the update provided at the last meeting.
17. Robert Wright (MoJ) was welcomed to the meeting and contributed to the discussion.
18. The Chair provided some introductory remarks, reiterating the importance and complexity of this area of work. Thanks were also conveyed, and duly **NOTED**, for the extensive work being carried out by the Costs Sub-Committee, its co-opted members, District Judge Simon Middleton and Andrew Parker, MoJ officials and MoJ legal. This sentiment was endorsed by Mr Justice Trower, observing that their expertise is invaluable.
19. It was also **NOTED**, from the Chair, that the Civil Justice Council is conducting a wider piece of work on costs generally. It included consideration of any further work regarding FRC beyond that covered by the specific task currently before the CPRC.

**20. Extending FRC: points of policy and principle CPR(22)39**

21. Mr Justice Trower reiterated that the proposed changes flow from Sir Rupert Jackson's 2017 report on FRC. The Government consulted on the implementation of the proposals in 2019 and responded to the consultation in September 2021.
22. In summary, the work is complex, and a number of detailed points have been identified, where rationalization is appropriate or changes are required, to remove unnecessary repetition and adopt a more consistent style.
23. The intention is to retain the existing practice of different sections for different categories of case and the Sub-Committee has sought to ensure that the circumstances in which FRC are recoverable is identified in the text of a rule, while the amount recoverable for particular steps taken in the relevant circumstances, is set out in an accompanying Table.
24. Proposed amendments are mainly to CPR Part 45 (Fixed Costs), which has largely been rewritten, but significant changes are also required to Parts 26 (Case Management – Preliminary Stage) and 28 (Fast Track). Minor changes are also required in other sections of the CPR. An overview of the progress made to date was provided, in which it was explained that the aim was to present fully developed drafting proposals to the November 2022 meeting.
25. Trower J noted that a very large number of claims caught by the current FRC regime (for low value Personal Injury (PI) are quite commoditised in their structure, with resulting great familiarity with Part 45 in the existing form. The prospect of starting completely afresh was considered, but essentially rejected; the two main reasons being excessive difficulty and in recognition of how disruptive it would be for the market, and a strong desire to avoid unintended consequences.

26. The Chair cautioned of the need to remember that the civil jurisdiction extends beyond PI and clinical negligence. It was recognised that one of the problems of a ‘special pleading’ approach to drafting, is that issues change over time. However, the task in hand was driven by the Government’s position to implement *Jackson*, and this was understood.
27. Trower J explained that the Government originally decided not to pursue the recommendation to introduce a separate “Intermediate Track”. However, this has changed. During the course of the Sub-Committee's work, it has become apparent that some of the perceived practical difficulties for HMCTS can be overcome. The new intermediate track will increase the coverage of FRC to less complex claims from £25,000 – £100,000 (with exemptions). It was observed that this is a very significant change for the CPR.
28. It was noted that it was expected that designated civil judges (DCJs) would determine which district judges could hear intermediate track cases. Master Dagnall raised whether PD 2B (Allocation of cases to levels of judiciary) needed to be reviewed in consequence. Trower J observed that wider consequential issues have not yet been fully identified but it was noted that allocation may already be covered by PD 2B para 11.1 (d) ‘any other proceedings with the direction or permission of the Designated Civil Judge or Supervising Judge or Supervising Judge’s nominee’. However, officials are in discussion with the MR’s office on this and other points. District Judge Clarke queried whether the arrangements would draw HMCTS staff into decisions about banding (especially with greater digitisation). The Chair noted that the limits on what HMCTS staff could do were clear, but that this may need further consideration. Court fees, was another such topic and one the Sub-Committee and policy officials are to consider in due course.
29. Rosemary Rand confirmed that HMCTS are content with the proposals and specifically the introduction of an Intermediate Track; this was duly **NOTED**.
30. The intention remains to secure the CPRC’s final approval at the 2<sup>nd</sup> December meeting, for implementation in April 2023. To do so, there are various outstanding policy points requiring CPRC input. Each was discussed in detail:
- **Non-monetary relief:** A discussion ensued as to the practical mechanics of appropriate FRC, where proceedings included a claim for non-monetary relief were concerned, and for a drafting solution to be as simple and clear as possible. The risk of some parties seeking to pursue tactical influence was aired and noted by the Sub-Committee. However, it was viewed as a probable inevitability where different tracks and bands exist and thus one which likely required robust case management to address. His Honour Judge Bird was concerned that the expanded FRC regime could be a difficult exercise for judges in terms of banding. Mr Wright said that the issue of banding and related guidance had been preoccupying him for some time, and that it had been discussed with Lord Justice Jackson and stakeholders. Mr Wright drew the CPRC’s attention to Chapter 5, para 4.4 of the 2021 consultation response which set out the Government’s position, stating that it, ‘... does not consider it appropriate to provide any further guidance on cost complexity’; the full response and rationale for that decision can be viewed here: <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/results/extending-fixed-recoverable-costs-civil-cases-government-response.pdf>
  - **Intermediate Track:** Trower J advised that the Sub-Committee had debated how the various Intermediate Track stages should be identified in the rules, and that this does not give rise to significant drafting changes. The Chair commented that there was further work to be done on making this Table clearer as to which FRC applied at which stage and, in particular, whether FRC for a particular stage included costs from earlier stages.

- **Contributory Negligence:** Trower J explained the position regarding contributory negligence and the aim to improve the current drafting at r.45.29F(4)(a)(v), which concerns the assessment of a successful defendant's costs. At present, the policy intent does not seem to be clear, although this has probably not arisen as an issue in practice due to QOCS. Nonetheless, this has been addressed in the proposed redraft of Part 45 (as per rule 45.5(3)(a)).
- **Litigants in Person (LiP):** Trower J noted that the only section in which Part 45 currently makes provision for LiPs to make recovery is Section VI (Fast Track trials). Neither the Jackson report nor the Government's consultation response deal explicitly with LiPs. The Sub-Committee have considered this point, and are of the view that the "2/3rds rule" should be applied across the board to Fast Track and Intermediate Track cases, although it is recognised that there are arguments against this. The CPRC endorsed the direction of travel as to drafting. Lizzie Iron urged for consideration to be given to supplementary guidance as a means to provide additional support for LiPs.
- **Legal aid possession claims:** Trower J explained the situation on the delayed application of FRC to defended legal aid possession claims. Master Dagnall asked whether the exclusion would apply in relation to claimants' (landlord) costs, given that recoverable costs were often prescribed in the contract. Mr Wright thought that was the case but would confirm. He said that MoJ are aware there are practical issues which need considering, in particular with counterclaims, but the policy position and therefore the drafting is still being finalised and this was duly **NOTED**.
- **Actions against the Police** the draft wording, at r.26.6(5A)(e)(vii), which outlines that 'a claim in tort, other than negligence, against the police' will be excluded from the proposed new Intermediate Track. The exclusion is intended to cover actions against the police for claims such as wrongful arrest and misfeasance in public office, but not to cover ordinary negligence claims, such as, for example, a claim arising out of a road traffic accident involving a police vehicle. The Sub-Committee is generally content that this wording captures the policy intention as set out in the MoJ's 2021 consultation response (see Chapter 5, paragraph 12.5), but the wording is not finalised and is subject to on-going consideration by the Sub-Committee. This was duly **NOTED**. The discussion raised whether Human Rights Act damages claims also need consideration. HHJ Bird ventilated the view that the Sub-Committee may wish to consider incorporating reference to an action being "triable by jury", as a means of distinguishing the nature of a claim involving the police. It was **AGREED IN PRINCIPLE** that a suitable line needed to be drawn and the CPRC welcomed the Sub-Committee's continued focus on this point.
- **Inflation:** the discussion highlighted the desire for a mechanism in which inflation adjustments could be built into the rules and applied automatically; possibly via a self-calculating spreadsheet/prescribed form. If that was possible, it may go some way to allaying concerns from practitioners that the rates are out of date. The practicalities of this were discussed. Isabel Hitching KC observed that inflation is a policy issue, and not really one within the remit of the Sub-Committee, which was agreed, however views were expressed which illustrated concerns in practice and from the junior Bar. Master Cook added possible access to justice issues, if other figures were not updated in a similar way. Mr Wright confirmed that he had given a commitment to regularly review FRC rates and this would be the subject of more policy work and a further statement in due course. This was duly **NOTED**.

31. It was **RESOLVED to NOTE**, in addition to the above points:

- the preliminary drafting amendments to Part 45, Part 26, PD 26, Part 28 and PD 28;

- wider drafting issues in relation to PD 26 may benefit from the attention of the section 2(7) Sub-Committee, in due course;
- further drafting is being done to implement the Noise Induced Hearing Loss (NIHL) changes, particularly in relation to the Occupational Disease and Illness Protocol, which is progressing and the approval process for this will be discussed with the Master of the Rolls' office;
- consequential changes to online services, for example the Damages Claims Portal pilot, require further consideration;
- MoJ Policy are in discussion with Judicial Office as regards judicial training in advance of implementation;
- whether the Table of HMRC Fixed Commencement Costs, currently located in Table 7 of Part 45, can be simplified and updated, is under consideration.

32. It was **AGREED:**

- to remove from Part 45, Section X (costs limits in Aarhus Convention claims) because it more naturally falls within Part 46, which already contains a section on Costs Capping (in JR claims);
- Sub-committee/MoJ to produce some worked examples illustrating how a claim progresses and how it is allocated within the proposed new FRC regime;
- MoJ to consider what and when material can be published at an early stage, so that stakeholders have as early notice of the detail of the reforms, as early as possible;
- MoJ to confirm whether landlord costs would be excluded if prescribed in the contract;
- MoJ to consider and set out in due course proposals post-implementation review/issues related to inflation;
- matter to return to the November meeting, with a time-estimate of around two hours.

33. **Actions:** (i) Secretariat to programme in sufficient time at the 4<sup>th</sup> November CPRC meeting (ii) MoJ policy to note the above points of action and revert as necessary (iii) Sub-Committee/MoJ to provide papers for the November meeting, to the Secretariat no later than 28<sup>th</sup> October 2022.

34. **Qualified One-Way Costs Shifting (QOCS): post consultation proposals CPR(22)40**

35. Trower J explained that the Supreme Court's judgment in *Ho -v- Adeleku* [2021] UKSC 43, raised whether the CPRC should consider revisiting the rules. The Court of Appeal ([2020] EWCA Civ 517) had also previously said that the CPRC may wish to consider whether costs set-off should be possible in a QOCS case (QOCS being a form of costs protection in Personal Injury (PI) cases which was introduced in 2013). MoJ Costs Policy were engaged to consider the policy implications and the CPRC decided (in November 2021) to take this work forward as part of the Costs Sub-Committee's work on extending FRCs. A drafting proposal was framed and consulted upon. The consultation explained that the rationale was to ensure that the extension of FRC does not exacerbate existing issues with QOCS arising from the Supreme Court's judgment in *Ho* and the earlier Court of Appeal decision in *Cartwright -v- Venduct Engineering* [2018] EWCA Civ 1654. The issues concern (i) whether both damages and costs should form a fund for the defendant's

costs where the claimant does not beat the defendant's offer at trial (in *Ho*), and (ii) the interplay of QOCS and Part 36 (in *Cartwright*).

36. The consultation exercise closed on 20<sup>th</sup> June 2022. The majority of the 33 responses received, (20 respondents (60.6%)), were broadly supportive of the proposed rule changes on QOCS, as set out in the consultation; some respondents raised minor rule drafting amendments. Of the remaining 13 respondents (39.4%), 11 engaged constructively with the proposals, to say how they could be improved. All comments have been carefully considered and thanks were expressed to everyone who had taken the time to submit responses.
37. MoJ recommend implementing the rule changes on QOCS (as set out in the consultation) but with one small rule drafting amendment regarding 'agreements to pay' at r.44.14(1). The Government considers this to help achieve the consultation objectives and ensure that the scope of set-off is appropriately addressed.
38. During the discussion, it was **NOTED** that a further point had been raised by Nicola Critchley, out of committee and in relation to which an additional, clarificatory, drafting proposal was submitted. This is still to be considered by the Sub-Committee, but at this stage, they were content that the proposed way forward on QOCS delivers the MoJ's policy intention.
39. It was **RESOLVED to agree in principle**, the proposed redrafted CPR 44.14(1), subject to consideration of the above. Final drafting proposal to return in due course (at/by the December 2022 meeting) for final determination.
40. **Action:** Sub-Committee to revert with final proposed drafting when ready.
41. **Vulnerability: post consultation proposals CPR(22)41**
42. Trower J explained that in May 2022, MoJ consulted on specific vulnerability provisions to be implemented as part of the wider extension of FRC in CPR Part 45. Moreover, to ensure consistency, the Government considers that the new vulnerability provision should be applied to existing FRC regimes (the consultation was run alongside the QOCS consultation above). It was explained that, following careful consideration of the consultation responses, the Government proposes to implement the rule changes on vulnerability as set out in the consultation.
43. The consultation attracted 38 responses. 15 (39.5%) were broadly supportive of the proposals and the desire to reconsider additional vulnerability measures. Of the other 23 respondents, 16 engaged constructively with the proposals (42.1%), to say how the proposals could be improved. All comments have been carefully considered and thanks were expressed to everyone who had taken the time to submit responses.
44. It was **NOTED** that:
  - the Sub-Committee do not have any comments on the drafting, which they consider achieves MoJ's policy objectives;
  - the Government does not propose to make any changes to the arrangements for disbursements for vulnerability in FRC cases, and will monitor this as the new regime beds in;
  - final proposed drafting is to return in due course (at/by the December 2022 meeting) for final determination.



45. **Action:** Sub-Committee to revert with final proposed drafting of the new vulnerability (FRC) rule/s when ready.

#### **Item 5 CPR 5.3 Signature by electronic means CPR(22)42**

46. The Chair explained that, at his request, the Industry Working Group (IWG) on Electronic Execution of Documents was asked to consider a proposal to amend CPR r.5.3. The IWG is co-chaired by Mr Justice Fraser and Law Commissioner, Professor Sarah Green.
47. The matter was considered at the IWG meeting on 27<sup>th</sup> June 2022, at which the IWG resolved to propose a drafting amendment, subject to any proposed revisions, provided by IWG members out-of-committee, of which there were two. Accordingly, all options were provided for CPRC consideration and briefly discussed.
48. In response to an out-of-committee point raised by Lizzie Iron, it was suggested that the word “shall” in the existing rule may not be entirely helpful, and becomes less helpful with the proposed amendments. As such, it may assist to replace, “shall” with “may”
49. With no immediate consensus as to a final drafting solution, and in recognition of the potential for (i) interaction with CPR digital services and (ii) cross-jurisdictional consistency, it was **RESOLVED** to form a CPRC Sub-Committee to consider the issue and report back; with proposals having been subject to the usual consultation with MoJ Policy, Drafting Lawyers and HMCTS. Liaison with the FPRC is also advantageous. Dr Anja Lansbergen-Mills was duly appointed to the Sub-Committee; Katie Fowkes (MoJ Legal) agreed to provide input. Any other CPRC members wishing to join the Sub-Committee should make themselves known to the Chair/Secretariat in the coming days.
50. **Actions:** (i) Nominations to join the Sub-Committee by 4<sup>th</sup> November. (ii) Secretariat to discuss programming the matter in for further CPRC consideration with Dr Lansbergen-Mills and Katie Fowkes.

#### **Item 6 Workplace Claims CPR(22)43**

51. His Honour Judge Jarman KC joined the meeting remotely from the Welsh Legal Conference and introduced the matter.
52. The other Sub-Committee members are John McQuater and Brett Dixon (at the time, of appointment they were both CPRC members) and two co-opted members, Helen Devery, a partner in BLM, now a consultant with Clyde & Co; and Huw Andrews, Principal Consultant, Casualty at Ecclesiastical Insurance Group. Messrs McQuater and Andrews also joined the meeting remotely, as did Jeremy Bevan (Health & Safety Executive (HSE)).
53. This work was commissioned following a paper from the HSE presented at the November 2021 meeting. The Sub-Committee’s task was to review Annex C (Standard Disclosure in Workplace Claims) of the Pre-Action Protocol for Personal Injury (PI) Claims, to bring it up to date. In doing so, the Sub-Committee have identified additional proposed amendments to the PAP more generally. The intention being to:
- make clear that the duty of disclosure includes electronic documents,
  - amend the template letter of claim, to provide for the claimant to identify documents thought to be disclosable, without prejudice to the defendant’s obligation of disclosure,
  - amend the template letter of response, to give the defendant an opportunity to explain why certain documentation requested may not be disclosable,
  - provide for any appropriate exemptions.

54. Consideration was also given to what extent, if any, Annex C should deal with proposed legislation. It was concluded that the most appropriate way of doing this is simply to signpost the HSE Consultations Hub. The concept of introducing a table (as recommended by the HSE) has also been considered. The Sub-Committee's view, on balance, is to support that approach, but the CPRC's steer was sought. It was also highlighted that the Sub-Committee has not come to a concluded view on the issue of proportionality. The Sub-Committee also recommended a consultation take place before making a final decision on the proposed reforms. A discussion ensued.

55. It was **RESOLVED**:

- amendments to bring Annex C up to date were **AGREED IN PRINCIPLE, subject to consultation**
- proposals for wider changes, to the Pre-Action Protocol (PAP) for Personal Injury Claims, to be referred to the Civil Justice Council to consider in conjunction with their ongoing review of PAPs generally. This recognises the PAP's application beyond PI workplace claims.

56. The Chair expressed thanks to all involved for their time, care and hard work.

57. **Actions:** (i) Secretariat to relay wider PAP proposals to the CJC Secretariat (for onward consideration by Prof Andrew Higgins, Chair of the CJC's PAP Working Group) (ii) In consultation with the Sub-Committee, the Secretariat facilitate a focused consultation (iii) Secretariat to programme the matter in to return, post consultation.

#### **Item 7 Lacuna Sub-Committee (LSC) CPR(22)50**

58. Master Dagnall led the presentation, which consisted of the following five matters; each was discussed:

59. **LSC2022/12** concerns awarding less than the Part 36 10% uplift; a topic on which there has been various obiter judgments. The LSC recommend that this may merit referral to the Costs Sub-Committee and this was **AGREED**; however a timescale in which to consider the referral could not be committed to, given the weight of other work. **Action:** Secretariat to add to the ongoing log of non-priority business, to be considered as/when resources allow.

60. The LSC's reports under cover of **LSC2022/13**, which concerns CPR 13.3 (Possible Implied Sanction) and **LSC2022/14** on CPR 15.1 (Lifting an Automatic Stay) were, respectively, **NOTED**. The CPRC recognised the important points raised therein and that there have been recent and continuing conflicting issues in first instance decisions. However, there was not currently sufficient capacity for the CPRC to consider the matters substantively. To do so, they would need to be subjected to the usual prioritisation test. It was therefore **AGREED** not to take any further action at this stage. **Action:** The Chair and Master Dagnall to consider whether these points (and other LSC matters) should be considered further and if so when.

61. **LSC2022/15** concerns CPR 3.13 (Costs Budgeting and Allocation) and was explained by DJ Clarke. CPR 3.12 applies costs budgeting to Multi-Track cases and CPR 3.13 requires filing of costs budgets with Directions Questionnaires unless otherwise ordered, but CPR 26.3 only requires a court officer to send out a notice of "proposed allocation". The LSC (by a majority) suggests that consideration might be given to amending CPR 26.3 (or perhaps CPR 3.13) to improve clarity that (i) Section II of Part 3 will apply (unless the court otherwise orders) if a Notice of Proposed Allocation states that the Multi-Track appears to be the most suitable and (ii) the Notice may contain a direction varying the provisions of

CPR3.13(1). The discussion identified various related issues, including the proposals (above, under Item 4) for the introduction of an Intermediate Track. It was **RESOLVED** to refer the matter to the CJC as part of its wider work on costs generally and to note the points for possible further consideration once the CJC has reported in relation to costs budgeting and the Intermediate Track has proceeded further. **Actions:** (i) Secretariat to add to the ongoing log of non-priority business, to be considered as/when appropriate (ii) Matter be referred to the CJC Secretariat.

62. **LSC2022/16** is in regard to apportionment in fatal accident claims. It has been raised by Master Sullivan. It appears that the point was overlooked in what was a reordering provision in 2006/7 and that an accidental lacuna has occurred. It is therefore suggested that it could be corrected simply by making CPR 41.3A its own "Section 1A" within Part 41, and giving it an appropriate title because it has none at present. The previous (pre 2006/7) title was "Proceedings under Fatal Accidents Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934 - apportionment by the court." The LSC indicate that something shorter could be used. It was **RESOLVED** to create Section 1A: "Apportionment in Fatality Claims" for Rule 41.3A. **Action:** Drafting Lawyers/Secretariat to incorporate into the next mainstream CPR Update, due to be settled in December for in-force in April 2023.

#### **Item 8 Section 2(7) Sub-Committee**

63. Mr Justice Kerr explained that this item comprises four elements. Each was discussed.

#### **64. CPR Part 17 Amendments to Statements of Case and Part 38 Discontinuance: final proposals CPR(22)44**

65. This follows the last meeting when post-consultation drafting proposals were approved in principle but subject to the remittal of the Part 38 reforms, namely the amended rule 38.7 (discontinuance and subsequent proceedings), which required further consideration. As such, it returns for final determination and approval of the proposed amendments to Part 17, PD 17 and Part 38.

66. Master Cook observed the operational implications in relation to the proposed drafting at sub-rule (3) and it was proposed to revise the drafting to insert "(copying the claimant)" after "The defendant shall inform the court in writing" and this was **AGREED**. It was also **AGREED** to replace, "will" with "shall" in sub-rules (4) and (5) of r.38.7.

67. It was **NOTED** that the preliminary view was that no changes were required to form N279 (Notice of Discontinuance) in consequence. However, Master Cook undertook to check.

68. It was **further RESOLVED** to approve the reformed Part 17 and PD 17 as drafted.

69. **Actions:** (i) Master Cook to check if any form changes were necessary and revert to the Secretary if required. (ii) In consultation with Kerr J, and subject to any outstanding consequentials to be identified by Drafting Lawyers, the reformed Part 17, PD 17 and Part 38 be incorporated into the next mainstream CPR Update, to be settled in December, with an April 2023 in-force date.

#### **70. CPR Part 19 Parties and Group Litigation: post-consultation proposals CPR(22)45**

71. Isabel Hitching KC explained that the pre-consultation drafting was agreed in principle at the May 2022 meeting, when it was noted that given the significance of Part 19 and practitioner comments on topics beyond the scope of the s.2(7) Sub-Committee, that the review be best approached in two stages: Stage one - an initial review for duplication, clarity and modernisation by the Section 2(7) sub-committee and Stage two - a substantive review of Part 19 by the Lacuna or "other" sub-committee to be established for that task.

The Senior Master and Chief Chancery Master to whom thanks were conveyed, considered this a sensible approach; they also indicated that they envisage revising the court guidance.

72. The consultation followed the May meeting and closed on 5<sup>th</sup> July. Three substantive responses were received, with thanks. Some of the comments fall into the anticipated “stage two” review of Part 19. All comments were reviewed.
73. One respondent raised only one point, that the deletion of the opening phrase at rule 19(3)(1) may cause confusion and that it should not be amended simply for brevity. No example was given of how the new wording might be confusing. The Sub-Committee have revisited the new wording but consider its meaning sufficiently clear and do not propose any change from the wording approved for consultation. This was **AGREED**.
74. The Secretariat was requested to check if the Senior Master and Chief Chancery Master are conducting a wider piece of work and if so, to pass on the consultation comments to be considered as part of that work.
75. In summary, the proposed reforms are the same as agreed in principle at the May meeting, save for one modest change, in response to the consultation, at r.19.2(4)(a) which was explained. The respondent considered that the “and” at the end of r.19.2(4)(a) should be changed to “and/or”, submitting that that construction would ensure consistency with case-law and the court’s existing power, now expressly provided for at the proposed r. 19.4(11) “A court may remove, add or substitute parties in existing proceedings on its own initiative.” The discussion concluded with the view not to adopt “and/or”, but that the better drafting solution was to remove “and” altogether and this was **AGREED**.
76. It was **NOTED** that reference was made to a “prescribed form” (for example in the new rule 19.15(4)(a)) being a reference to the current form currently annexed to PD 19C. Master Cook undertook to check whether a new or modified form was required in consequence.
77. It was **RESOLVED** to **APPROVE, subject to the above points and final drafting**, the reformed Part 19 (Parties and Group Litigation) and supplementing PDs. The reforms comprise:
- merging PD 19A (which dealt with Section I) with the rule i.e. dispense with PD 19A;
  - reduce the scope of PD 19C with some text imported into the rule and duplicative and obsolete text deleted. (As this PD deals with what is Section II of the rule it has been renumbered PD 19A, so that it is the first remaining PD). The remaining scope of the PD is very limited, but on balance, it is considered that the guidance is sufficiently valuable for it to be retained;
  - reduce the scope of PD 19B with some text imported into the rule and duplicative text deleted;
  - change the numbering within the rule (to run sequentially); this was raised by the Council of Circuit Judges during previous consultations;
  - introduce gender neutral language;
  - update all QBD references to KBD, throughout.
78. **Actions:** (i) Isabel Hitching KC to provide final drafting to the Secretariat and contact details to be obtained for the purpose of para 10 of the PD for the KBD and Chancery

Division (ii) Drafting Lawyers/Secretariat to incorporate reformed Part 19 into the next mainstream CPR Update as part of the April 2023 common-commencement date (iii) HMCTS to note any operational implications (iv) Master Cook to check for any actions in relation to forms and revert to the Secretariat as necessary (v) Secretariat to check if the Masters are conducting a wider project and to update the consultation respondents accordingly.

**79. CPR Part 20 Counterclaims and other Additional Claims: post-consultation proposals CPR(22)46**

80. Kerr J explained that the Part 20 consultation closed on 23<sup>rd</sup> September 2022 and attracted two responses from industry practitioner bodies; to whom thanks were conveyed. The responses, which were duly **NOTED** and discussed, raise some conflicting views, including a point of principle regarding the scope of the project.

81. The pre-consultation drafting comprising a reformed Part 20 and retained reformed PD 20, was agreed in principle at the June 2022 meeting. In addition, an item of LSC business concerning the references to “Part 20 Claims” and whether the CPRC should consider reinstating a definition of “Part 20 Claim” (which was abandoned in or around 2005) was also resolved upon. The Part 20 rolling consultation therefore included reference to the proposed amendment to the definition in rule 2.3(1)) whereby “statement of case” should be amended to substitute “a counterclaim or other additional claim” for “Part 20 claim”. The June meeting also resolved to amend r.16.6 to substitute “an additional” for “a Part 20” claim and that specific amendment was included in the summer CPR Update which came into force on 1st October 2022.

82. Following consideration of the consultation responses, the Sub-Committee do not propose any drafting changes.

83. It was **RESOLVED**:

- not to expand the scope of the current review by way of substantive revisions, and thus, confine the drafting exercise at this stage to the simplification work within the ambit of the s.2(7) Sub-Committee;
- the comments from the consultation, in relation to anomalies, were not considered to be issues in practice and thus no changes were adopted at present;
- to **APPROVE** the change to the definition in rule 2.3(1)) whereby “statement of case” be amended to substitute “a counterclaim or other additional claim” for “Part 20 claim”. This is genuine tidying up, because there is no defined term for “Part 20 claim”;
- to **APPROVE** the reformed Part 20 and reformed PD 20 (Counterclaims and Other Additional Claims) as drafted, subject to the correction of one typographical error in rule 20.11(3)(a) where a space needs to be added between “against” and “them”.

84. **Action:** (i) Drafting Lawyers/Secretariat to incorporate reformed Part 20 and PD 20 into the next mainstream CPR Update as part of the April 2023 common-commencement date (ii) HMCTS to note any operational implications.

**85. CPR Part 21 Children and Protected Parties: pre-consultation proposals CPR(22)47**

86. Kerr J explained that the proposed revised Part 21 has been produced following input from Masters Cook and Sullivan, to whom thanks were conveyed. It is proposed to dispense with PD 21, on which the Masters’ comments indicated that the PD was a mix of (i) repetition, (ii) outmoded or otherwise inappropriate content and (iii) provisions that should be in the rule. Accordingly, the Sub-Committee find no continued need for the PD, but do

propose to import some provisions into the rules. As a result, Part 21 is lengthened, though more succinctly expressed. In addition, a few superfluties have been removed; in particular, rule 21.12(3), (4) and (5) which unnecessarily repeat and restate ordinary principles for determining a costs application. These principles are the same in effect as enacted, in different words, in Parts 44 and 46.

87. The usual incorporation of gender neutral language had been adopted and care was being taken to avoid language that was only suitable for guidance in a PD, not to be absorbed into the rules. To this end, the discussion identified further drafting revisions, including replacing, “should” with “shall” and the text, “will normally” was considered to be without sufficient legal force for a rule and thus it was **AGREED** to remove it from the rule, prior to consultation.
88. Her Honour Judge Hilder, Senior Judge of the Court of Protection, had submitted comments to Kerr J on the proposed amendments in which the Court of Protection has an interest. Each of the points were ventilated and will be incorporated prior to consultation.
89. Other drafting and typographical revisions were also resolved upon and are to be reflected in the final proposed drafting in advance of publication for consultation.
90. It was **RESOLVED** to:
- **APPROVE IN PRINCIPLE**, subject to the above points and to final drafting, the proposed reformed CPR Part 21 and PD 21 **which are also FIT FOR CONSULTATION**, using the (online) rolling consultation facility.
  - Provide specific notification of the consultation to the Official Solicitor, Court of Protection and Costs Office, respectively.
91. **Actions:** (i) Kerr J to provide perfected final proposed drafting to the Secretariat to form the consultation material (ii) Secretariat to facilitate publication as part of the rolling consultation facility, as soon as practicable (iii) Secretariat to provide specific notification of the consultation to the Official Solicitor, Court of Protection and Costs Office, respectively. **Post Meeting Note:** the Part 21 consultation was published on 13<sup>th</sup> October, with a closing date for comments of 24<sup>th</sup> November 2022.
92. **Post Meeting Note (Membership):** With thanks from the Chair, Ben Roe (legal member) has been appointed to the s.2(7) Sub-Committee with immediate effect.

#### **Item 9 Items for next PD Update: PD 3G and PD 5B**

93. It was **NOTED** from the Chair, that some modest tidying up to the following PDs had been identified and unless there is anything substantive identified in consequence, it should not be necessary to bring these amendments to the full Committee prior to being included in the next PD Update:
- PD 3G Requests for the Appointment of an Advocate to the Court required a technical, *housekeeping*, amendment to reflect the new address for the Attorney General’s Office.
  - PD 5B Communication and Filing of Documents by email requires updating because it refers to an out of date link to guidance, which has been withdrawn.
94. **Action:** Drafting Lawyers and Secretariat to incorporate into the next available PD Update.

## Item 10 Any Other Business & Close

95. The Chair raised the following, which were duly **NOTED**:

- **Migration of CPR from *Justice* to Gov.uk:** Government Digital Services have confirmed that this project is currently paused (the *Justice* web site remains operational in the interim); a fuller timetable is therefore awaited in due course.
- **Member Appraisals:** the annual appraisals have been completed over the summer. Members can request a copy via Andrew Caton in Judicial Office.
- **Lay Member recruitment and representation on Sub-Committees:** (i) the successful applicant to fill one of the two lay member vacancies should, subject to vetting, be able to join the next meeting. However, there is a need to re-run the campaign to fill the second vacancy. (ii) Lizzie Iron has recommended that, Charlotte Rook (Regional Service Manager at Support Through Court) should provide interim representation on the Vulnerable Parties (DAPO) Cross-jurisdictional Working Group following the end of Ms Iron's term of office and this has been **AGREED** out-of-committee; thanks were conveyed to Ms Rook for her valuable time.
- **4<sup>th</sup> November 2022 CPRC Meeting** will be a fully remote meeting and will start later than normal, due to the Chair having a speaking engagement.
- **Welsh translations:** an issue has arisen with the translation of the word "shall". In the interests of clarity and to limit any scope of divergence when provisions are translated into Welsh, the matter was discussed. It was **AGREED** that the CPRC's intention is that, "shall" provides an obligation. **Action:** Secretariat to relay to the Welsh Language Unit.
- **Sub-Committee vacancies:** following member turnover, two CPRC positions need to be filled on the Damages and Money Claims Committee (one legal member and one lay member). **Action:** All to consider and submit nominations to the Chair/Secretary by 4<sup>th</sup> November.

C B POOLE  
October 2022

### Attendees:

Carl Poole, Rule Committee Secretary  
Pete Clough, Secretariat  
Master Dagnall, Chair, Lacuna Sub-Committee  
Nicola Critchley, Civil Justice Council  
Alasdair Wallace, Government Legal Department  
Katie Fowkes, Government Legal Department  
Andrew Currans, Government Legal Department  
Amrita Dhaliwal, Ministry of Justice  
Andy Caton, Judicial Office  
Rosie Rand, HM Courts & Tribunals Service  
Faye Whates, HM Courts & Tribunals Service  
Liam Walsh, Ministry of Justice (Item 3)  
Robert Wright, Ministry of Justice (Item 4)  
John McQuater (Item 6)  
Huw Andrews (Item 6)  
Jeremy Bevan, Health & Safety Executive (Item 6)