

Approved

Minutes of the Civil Procedure Rule Committee

Friday 3rd March 2023, 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 Bird
District Judge Clarke
David Marshall
Dr Anja Lansbergen-Mills
Tom Montagu-Smith KC
Virginia Jones
Ian Curtis-Nye

Apologies

His Honour Judge Jarman KC; Isabel Hitching KC; Ben Roe; Senior Master Fontaine (Item 2)

Item 1

1. **Minutes:** The minutes of the meeting on 3rd February 2023 were **AGREED**.
2. **Action Log:** The following topic was duly **NOTED**:
 - **AL(22)29 - Domestic Abuse Protection Orders Pilot Schemes (DAPOs):** The Chair relayed an update from Mrs Justice Knowles (FPRC) regarding the progress with drafting the related FPR PD and the timetable for its intended consultation. As yet, the cross-jurisdictional working group had not begun to draft the civil rules. It was proposed that the consultation proceeds on the basis of the family PD with a clear statement that the CPRC's intention is to keep civil specific provisions to a minimum and to align any civil provisions with the family ones as far as possible. This was **AGREED**.

Item 2 Foreign Evidence Requests

3. Master Cook presented the matter on behalf of the Senior Master. The item consisted of two elements, which were discussed in turn:

PD 32 Evidence, Annex 3: proposed amendments CPR(23)10

4. Master Cook explained the background and related processes concerning the suite of modest amendments to bring PD 32 up to date. The proposed changes are in consequence of the Foreign, Commonwealth and Development Office (FCDO) having recently established a new unit, the Taking of Evidence Unit (ToE) for the purposes of providing information as to whether any particular country would raise an objection, at diplomatic level, to taking of evidence by video conferencing, from a witness in their jurisdiction.
5. The Chair raised the practicalities and desirability of email address – throughout the CPR - being expressly included within the rules/PDs. For example, email addresses are often prone to change, which then necessitates further rule/PD updates. A possible solution could be to have a standalone list of CPR related email addresses, available online, to be

used in conjunction with the rules, but not formally part of the rules. This would allow the list to be updated more readily as/when email addresses were created and/or modified. This was discussed and garnered support. It was **RESOLVED** to **AGREE IN PRINCIPLE**:

- **amendments to Annex 3 of PD 32 Evidence** to reflect the creation of the FCDO's ToE Unit;
 - **introduce a standalone "list of CPR email addresses"** (title to be finalised), together with any necessary flagging provision and/or signpost/s within the CPR;
6. The Chair also observed that there is a wider issue concerning reforms to video conferencing generally, that will require review and updates to the CPR so that the rules align with modern practice. Master Cook commented that where possible, technologically neutral language was being used, with the aim of future proofing the provisions, and this was duly **NOTED**.
7. **Actions:** Drafting Lawyers/Secretariat to (i) produce a draft "list of CPR email addresses" with supporting/consequential CPR amendments by 31-03-23 (ii) provisionally incorporate amendments into the next mainstream (summer 2023) CPR Update (iii) update programme planner to include the wider review regarding video conferencing reforms, when time permits.

PD 34A Depositions and Court Attendance by Witnesses CPR(23)11

8. This flows from the last meeting on 3rd February 2023. Master Cook explained that not all the amendments required were reflected in the papers provided at the last occasion. As such, and in the interests of completeness, the intended amendments in respect of Annex A to PD 34A were provided and duly **APPROVED**.
9. **Action:** Drafting Lawyers/Secretariat to incorporate into the next mainstream CPR Update.

Item 3 Part 52 Appeals and ASBI related work CPR(23)12

10. His Honour Judge Bird presented the matter. **THANKS** were conveyed to Andrew Currans (MoJ Legal) and to Jonathan Turnbull (UK Supreme Court), together with Lord Justice Underhill (Vice President of the Court of Appeal) and the Court of Appeal Registrars, all of whom, had also been consulted and were content with the proposals.
11. The origins of this work go back to 2021, twofold: initially, correspondence from a litigant in person generated the Lacuna Sub-Committee's (LSC) report (LSC2019/05) in February 2021. The Civil Justice Council's Report concerning Anti-Social Behaviour Injunctions followed and raised further related issues, which were considered at the December 2021 meeting. Essentially, CPR Part 52 and PD 52A need updating and to provide clarity, because the test for permission to appeal varies, and to reflect the dual route of appeal, in contempt proceedings.
12. In summary, the proposed amendments aim to address three issues, which were discussed:
1. Routes of appeal in certain contempt proceedings. These routes of appeal are set out in the Administration of Justice Act 1960. They cover (a) the dual route of appeal from a District Judge sitting in the county court in contempt proceedings and (b) those cases where the route of appeal is to the Supreme Court.
 2. The process of appealing from the Court of Appeal in non-contempt proceedings.

3. Changes to r.52.8(1) in response to caselaw, namely *R (Kearney) -v- Chief Constable of Hampshire Police [2019] EWCA Civ 1841* and the Lucana Sub Committee (LSC) report. The effect of the decision in *Kearney* being that there is no route of appeal to the Court of Appeal against refusal of permission on a Judicial Review in a criminal cause or matter.
13. Master Dagnall raised whether the recent case of *Deutsche Bank AG -v- Sebastian Holding Inc* required review before final drafting amendments are settled. It was **AGREED** that HHJ Bird would consider the matter with the Chair.
14. Thomas Haworth (HMCTS Legal, Administrative Court Office at Birmingham) raised whether r.52.8(2) required further consideration in light of the intended amendment to r.54.7A (due to come into effect on 6th April 2023, pursuant to SI 2023/105) regarding an appellant's right to renew. It was **AGREED** to consider this out of committee.
15. It was **RESOLVED to APPROVE IN PRINCIPLE, subject to the above points and to final drafting:**

- **amendments to CPR Part 52 Appeals**, these amendments provide for the routes of appeal to the UK Supreme Court in contempt proceedings and to reflect the decision in *Kearney*.

In summary, the reforms to Part 52 comprise: (i) amended r.52.3; the new r.52.3A(1) and the new r.52.7A to cover the need and test for permission (ii) new r. 52.15A to deal with the limited right to apply to extend time (iii) general appeals from the Court of Appeal to the Supreme Court are provided for at r.52.1(e) and (iv) the need for permission is set out at r.52.3 and r.52.3A(2).

It was **NOTED** that the CPRC does not have vires to deal with the practice and procedure of the Supreme Court and care has been taken to ensure the drafting respects that;

- **amendments to PD 52A Appeals: general provisions, and to Table 1** therein, concerning proceedings other than family or insolvency proceedings. The amendments set out the dual route of appeal. The Table also reflects the destination of first appeals in contempt proceedings.

16. **Actions:** (i) HHJ Bird and Birss LJ to consider whether any issues arise from the judgment in *Deutsche Bank AG -v- Sebastian Holding Inc* (ii) Drafting Lawyers and Mr Haworth to discuss any drafting revisions arising from the interplay between r. 52.8(2) and r. 54.7A (as amended) and revert to the Committee if necessary (iii) Drafting Lawyers/Secretariat to provisionally incorporate amendments into the next mainstream (summer 2023) CPR Update.

Item 4 Extending Fixed Recoverable Costs (FRC) CPR(23)13

17. The Chair provided some introductory remarks which praised the sub-committee, policy officials and drafting lawyers for the extent and pace of work since the last meeting, in February 2023. He considered the reforms to be an exciting development in civil litigation.
18. Mr Justice Trower presented the sub-committee's report and accompanying drafting proposals, which were discussed. District Judge Simon Middleton and Andrew Parker, co-opted members of the sub-committee, also provided input, as well as Robert Wright (MoJ Policy) and MoJ Legal. Trower J observed the necessary compromises required as part of the drafting process in order to achieve workable solutions to what are complex issues; it was not possible to cover all eventualities, and this was **NOTED**.

19. The main focus of the meeting concerned the revised version of Part 45. The Tables had been removed and draft amendments incorporated to reflect the proposed definition for the housing exclusion. **THANKS** were expressed to HHJ Bird for his helpful comments. The President of the Association of District Judges, District Judge Kevin Harper, had also been consulted and this was duly **NOTED**.
20. The proposed new PD 45 now includes the Tables setting out the rates of FRC for the fast track, intermediate track, and Noise Induced Hearing Loss (NIHL) claims. The proposed inflated FRC matrices are duly incorporated. It was explained that the FRC matrices set out in Sir Rupert Jackson's 2017 Report have been updated for inflation using the January 2023 Services Producer Price Index (SPPI). The intention of moving the Tables into the PD is to enable a more streamlined process for updating the rates in the most efficient and straight forward way.
21. A discussion ensued as to how the first set of inflated figures should be reflected in the Tables. The Chair was keen to avoid spurious precision and considered whether, and if only for the initial figures, they should be shown to the nearest two significant figures. It was acknowledged that the figures in the *Jackson Report* were specific, but they are old in origin and it is only by including figures in the CPR, that they have any force; hitherto the figures have been mere commentary. By including FRC rates that have been rounded to the nearest two significant figures in the first iteration, it did not pre-determine the future formulae, nor change other figures in the Tables which are outside these reforms. However, it was, on balance, considered to be the most effective starting point for the new FRC regime.
22. The challenges of drafting a transitional provision were recognised and the proposed approach was deemed a sensible way forward. The intention is that it will deal with changes to the Tables of fixed costs after they are implemented, whereby, the new FRC will apply to claims where proceedings are issued on or after 1st October 2023, save for personal injury (including disease). The new FRC will apply to personal injury (PI) claims where the cause of action accrues on or after 1st October 2023; and will only apply to disease claims where the letter of claim has not been sent to the defendant before 1st October 2023.
23. The general transitional provision will be contained in the rule amending SI, so that needs to be read alongside the new figures, to put the reforms in context. The Chair was keen, therefore, that when publishing the figures, the draft SI should also be available. MoJ Policy indicated that they were also working on an explanatory note to compliment the other material published in advance of implementation.
24. Amended drafting on disclosure at r.28.7 includes further provisions inserted in r.28.2 with the aim of ensuring that the redraft achieves a consistent approach to disclosure in the fast track and intermediate track. Emphasis has been placed on the discretion available to the court, rather than being too prescriptive. In doing so, a suitable balance has been struck. In response to a question from Dr Anja Lansbergen-Mills, as to why the proposed sub-paragraph (4) only includes PI claims being subject to standard disclosure, DJ Middleton and Master Cook explained that the aim is to try and keep the regime as near as possible to the current disclosure rules. Moreover, it was not considered to be a problem in practice because disclosure in PI was not voluminous.
25. It was **RESOLVED to agree in principle, subject to final drafting**, the amendments to:
- **Part 28 and PD 28 The Fast Track and Intermediate Track:** this includes the amended rules on disclosure;

- **Part 45 and PD 45 Fixed Costs:** this includes (i) the transitional provision at r.45.1(8) and (ii) the rates applicable under the new FRC regime are to be rounded to the nearest two significant figures in the Tables within PD 45;

26. It was **NOTED** that:

- the housing exclusion provisions need to be checked for any Welsh language implications;
- Part 26 and Part 36 contain further consequential amendments, which had been made, since 3rd February meeting;
- recent correspondence from the Police Action Lawyers Group and from Inquest had been received by the Chair. The correspondence concerned the proposed exclusion clause regarding claims against public authorities and in particular its scope; as to whether it should be expanded beyond “a claim against the police” to encompass “public authority” more widely. The points garnered some general sympathy, particularly where custodial services were concerned. However, the matter had been considered previously and it was difficult to draft for all variations. Nonetheless, the points have been referred to the sub-committee to review and consider with care;
- work is ongoing in relation to: Part 36 and multiple parties; amendments to the Occupational Disease and Illness Pre-Action Protocol; the NIHL standard directions and a number of other small consequential amendments.

27. **Actions:** (i) In consultation with HHJ Jarman KC, the sub-committee and Drafting Lawyers are to check the drafting (specifically the housing exclusion provisions (in Part 45)) for compatibility with Welsh law/language; and (ii) the final suite of draft amendments to return to 31st March 2023 meeting.

Item 5 Section 2(7) Sub-Committee

28. Mr Justice Kerr provided some introductory comments. It was explained that the item comprised two topics, as follows. **THANKS** were also relayed to HHJ Bird and Ben Roe (specially in relation to the amendments to Part 14 and Part 20) and to Katie Fowkes (MoJ Legal) for her drafting contributions generally, out of committee and to Isabel Hitching KC’s work on Part 22 (noting that Ms Hitching was unavoidably absent due to an urgent domestic issue). Each topic was discussed.

Part 14 Admissions: consequentials CPR(23)14

29. Kerr J explained that, following public consultation, a reformed CPR Part 14 was resolved upon at the May 2022 meeting. The amendments included the revocation of PD 14. Subsequently, it emerged that there were knock-on effects on other rules which had to be considered before the new Part 14 was ready to enter into force. In particular, an internal consultation with the judiciary to assess any implications for the Commercial Court and Circuit Commercial Court. An operational issue concerning the provisions as to how a court officer draws orders on admission also needed to be considered and finalised. This has now taken place. **THANKS** were conveyed to Mr Justice Foxton, judge in charge of the Commercial Court, for his helpful comments. Taking into account these developments, a suite of amendments to, and in consequence of, the Part 14 reforms were presented. Further comments from Katie Fowkes (MoJ Legal) had also been provided and were addressed orally as part of the presentation. The discussion ventilated various additional, albeit modest, drafting points which were duly **NOTED** and adopted where necessary. Points of particular substance, included:

- the rationale for the use of the word, “will”, because this is not favoured by the Joint Committee on Statutory Instruments’ (JCSI) as a drafting convention. Drafting Lawyers indicated that suitable alternatives are generally, “is to be” or “shall”; although there have been translation issues with the word, “shall” where the Welsh Language translation has not always conveyed it as an obligation. This has been noted by the Welsh Language Unit, to avoid any divergence when translating the rules. Moreover, Kerr J indicated that, “will” may be the correct verb, in these circumstances, to describe the necessary action in relation to practice and procedure. The action being fact specific, depending on the individual case and thus it is a matter for the judiciary when applying the rules. It was **RESOLVED** that if officials could provide an early explanation to the JCSI, that may assist when the SI is before them as part of its Parliamentary scrutiny.
 - the need for drafting to reflect any consequential flows from the FRC reforms. This was **AGREED**
30. It was **RESOLVED to APPROVE IN PRINCIPLE, subject to the above points and to final drafting:**
- **amendments to CPR Part 14 Admissions** (further to those agreed at the May 2022 meeting) **and the revocation of PD 14;**
 - **suite of amendments in consequence,** to: PD 7C Money Claim Online; Part 12 Default Judgment; Part 20 Counterclaims and Other Additional Claims; Part 26 Case Management – Preliminary Stage; Part 40 Judgments, Orders, Sale of Land Etc; Part 45 Fixed Costs; Part 58 Commercial Court; Part 59 Circuit Commercial Court.
31. **Actions:** (i) In consultation with Kerr J and the Chair, Drafting Lawyers/Secretariat to consider position and explanatory lines for the JCSI in advance of laying the SI, if necessary (ii) In consultation with Trower J, final drafting to be cast in light of any consequential flows from the FRC reforms (iii) Drafting Lawyers/Secretariat to incorporate into the next mainstream (summer 2023) CPR Update.

Part 22 Statements of Truth: post-consultation proposals CPR(23)15

32. Kerr J explained that the proposed reforms were agreed in principle, subject to public consultation, at the December 2022 meeting.
33. The public consultation took place in January and closed on 24th February 2022. **THANKS** were expressed to the two respondents (the Forum of Insurance Lawyers (FOIL) and Linklaters); their comments were reviewed and discussed.
34. In essence, Part 22 is revised for gender neutrality and clarity. Mandatory provisions from the PD are also moved into the Rule where possible. Some amendments have been made for sense, such as the proposed reconstruction of rule 22.1 (documents to be verified by a statement of truth) in which 22.1(b) is deleted as being superfluous, and the provisions on who may sign a statement of truth and what that statement of truth should contain, are more clearly separated.
35. The response from FOIL, acknowledged that the reference to responses to further information was otiose. It is a statement of case, as defined in CPR Part 2.3. However, FOIL considers that the proposed reform will be confusing because the current text aligns with the wording in Part 18. The Chair suggested that a possible solution could be to update the signpost in Part 18 so that it reflects what the reformed Part 22 provides. It was **RESOLVED** to review this before the final drafting is cast.

36. FOIL raised a point regarding costs at r.22.2(4). This was text imported from the PD and, on reflection, is not considered worthy of retaining. Master Cook proposed to delete sub-rule (4) and this was **AGREED**.
37. The response from Linklaters generated a discussion regarding the text of the current table at paragraph 3.11 of PD 22, describing those who may sign a statement of truth. A discussion ensued as to the extent to which, if at all, the table and/or the text should be retained. Overall, it was considered that not all the information merited retention, for example the text concerning Trusts. However, it was understood that much of the other information was regularly used in practice. It was **RESOLVED** to retain the substance by way of slimmed down text, which can either be cast in the form of a table (as currently) or forming specific provisions within the retained PD (such as a reformed paragraph 3.11).
38. It was **RESOLVED to APPROVE IN PRINCIPLE, subject to the above points and to final drafting, the amendments to CPR Part 22 Statements of Truth and the supplementing Practice Direction.**
39. **Actions:** Kerr J to provide final drafting to Drafting Lawyers/Secretariat for the usual review with the aim of incorporation into the next mainstream (summer 2023) CPR Update.

Item 6 Civil Procedure (Amendment) Rules 2023

40. The Joint Committee on Statutory Instruments' (JCSI) recent report and the related memorandum response from the MoJ were duly **NOTED** and discussed.
41. Overall, the view was that many of the drafting points were, regrettably, caused by the legislative conversion from tracked change drafting into the format required for the SI itself, for which apologies were conveyed. The intention was to correct them as part of the next routine amending instrument. To that end, drafting proposals will return to the next available meeting. Alasdair Wallace (MoJ Legal) advised that the SI Registrar had agreed to the duplicated paragraph (which had inadvertently occurred during the process of fixing a technical issue with the template and had not appeared on the version signed by committee members) would be corrected by a re-print.
42. The Chair placed on record his appreciation for the hard work of MoJ drafting lawyers, observing that he considered the overall number of drafting slips to be low.
43. **Action:** MoJ Legal to prepare drafting proposals and revert when ready and no later than 9th June 2023 for incorporation into the summer SI.

Item 7 Flexible Deployment of Judges and First Tier Tribunal (Property Chamber) Proposed Pilot PD CPR(23)16

44. This follows the last meeting, when District Judge Clarke and Master Dagnall were to work with the Tribunal judiciary and others to finalise the drafting of a new PD for the introduction of a pilot scheme to allow a judge who is both a county court judge, and a judge of the First Tier Tribunal (FTT) Property Chamber, to deal with related matters from each jurisdiction at the same time.
45. DJ Clarke explained the degree of urgency from the FTT President due to upcoming training. However, further developments had occurred including points raised in consultation with the President and Deputy President of the Upper Tribunal (Lands Chamber). In addition, a number of practical issues also remained under discussion concerning, the scope of any wider consultation, implementation and evaluation. Accordingly, at this stage it was premature to provide a substantive report because

progress was ongoing. This report, and the current iteration of the draft pilot PD were duly **NOTED**.

46. **Actions:** (i) In consultation with the Chair, Judicial Office to convene a meeting to set out next steps and (ii) DJ Clarke to advise the Secretariat when the matter was ready to return for CPRC consideration.

Item 8 Any Other Business & Close

47. **Annual Open Meeting:** The Chair confirmed practical arrangements for the Annual Open Meeting on 12th May 2023. This year it will be conducted in a hybrid format, whereby the committee will meet in person, with non-secretariat officials and public observers attending remotely. By conducting the open meeting in this way, it meant the accommodation limitations did not restrict numbers and, therefore, it maximised transparency and provides the widest possible opportunity to observe the committee in session.

48. **Recent Practice Direction Updates:** It was **NOTED** from the Chair that the MR and Parliamentary Under Secretary of State for Justice had signed the following two PD Updates, for in-force this month:

- 154th PD Update regarding OCMC (PD 51R) and Damages (PD 51ZB) which includes amendments concerning (i) default judgments (ii) standard directions orders and (iii) a suite of revisions to ensure the IT and the rules are aligned. This having been approved in principle by the Damages and Money Claims Committee. **THANKS** were expressed to Katie Fowkes (MoJ Legal).
- 155th PD Update and RTA Small Claims PAP Update regarding the Official Injury Claims Portal (PD 27B). This being pursuant to the CPRC's resolution at the last meeting.

49. **Online Procedure Rule Committee (OPRC):** The Chair provided a brief oral update on the progress to establish the new, multi-jurisdictional (Civil, Family and Tribunals), OPRC. It was **NOTED** that the public appointments for the non-judicial members were subject to Ministerial approval.

C B POOLE
March 2023

Attendees:

Carl Poole, Rule Committee Secretary
Peter Clough, Secretariat
Master Dagnall, Chair, Lacuna Sub-Committee
Nicola Critchley, Civil Justice Council
Alasdair Wallace, Government Legal Department
Andrew Currans, Government Legal Department
Katie Fowkes, Government Legal Department.
Amrita Dhaliwal, Ministry of Justice
Andy Caton, Judicial Office
Terry McGuinness, Judicial Office
Faye Whates, HM Courts & Tribunals Service
Rosemary Rand, HM Courts & Tribunals Service
Robert Wright, Ministry of Justice (Item 4)
Andrew Parker (Item 4)
District Judge Simon Middleton (Item 4)
Thomas Haworth, HMCTS Legal (ACO) (Item 5)
Marcia Williams, Ministry of Justice