

Approved

Minutes of the Civil Procedure Rule Committee

Friday 6th October 2023, conducted in a full remote format via video conference.

Members attending

Lord Justice Birss, Deputy Head of Civil Justice (Chair)
Mr Justice Trower
Senior Master Cook
His Honour Judge Jarman KC (joining from the Welsh Legal Conference)
His Honour Judge Bird
District Judge Clarke
District Judge Johnson
Isabel Hitching KC
David Marshall
Ben Roe
Ian Curtis-Nye
Elisabetta Sciallis
Virginia Jones

Apologies

Members: Dr Anja Lansbergen-Mills (maternity leave); Tom Montagu-Smith KC (unexpected professional commitment). Officials: Rosemary Rand, HM Courts & Tribunals Service (annual leave); William Vineall, Department of Health and Social Care (annual leave) (Item 4).

Item 1 Welcome and Introductory Remarks

1. The Chair was pleased to make the following opening remarks:
2. **New judicial member of the committee, District Judge Johnson**, was duly welcomed to her first meeting. DJ Johnson sits at the County Court at Liverpool and hears Chancery, Insolvency and general civil work (including clinical negligence and industrial disease); she is a contributor to the Civil Court Service (the Brown Book) and a former Associate Professor at the University of Law in Chester.
3. **Senior Master of the King's Bench Division and King's Remembrancer.** Congratulations were conveyed to Master Cook following his appointment as Senior Master, which took effect from 18th September 2023. In due course, the usual expression of interest exercise will take place to appoint a new Master member of the committee in succession.

Item 2

4. **Minutes:** the minutes of the last meeting, on 7th July 2023, were **AGREED**.
5. **Matters arising not covered by later items:** The following was duly **NOTED** from the Chair:
6. **Matter arising from last meeting: Court Records Sub-Committee (AL(22)121) (Item 2 at 7th July meeting).** A typographical error in the sub-committee's approved terms of reference has been corrected by the sub-committee. The reference to, "a Part 19 response to a request for further information..." should have been "Part 18".

7. **Matter arising from 7th October 2022 meeting: Lacuna Sub-Committee business (LSC2022/13) on whether CPR 13.3 (applications to set aside default judgments) should involve a Denton approach).** This item of Lacuna Sub-Committee business has now been addressed by authoritative judgment. The possible lacuna was to consider whether CPR 13.3 (applications to set aside default judgments) should involve a Denton approach. The Court of Appeal has authoritatively decided both the rules construction and appropriate policy in the FXF case <https://caselaw.nationalarchives.gov.uk/ewca/civ/2023/891>. However, Master Dagnall suggested that, in view of the very considerable number of applications, especially in the County Court, to set aside default judgments which are made, often after, and triggered by, the initiation of some enforcement procedure and where claimants may seek to use the FXF decision to resist applications more in the future, that this aspect be considered in any future review of the N9 response pack, so as to emphasise it to defendants. **Action:** Secretariat to add the N9 response pack to the Forms Sub-Committee work plan for consideration when resources allow.
8. **Action log items not covered by later items:** the Action Log was duly **NOTED** along with the following updates:
9. **AL(23)192 - PD40E and Rubics (Varsha Gohil -v- Bhadresh Babulal Gohil & Others [2023] EWHC 1567 (Fam)).** A post scriptum note under item 8 in the July minutes has been inserted to the effect that when this judgment was considered by the Criminal Procedure Rule Committee on 14th July, it was noted that the (then) Lord Chief Justice was minded to review the provision made by practice directions for civil, family and criminal cases, with the other Heads of Division, rather than asking each procedure rule committee to devise its own provision.
10. **AL(23)182 - Domestic Abuse Protection Orders (DAPO) pilot PD.** The draft pilot PD is reaching its near final draft form. It now reflects the adjustments made by the DAPO Cross-Jurisdictional Working Group, as a result of the consultation which concluded in the summer and is due before the Family Procedure Rule Committee soon. Thereafter the draft civil provisions will be considered by the CPRC. **Action:** Secretariat to provisionally programme in time for the December meeting.

Item 3 Extending Fixed Recoverable Costs (FRC): update CPR(23)41

11. Robert Wright (Ministry of Justice) was welcomed to the meeting.
12. The Chair provided some opening remarks, acknowledging that the extended FRC scheme, which came into force on 1st October 2023, represents a very significant piece of work. It is always possible with reforms of such scale that tweaks and further changes are required. However, the principle is sound. Two recent events were explained and **NOTED:** a Law Gazette article reporting on an address made to the Chair when he attended a Law Society Conference and a practical drafting point identified during a Judicial College training course he observed. It was **FURTHER NOTED** that the secretariat had also received correspondence on aspects of the new rules, which were being carefully considered by the FRC Costs Sub-Committee.
13. Mr Wright provided an update on developments in response to the various issues which had arisen following the publication of the new rules in April and May and on which MoJ had published a consultation which ran from 21st July to 8th September 2023. MoJ officials are now considering the way forward in the light of the responses and are working closely with the Costs Sub-Committee to prepare draft amendments for consideration as part of the next mainstream CPR Update cycle in April 2024.
14. Mr Justice Trower explained that the Costs Sub-Committee is considering drafting amendments covering the issues raised in the consultation, namely:

- fixing costs on assessment;
 - fixing costs in Part 8 claims;
 - inquests costs / restoration proceedings;
 - the recoverability of advocacy fees in cases that are (a) settled late and (b) vacated;
 - the timing for the admission of clinical negligence claims to be allocated to the intermediate track (at 26.9(10)(b)).
15. The sub-committee is also considering some other issues that have been raised outside of the consultation, including for example:
- the wording around contractual entitlement to costs at CPR 45.1(3);
 - the length of expert reports;
 - a drafting point at CPR 28.12, as raised during the Judicial College training. This concerns case management conferences in the new intermediate track and was discussed.
16. Notwithstanding the ongoing work on these points of detail and thus a formal decision on any outstanding point cannot happen before that important work is complete and formal rule changes then received the necessary ministerial and Parliamentary approvals, the Chair felt there was value in asking the committee if it felt able to express a preliminary view on the particular CPR 28.12 point, conscious that there was judicial training actively ongoing. The Chair referred to a letter and proposed drafting solution provided by former CPRC member and retired judge, Chris Lethem, who is delivering training to judges. It highlighted an apparent drafting slip. The rule currently reads, “The court shall fix a case management conference (CMC) and may fix a pre-trial review”. The committee’s view is that the “shall” should be “may” and this was duly **NOTED**.
17. It was **AGREED** that it would be helpful if this preliminary, non-binding view, that CMCs in the intermediate track should be discretionary, was relayed back to Chris Lethem for the purposes of the training.
18. It was **FURTHER NOTED** that:
- a consultation response will be published in due course, once the way forward is confirmed;
 - MoJ is considering the best way forward in respect of claims against public authorities, (following discussion on this point at the 3rd March and 31st March 2023 CPRC meetings) with the aim to present a draft rule for approval in due course;
 - a Judicial Review and one Letter Before Action have been filed.
19. **Actions:** (i) Chair to relay views re drafting of CPR 28.12 (ii) Secretariat to provisionally schedule in time for the November and December meetings.

Item 4 Fixed Recoverable Costs (FRC) in Clinical Negligence CPR(23)42

20. Laurent Viac (Department of Health and Social Care (DHSC)) and Helen Keefe (DHSC Legal) were welcomed to the meeting.
21. This matter follows the introductory item at the last meeting on 7th July, when it was agreed that some preliminary work be undertaken, out-of-committee. The Chair expressed **THANKS** to all involved and provided some introductory remarks.
22. Mr Viac reiterated **THANKS** to committee members for their valuable input and time over the summer. It had been a very productive experience, which has helped narrow the issues. However, the need to continue this work was imperative, to ensure the drafting proposals were carefully scrutinised.
23. It was explained that, in summary, that the proposed scheme solely concerns pre-issue costs and processes for clinical negligence claims with a value at settlement, or following judgment, of between £1,501 and £25,000. It does not extend into the post-issue phase, or apply to higher value claims, and there is no intent to extend the scheme in these ways. The fixed cost levels and bolt-on amount for protected party and child claims have been increased, in part to ensure that access to justice safeguards are strengthened. Arrangements for agreeing and conducting neutral evaluations, modifications to proposed sanctions, and a range of modest process changes, to improve the workability of the scheme, are also proposed.
24. A discussion ensued, which centred on the following points: why the reforms are referred to as purely clinical negligence FRC, rather than making clear that the proposals include an early neutral evaluation element, which is quite distinct; how the proposals relate to the existing FRC scheme, namely the extent to which it is different and that it appears wider than FRC alone; the difference it makes when the figures are applied in practice; which costs regime should take precedence in various scenarios when claims continue into litigation and sanctions. David Marshall and Senior Master Cook also gave some perspectives from their experience on the original Civil Justice Council Working Group. This highlighted such additional issues as vulnerability and expert evidence, as being particularly important.
25. It was **NOTED** that:
- A serious risk exists to achieving the desired timescale for approval (at the December meeting for inclusion in the next mainstream CPR Update as part of the April 2024 common-commencement cycle): officials were urged to consider the timetable in the light of the comments made and the context of possible further consultation being necessary, liaison with HM Courts and Tribunals Service on the operational implications and the benefit of early notice to users, conscious that draft amendments are not currently in a suitable state for publication;
 - a mini-consultation is currently running (until 27th October) in regards to disbursements. DHSC will report back on that in due course;
 - DHSC have set out (and published in September 2023) the policy positions following their consultation on lower damages clinical negligence claims (<https://www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims>);
 - Government has committing to review various aspects of the scheme within three years of commencement.

26. It was **RESOLVED to establish a sub-committee**, comprising Senior Master Cook (for as long as he feels able to participate, given the additional demands of his new role), District Judge Johnson, David Marshall, Ian Curtis-Nye and possibly one other member to be co-opted out-of-committee.
27. **Actions:** (i) In consultation with the Secretariat, DHSC to convene the inaugural meeting of the sub-committee (ii) the Secretariat to provisionally schedule in time for the November and December meetings.

Item 5 Strategic Lawsuits Against Public Participation (SLAPPS) CPR(23)43

28. Rachel Powell (Ministry of Justice) was welcomed to the meeting. An overview of the background and early policy thinking as regards the anticipated CPR implications were explained, in the event that the Economic Crime and Corporate Transparency Bill (ECCTB) ("the Bill") receives Royal Assent.
29. SLAPPS are actions typically brought by corporations or individuals with the intention of harassing, intimidating and financially or psychologically exhausting opponents via improper use of the legal system. They are typically framed as defamation cases brought by wealthy individuals or corporations to evade scrutiny in the public interest.
30. The Bill covers SLAPPs that relate to economic crime and provides for a statutory definition of a SLAPP. In due course, it will require the CPRC to make rules that:
- create an early dismissal mechanism where a claim has been deemed by the court to be a SLAPP and the claimant cannot prove that their claim is more likely than not to succeed; the early dismissal mechanism differs from existing strike out procedures in CPR Part 3; and
 - to introduce costs protection rules which can stop a court ordering a defendant to pay the claimant's costs in a SLAPPs case, except where, in the court's view, misconduct of the defendant in relation to the claim justifies such an order.
31. Whilst the ECCTB will not cover every conceivable SLAPP, due to the scope of the Bill, Government has formed a SLAPPs-focused taskforce within the framework of the National Committee for the Safety of Journalists, bringing together government and key stakeholders to work on a non-legislative response to SLAPPs. The taskforce is developing measures to coordinate a response to SLAPPs beyond the issues that arise in litigation alone that will complement the legislation, for example guidance to enable understanding of when an action is a SLAPP and the support available. The UK is also actively engaging with the Council of Europe to support international efforts to tackle SLAPPs.
32. An illustration of different claim scenarios for SLAPP claims and policy officials' early thinking on the points at which they expect existing Rules to apply, or new Rules to be required was **NOTED**, as was the expectation that further consultation and analysis of options will be undertaken in due course.
33. It was **RESOLVED in principle**, to form a sub-committee comprising at least one High Court Judge, a judge with experience of the Media and Communications (MAC) List, a High Court Master (possibly Master Dagnall) and co-opted practitioner representation.
34. **Actions:** (i) CPRC members wishing to volunteer to join the sub-committee to notify the Chair/Secretariat by 20th October 2023 (ii) Chair to consult the judge in charge of the MAC List (iii) MoJ to propose co-optee membership to the Secretariat for consultation with the Chair at the earliest opportunity and (iv) to keep the Secretariat apprised of developments as to a timetable for convening the sub-committee and for general programming purposes.

Item 6 Judicial Review (JR) CPR(23)44

35. Mr Justice Swift (Judge in charge of the Administrative Court) and Liam Walsh (Ministry of Justice) were welcomed to the meeting.
36. **THANKS** were conveyed to His Honour Judge Jarman KC and Swift J for their invaluable input in formulating the proposed amendments. It was also **NOTED** that the President of the King's Bench Division had been consulted.
37. It was explained that the topic flowed from a recommendation by the Independent Review of Administrative Law (Chaired by Lord Faulks KC) and the MoJ consultation which followed, within which, 80% of respondents supported the proposal. The matter was last before the CPRC in May 2023 when it was agreed, in principle, to amend the CPR to allow for a provision for a JR claimant to file a reply to the defendant's acknowledgement of service and that any such reply should be filed within a seven-day deadline and limited to three-pages in length. However, in developing the final draft proposal, a page limit of five-pages has been adopted and this was **AGREED**.
38. Swift J summarised the position, concluding that CPR amendments are relatively modest, observing that at present, many claimants do already make applications. The proposed reforms should therefore assist by standardising and regulating the practice with appropriately pragmatic measures and would not slow down proceedings in any significant way.
39. A discussion ensued. HHJ Jarman highlighted that the proposed PD amendment makes clear that a reply is not required in every case. Swift J added that if a reply is made which the court considers to be unnecessary, then the court may make an order as to sanction/s in appropriate cases.
40. District Judge Clarke raised whether the drafting of the proposed new paragraph 7.2 in PD 54A should be cast as, "unreasonably" rather than, "unnecessarily". However, no change was made.
41. It was **NOTED** that:
- a new court form is not required, because a reply is not the equivalent of either a claim form (form N461) or an acknowledgement of service (form N462), and since the rules will permit a reply to be filed, there will be no need for an application notice (form N244). Experience in practice is that most parties are, at this stage, represented, but even where there are litigants in person, most are now producing documents with numbered paragraphs and in a format that does not suggest the need for a new bespoke pro-forma to be produced;
 - the Administrative Court Guide will be revised in consequence, as part of the next annual update in the autumn 2024;
 - no further amendments to guidance have been identified.
42. It was **RESOLVED to approve**:
- the amendment to CPR 54, by way of the introduction of new rule 54.8A (reply to acknowledgement of service) as drafted;
 - the introduction of a new provision at paragraph 7 of PD 54A, in consequence, as well as a like amendment in PD 54D in respect of the Planning Court;

- a suite of further minor amendments to PD 54A and the paragraph numbering of CPR 54.8(4)(a), including to replace, “practice form” with, “approved form” in CPR 54.8(1). This suite of additional amendments are unrelated to the proposal to permit a right of reply but serve as general housekeeping and linguistic simplification revisions.

43. **Actions:** Drafting Lawyers and Secretariat to incorporate into the next mainstream CPR Update, due to be published in the New Year as part of the April 2024 common-commencement cycle, subject to Ministerial approval.

Item 7 PD57AC Trial Witness Statements in the Business and Property Courts CPR(23)45

44. Chief Chancery Master Shuman was welcomed to the meeting.

45. Mr Justice Trower set out the background. It was explained that the proposed amendment was made by the practitioner members of the Pensions Litigation Court Users Committee, of which he and the Chief Chancery Master are both members. The proposal is supported by them both as well as by the Chancellor of the High Court. It is considered to facilitate the work of the courts and assist practitioners and their clients in this specialist area of practice.

46. The Chief Chancery Master provided some workload data and practical implications, explaining that although the diet of work is relatively small in volume, its inclusion within PD 57AC (Trial Witness Statements in the Business and Property Courts) is having a significant impact in practice. Pension rectification claims differ from contractual rectification claims where typically all parties to the contract have historic evidence and knowledge of what was intended and are parties to the case.

47. Other specialist areas of work, such rectification of wills, or claims relating to the administration of estates of deceased persons or trusts, are excluded from being governed by PD 57AC. This suggests that pension rectification claims was an oversight and should not have been captured by the PD. An amendment to the list of exceptions in the PD is considered to be universally welcomed by practitioners, because it will provide certainty over this issue, avoid the potential difficulties over duplication of witness statements and reduce unnecessary costs on the sponsoring employer, scheme or otherwise. Under the proposal, all rectification claims in relation to pension schemes, whether brought by Part 7 or Part 8 and whether opposed or unopposed, would be exempt from the requirements of PD 57AC.

48. It was **RESOLVED** to amend paragraph 1.3 of PD 57AC to add a new paragraph 1.3(10):

1.3 This Practice Direction does not apply to the following proceedings, unless the court at any stage directs that it is to apply:

.....

“(10) proceedings including a claim for the rectification of pension scheme deeds, rules or other governing documents.”

49. **Actions:** Drafting lawyers and Secretariat to include in the next mainstream CPR Update as part of the April 2024 common-commencement cycle.

Item 8 Rail Passenger Services Public Service Obligation Contracts (bringing EU Regulation 1370/2007 into domestic law) CPR(23)46

50. Nigel Wheat (Department for Transport (DfT)) was welcomed to the meeting, along with Susan Preston (Government Legal Department).

51. It was explained that the government intend to introduce the Public Service Obligations in Transport Regulations 2023, to reinstate provisions contained in Regulation (EC) No 1370/2007 (“R1370”), which concern the award of public service obligation (“PSO”) contracts. The Regulations also introduce into domestic law a limitation period for challenge to a decision or award made under the Regulations. The provision reduces the limitation period for awards to one month for claims. This includes judicial review challenges, as well as any private law claims for breach. The reform aligns with the time limits in the mainstream subsidy and procurement rules and the Subsidy Controls Act. In consequence, a proposed amendment to CPR 54.5 (time limit for filing a claim form) is envisaged. However, the draft provided required a modest revision following JCSI comments, this being that the reference to Reg.24 should now just refer to Reg. 24(1), rather than to Reg. (1) and (2). This is because Reg.24(2) was removed and this was duly **NOTED**.
52. Government consultation has demonstrated broad contentment with the proposal and no specific objections have been received. A discussion ensued. Trower J raised a moderate concern as to necessity and urged consultation with the Administrative Court to gain a sense of the need to include such an express provision. Given the number of potential categories of case there was a need to consider the interests of simplicity and consistency. It was **FURTHER NOTED** that DfT officials recognised that, technically, CPR 54.5 para (3), could be relied upon, because it provides that CPR 54.5 does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review. However, they felt that, for clarity and so as not to avoid prejudicing potential claimants, it would be prudent to update CPR 54.5 to reflect the reduction in time limit.
53. It was **AGREED** that before the matter is considered substantively by the CPRC, focused consultation with the judiciary should take place.
54. **Actions:** DfT officials to conduct an internal focused consultation (with the judiciary/HMCTS and MoJ) and keep the Secretariat apprised for programming purposes, so that the matter can be scheduled to return to the CPRC as/when necessary.

Item 9 PD52D Statutory Appeals and Appeals subject to special provision: time limit for appealing to the Court of Appeal from the Investigatory Powers Tribunal CPR(23)47

55. The Chair explained that this matter has been raised and prepared by Civil Appeals Office Master Sally Meacher, to whom **THANKS** were noted.
56. The proposed amendments intend to address a lacuna concerning the interface between Tribunals and the Court of Appeal, which needs to be addressed. Currently no specific provision is given for a time limit for appealing to the Court of Appeal from the Investigatory Powers Tribunal and this is causing issues in practice.
57. It was explained that the drafted addition to PD 52D is similar to paragraph 17.1 of that PD in relation to appeals from the Special Immigration Appeals Commission.
58. Both the Vice President of the Court of Appeal and Lord Justice Singh, who is the relevant lead judge for these cases, support this proposal. No concerns have been raised by MoJ Policy (Civil or Tribunals), HMCTS, or MoJ Legal and this was duly **NOTED**.
59. It was **RESOLVED** to amend paragraph PD 52D (Statutory Appeals and Appeals subject to special provision) to add a new paragraph as drafted:

“Appeal from Investigatory Powers Tribunal”

(1) An application for leave to appeal to the Court of Appeal must first be made to the Investigatory Powers Tribunal pursuant to rule 16(1) of the Investigatory Powers Tribunal Rules 2018.

(2) The appellant's notice must be filed at the Court of Appeal within 21 days of the date on which the Investigatory Powers Tribunal's decision granting or refusing leave to appeal to the Court of Appeal is given."

60. **Actions:** Drafting lawyers and Secretariat to include in the next mainstream CPR Update as part of the April 2024 common-commencement cycle.

Item 10 Mediation in Small Claims CPR(23)48 and CPR(23)49

61. Mr Justice Henshaw (co-opted Chair of the sub-committee) together with Kim Wager (Ministry of Justice) and Dee Hepher-Wallace (HM Courts and Tribunals Service (HMCTS)) were welcomed to the meeting. **THANKS** were also conveyed to DJ Clarke and Ben Roe as members of the sub-committee.

62. An overview of the policy objectives and proposed implementation plans provided context to the sub-committee's work and was duly **NOTED**.

63. The policy design followed an MoJ public consultation in 2022 (*Increasing the use of mediation in the civil justice system*), the Government's Call for Evidence on Dispute Resolution in 2021 and two reports by the Civil Justice Council.

64. The policy intention is that all defended small claims (up to £10,000) are referred for mediation before the claim can progress to a hearing. Mediation thus becomes a standard, integrated step, in the civil justice process. However, the pilot scheme is intended to commence initially in a format limited to all new specified money small claims. This is understood to represent around 80% of small claims. The aim remains to integrate mediation in all small claims, eventually.

65. Mediation services will be provided by HMCTS' Small Claims Mediation Service. The service is to be expanded and enhanced. No obligation exists to settle the case at the mediation appointment (a free, one-hour, telephone appointment) and the mediation process should not result in any material delay in the progress of the case towards a final hearing, if no settlement occurs. Litigation resumes as usual where mediation was unsuccessful or where one or both parties refused to attend mediation.

66. A proposed draft pilot Practice Direction was presented and discussed in detail. In summary, the points ventilated were as follows:

- Clarity of scope was important. Road traffic accident and personal injury claims, possession claims (in so far as they can proceed on the small claims track) and claims for injunctions are excluded from the pilot, but the scope of what constitutes a specified money claim required further consideration. Master Dagnall observed that there is a current debate about whether a claim for a "*specified sum of money*" includes a claim that is in substance for general damages, which the court would normally have to assess, but where the claimant has in fact put a monetary value on their claim; the distinction being important in the context of default judgments. Also, whether both paper claims and claims made under the online civil money claims schemes are captured by the pilot. Once the detail as to scope is settled, it may also assist if para 5 of the draft PD was re-drafted to provide for the types of claims to which the PD does apply, rather than setting out those types excluded from it. Subject to a decision as to scope, there may also be a need to review the pilot PDs governing the online schemes and this was duly **NOTED**, as was the desire to avoid unintended consequences.

- The position regarding sanctions has been very carefully considered. On balance, the view is that, for the time being at least, the system should provide for imposition of any sanctions only at the final hearing stage, whilst recognising that in practice these are likely to be confined to costs sanctions. Such sanctions might, for example, be linked to hearing fees or the estimated wasted costs of an ineffective mediation appointment. The position will be reviewed if, during the evaluation of the pilot, it appears that firmer sanctions may be necessary. Virginia Jones drew attention to the use of the word, “attended” in the context of a court considering the appropriateness of any sanction having regard to whether the parties attended mediation. An alternative of “participate” was raised. Ben Roe explained that Article 6 considerations had been applied and that each drafting option attracted different levels of obligation. The issue of how to determine what constitutes, “participation” is also valid. The sub-committee had, therefore, settled on “attended” and this was duly **NOTED**.
- Duration of the pilot scheme is to be two years (unless varied). The precise in-force date to be determined out-of-committee and with a view to be settled in time for inclusion in the next mainstream CPR Update as part of the April 2024 in-force cycle.

67. The Chair was content to discuss the scope of claims intended to be captured by the pilot, with the sub-committee and officials, out-of-committee; Elisabetta Sciallis also offered to participate, which was **NOTED with thanks**.

68. It was **RESOLVED to approve in principle**, subject to the above points and final drafting, the Practice Direction, “Small Claims Track Automatic Referral to Mediation Pilot Scheme”.

69. **Actions:** (i) In consultation with the Chair (a) the sub-committee to finalise drafting as to scope and any other consequential (b) in-force date to be settled no later than the December CPRC meeting in order to secure a slot in the next mainstream CPR Update (ii) MoJ to keep the Secretariat apprised of developments and to provide any papers by 17th November in the event that the matter needs to return to the December CPRC meeting.

Item 11 Section 2(7) Sub-Committee

70. This topic comprises two elements:

Future work plan of the sub-committee: second phase CPR(23)50

71. The Chair commended the sub-committee for its work over the summer.

72. Isabel Hitching KC presented the matter, expressing **THANKS** to His Honour Judge Bird and Ben Roe for their very helpful contributions and to MoJ Legal for their continued input at pace.

73. It was explained that the period of reflection had been very useful, an opportunity to take stock of the project date, look back at the origins of the work, what had been achieved and to refine the outline plan (presented at the July 2023 meeting) in order to draft a programme for the next phase of the project. In essence, the principles of the s.2(7) initiative are unchanged, to provide greater brevity, clarity and simplicity across the CPR. However, the sub-committee is conscious of the need to make best use of time and resources and for the project to be of genuine value to court users. The phase two plan represents a re-energised aim to ensure a streamlined process with maximum

engagement at optimal time, including engagement with the Joint Committee on Statutory Instruments and ensuring engagement of third parties during the consultation.

74. The discussion confirmed the direction of travel and drafting protocols, namely that the rules need to be clear and completely stated, but should not contain what is in effect commentary on how they are to be interpreted or applied. In principle, benefit was also seen from gaining some wider engagement in relation to some Parts (for example Part 35 (experts and assessors) where there are rules, PDs, specialist court guides and other guidance. The CPRC's focus is only on the rules and PDs. However, it may be helpful for the sub-committee to be in dialogue with specialist courts and others (such as the Civil Justice Council) to discuss their guidance, to help ensure clear and consistent information is available to court users. Scope for the possible future use of artificial intelligence (AI) was also briefly mentioned; Senior Master Cook will endeavour to make some external enquiries as to what/how AI is used in the publishing sector.

75. It was **RESOLVED** to:

- approve the sub-committee's phase two work plan, which has been formed by triaging the remaining CPR Parts within the project and moves away from a programme which reviews the Parts chronologically;
- commence a review of Part 42 (Change of Solicitor) with a view to presenting revised text to the December meeting;
- initiate preliminary wider engagement with specialist courts (et al). The initial focus being in relation to Parts 35 (Experts and Assessors) and 40 (Judgments, Orders and Sales of Land etc) before settling on a programme timetable for a review of those Parts;
- a review of Part 34 (Witnesses, Depositions and Evidence for Foreign Courts), is subject to the Service sub-committee considering the most useful timing of such a review;
- once a timetable has been drawn up for the above Parts, consideration can be given to when the review of the following Parts is undertaken:
 - Part 5 (Court Documents) (this is, in part, dependent upon the recommendations of the multi-jurisdictional working group chaired by Lord Justice Bean which is considering the UKSC judgment in *Cape Holdings - v- Dring*) (mentioned under Item 2 above);
 - Part 11 (Disputing the Court's Jurisdiction);
 - Part 2 (Application and Interpretation of the Rules);
 - Part 3 (The Court's Case Management Powers).

76. Ian Curtis-Nye felt that it would be beneficial for wider understanding of the project, if the sub-committee was renamed. Whilst it was important to acknowledge the CPRC's statutory obligation under s.2(7) of the Civil Procedure Act 1997, which states, "*The Civil Procedure Rule Committee must, when making Civil Procedure Rules, try to make rules which are both simple and simply expressed.*" This may be more readily obvious, particularly to lay users, if a name change was introduced. This garnered support, whereupon it was **RESOLVED** to refer to the sub-committee as the "**Simplification Sub-Committee**".

77. **Actions:** (i) SM Cook to make enquires (with the Whitebook publishers) regarding use of AI (ii) Secretariat to provisionally schedule time in for November and December (iii) A provisional timetable be prepared for the review of Part 34 in consultation with the Service Sub-Committee.

Part 25 (Interim Remedies and Security for Costs) proposals: pre-consultation CPR(23)51

78. Ben Roe presented the matter. It was explained that the first iteration of the proposed reforms were considered at the last meeting on 7th July 2023. The drafting has been revised in light of the comments made at and after the July meeting.

79. The proposed new CPR Part 25, in effect, revokes the two supplementing Practice Directions, PD 25A and PD 25B. Mr Roe reiterated that the structure of the current rule and PDs is complex and not particularly logical. A considerable amount of re-ordering has, therefore, taken place, into what is intended to be a clearer structure. Unfortunately, this makes presenting the reforms in tracked change format difficult to follow. A clean draft will, therefore, be provided, along with a destination table to showing how the current rule and PDs have mapped to the new.

80. Various drafting notes were contained within the body of the revised text and each was discussed in detail. In relation to the proposed new rule 25.11 (injunctions against third parties), drafting lawyers raised whether and the word, “promptly”, was sufficiently certain in rule drafting terms. The discussion ventilated the challenge of drafting where the context of specific circumstances in practice varied and sometimes immediate action was required. The phrase, “forthwith” is still used when framing orders, is understood in practice and on which there is caselaw. It was **AGREED** to test this point as part of the consultation exercise. Drafting lawyers also asked whether “responsible employee” (as used in draft rule 25.18) should be a defined term, which was discussed. An important concept was whether that individual had the authority to act. It was **AGREED** that the preference was to consider incorporating the text, “relevant authority” into the drafting and consider the list in PD22 of those eligible to sign a statement of truth, reverting to the next meeting if the matter cannot be settled out-of-committee prior to consultation.

81. It was **NOTED** that:

- five forms have/or are being reviewed to check for any amendments in consequence of the reforms. The forms are: the N244 (Application notice); N16A (Application for injunction); N361 (Notice of application for relief in pending action); PF43 (Application for security for costs) and PF44 (Order for security for costs);
- the sub-committee’s intention is to supply copies of the drafting proposals to the Joint Committee on Statutory Instruments (JCSI) as part of the consultation process as a means of early engagement.

82. It was **RESOLVED** to:

- include in the consultation some explanatory text alongside the proposed new CPR 25.29 (conditions to be satisfied) which reflects the current CPR 25.13(2) but with a proposed amendment to sub-section (a) regarding the distinction between 2005 Hague Convention states and non-Hague states, given that the Convention will only assist with enforcement where an exclusive jurisdiction already exists (the origins of which flow from the Lacuna Sub-Committee’s report (LSC2023/03) to the June meeting);
- a destination table to be provided with the consultation material to show how the current rule and PDs map over into the new;

- in principle, the two draft orders (Freezing Injunction and Model Search Order) which have been produced using the existing text in the annex of PD 25A and are to become standalone prescribed forms, may be published as part of the consultation following liaison with the judiciary;
- form changes to be drafted in consultation with the Forms Sub-Committee, out-of-committee;
- to **APPROVE IN PRINCIPLE, subject to** (i) the above points (ii) any further revision to CPR 25.9 concerning penal notices (an item of business due to be conducted at the 3rd November CPRC meeting) and to final drafting, the proposed reformed CPR Part 25 and proposed revocation of the supplementing practice directions (PD 25A and PD 25B) and which is also **FIT FOR CONSULTATION**, using the (online) rolling consultation facility.

83. **Actions:** (i) Ben Roe to mark-up proposed amendments to forms PF43 and PF44 (ii) Trower J to liaise with Foxton J (et al) as to the proposed new forms (iii) Chair to consult the PKBD as to the proposed new forms (iv) Secretariat to provisionally schedule time at the November meeting, if needed (v) Ben Roe to provide perfected final proposed drafting (subject to any further related resolutions at the November meeting) to the Secretariat to form the consultation material (vi) Isabel Hitching KC, in consultation with the Secretariat, to signpost the consultation material to/provide early notice to, the JCSI (vii) Secretariat to facilitate publication as part of the rolling consultation facility, as soon as practicable.

Item 12 Any other business & possible items for future business

84. The following items were duly **NOTED** from the Chair:

85. **Future Committee Business.** Three items of business were provisionally added to the programme for November meeting: (i) Penal Notices – a proposed amendment for clarificatory purposes in response to the judgment in Taray Brokering [2022] EWHC 2958 (Ch) and (ii) Appeals to the Court of Appeal – a suite of proposed amendments to PD52C to bring it up to date in relation to e-filing and other modest revisions. This item reiterates the need for a holistic review of PD51O Electronic Pilot Scheme which is currently in operation until 6th April 2024. **Action:** Senior Master Cook to check as to when PD51O will be ready to return to the CPRC and to advise the Secretariat for programming purposes (iii) Shorter Trials Scheme Costs Cap in Patent Cases – a proposed draft pilot PD flowing from the Civil Justice Council’s Report on Costs has been provided to the Secretariat, together with supportive correspondence from the Intellectual Property Court User Committee.

86. **Civil Justice Council’s Final Report on Pre-Action Protocols.** The report was published on 21st August and makes various recommendations, which will require policy and CPRC consideration. **Action:** Volunteer sought to conduct a preliminary review of the recommendations and report back in due course. Please notify the Chair/Secretary by 20th October. The report can be read online at <https://www.judiciary.uk/guidance-and-resources/civil-justice-council-publishes-final-report-on-pre-action-protocols/>.

87. **Member Appraisals.** The annual appraisals have been completed over the summer. Members can request a copy via Andrew Caton in Judicial Office if desired, as per normal.

88. **Focused Consultation.** DJ Clarke and Master Dagnall were thanked for their extensive work in drafting the consultation material and proposed amendments regarding references to judicial titles in the CPR (flowing from the 31st March 2023 meeting). The material is approved, subject to settling the consultation title. This can be done out of committee, in consultation with the Chair. Thereafter it will be circulated, inviting comments from a limited (internal) list of consultees. **Action:** DJ Clarke, Master Dagnall and the Secretariat.

89. **CPR Online Migration.** The CPR online is currently available via the *Justice* web pages <https://www.justice.gov.uk/courts/procedure-rules/civil>. The previous plan (in 2021) to migrate the CPR to Gov.uk was suspended (the minutes of 7th October 2022, paragraph 95 refer). An alternative to hosting the CPR on Gov.uk is now being explored by MoJ Digital and thus there is a desire to reconvene the joint Civil and Family Working Group. Ian Curtis-Nye and Ben Roe were **APPOINTED** to the working group. **Action:** Chair to consider other membership vacancies with the Secretariat, out-of-committee.

90. **Future Reforms to the CPR.** The Chair invited members to consider proposals for reforms to the CPR which are wider than the current simplification project (discussed under item 11 above). Any forthcoming ideas can then be considered as part of the committee's future work plans.

C B POOLE
October 2023

Attendees:

Carl Poole, Rule Committee Secretary
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
Dr Terry McGuinness, Judicial Office
Robert Wright, Ministry of Justice (Item 3 and Item 4)
Laurent Viac, Department of Health and Social Care (Item 4)
Stephen Rippon, Department of Health and Social Care (Item 4)
Helen Keefe, Department of Health and Social Care (Legal) (Item 4)
Rachel Powell, Ministry of Justice (Item 5)
Marc De-Souza, Government Legal Department (Item 5)
Liam Walsh, Ministry of Justice (Item 6)
Mr Justice Swift (Item 6)
Chief Chancery Master Shuman (Item 7)
Nigel Wheat, Department for Transport (Item 8)
Susan Preston, Government Legal Department (Item 8)
Kim Wager, Ministry of Justice, (Item 10)
Dee Hepher-Wallace, HM Courts and Tribunals Service (Item 10)
Mr Justice Henshaw (Item 10)