

Approved

Minutes of the Civil Procedure Rule Committee

Friday 3rd November 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, Deputy Head of Civil Justice (Chair)
Mr Justice Trower
Senior Master Cook
His Honour Judge Jarman KC
His Honour Judge Bird
District Judge Johnson
Isabel Hitching KC (from Item 3 onwards)
Tom Montagu-Smith KC
David Marshall
Ben Roe
Ian Curtis-Nye
Elisabetta Sciallis

Apologies

District Judge Clarke; Dr Anja Lansbergen-Mills; Virginia Jones.

Item 1 Welcome and Introductory Remarks

1. The Chair made some brief introductory remarks, welcoming everyone in attendance, whether remotely or in person.

Item 2

2. **Minutes:** the minutes of the last meeting, on 6th October 2023, were **AGREED**.
3. **Matters arising not covered by later items.** The following was duly **NOTED** from the Chair:
4. **Lacuna Sub-Committee Chair (AL(22)123):** District Judge Clarke will succeed Master Dagnall as Chair of the Lacuna Sub-Committee. This is anticipated to take effect from January 2024. An out-of-committee meeting will take place to finalise handover arrangements.
5. **Focused consultation on judicial references in the CPR (AL(23)154):** The, internal, consultation was distributed to the consultee list on 20th October 2023 and closes on 1st December 2023.
6. **CPR migration AL(23)214:** Following the update provided at the last meeting (see paragraph 89 of the minutes of 6th October meeting). The Chair provided an update on the productive meeting he, Messrs Roe and Curtis-Nye had attended with officials from the secretariat and MoJ Digital regarding the plans for a like for like replacement of the justice.gov.uk rules pages (for CPR and FPR) and aspirations for subsequent phases of improvements. A joint civil and family working group is to be reconvened under the chairmanship of Mr Justice Pepperall, to whom, **THANKS**, were noted. CPRC members of the group will be Anja Lansbergen-Mills, Ian Curtis-Nye and Ben Roe. Other co-opted members from the judiciary and an external representative are also envisaged. **Action:** In consultation with the Chair, the secretariat is to finalise membership and facilitate the initial meeting.

Item 3 Extending Fixed Recoverable Costs CPR(23)55

7. The Chair provided some introductory remarks, observing the complexity of the reforms and expressing continued **THANKS** to the sub-committee, drafting lawyers and officials; he considered the collective contribution to be huge.
8. Robert Wright (Ministry of Justice) was welcomed to the meeting and Mr Justice Trower presented the matter, which follows the report at the last meeting (Item 3 on 6th October 2023).
9. It was explained that a suite of proposed amendments, to CPR Parts 26 (Case Management), 28 (Fast Track and Intermediate Track), 31 (Disclosure and Inspection of Documents), 45 (Fixed Costs) and PD 45 flowed from a combination of the responses to MoJ's July 2023 consultation and various other points raised outside the consultation, by practitioner bodies, the Justice Select Committee and others. This included the point raised by former judge, Chris Lethem, in the context the Judicial College training (paras 16 and 17 of the minutes of 6th October refer) as to whether case management conferences were discretional.
10. Some topics were still under active consideration with the aim of returning to the December CPRC meeting and this was **NOTED**.
11. Each proposal was explained and carefully considered. In summary, they are:
12. Allocation, assignment, case management conferences and directions. The amendment to rule 26.7(1)(a) to replace "when" with "after" was explained as having the intention to enable the court to allocate the claim to a track and, where applicable, assign it to a complexity band, at the same time, but in a particular order and the amendment was **AGREED as drafted**.
13. The timing for the admission of clinical negligence claims to be allocated to the intermediate track and whether early admission of liability must be made in the pre-action protocol letter of response. The revisions to rule 26.9(10)(b) were seen as important because they provided clarity on how an admission is made. Senior Master Cook, added that this should also contribute to good behaviour. However, the discussion highlighted a need to incorporate further revisions in order to (i) separate out the criteria for Limitation Act 1980 issues and liability in full (ii) replace "accrued" with "raised" [a defence] and re-numbering, so that "(bb)" is "(iii)" and "(iii)" becomes "(iv)". This was **AGREED subject to final drafting**.
14. A proposed new definition regarding claims against public authorities. Considering the new provision at rule 26.9(10)(f) concerning a claim against a public authority for trespass, it was **AGREED** to replace trespass "against" with "to" [the person]. The discussion raised whether the term, "trespass" sufficiently met the plain language principles. Overall, the view was that it is a well-recognised term, notwithstanding its traditional phraseology. District Judge Johnson questioned whether, "false imprisonment" should be added to the drafting. On balance, that was not considered to be necessary, but the Chair observed that in practice, trespass to the person includes assault, battery and false imprisonment; this was duly **NOTED**.
15. Robert Wright added, that it has been a challenge to frame a drafting solution. The proposed text follows liaison with the Prison Service Government Legal Department and a concern they raised that FRC should apply in appropriate cases such as a straightforward negligent late release of a prisoner, which should be subject to FRC and this was **NOTED**. The concluding view was that the rule was drafted to deal with that appropriately. Rule 26.9(10)(f) was **AGREED as drafted, subject to** replacing "against" with "to" [the person].
16. The general provision at rule 28.2(1) was discussed. His Honour Judge Bird, explained that, as presently drafted, the proposed revision does not reflect the usual practice, that in fast track cases, directions are given at the same time as allocation. The consensus was that the mandatory obligation is to give directions, but that the rule could be reconstructed to separate

out fast track and intermediate track cases. It was **RESOLVED** that HHJ Bird and DJ Johnson will consider a revised drafting solution.

17. The point concerning the court's discretion to fix a case management conference, which was raised during Judicial College training, has been met by replacing "shall" with "may" in rule 28.12 and this was **AGREED as drafted**.
18. A clarificatory amendment concerning expert reports was proposed by expanding rule 28.14(c) with a new (c)(i) and (ii) which are designed to set out what is and is not included within the 20 page limit. New (c)(i) will provide that the expert's description of the issues on which they are instructed to give their opinion, the conclusions they have reached and the reasons for those conclusions, are included within the 20 page limit; but new (ii) will expressly provide that the expert's CV and any supporting materials to which the reasons for their conclusions refer, are added to the existing list of items (comprising any necessary photographs, plans and academic or technical articles attached to the report) are excluded. Isabel Hitching KC also provided some reflections from an earlier speaking engagement which supported the industry desire for clarification. The amendments were **AGREED as drafted**.
19. Disclosure. It was explained that the issue in relation to rule 31.5 arises more acutely now that there are three applicable tracks, because of the introduction of the intermediate track and because it now applies to the fast track, when it did not previously. DJ Johnson commented that the current practice is to only have case management conferences in fast track cases by exception. Experiences in practice were discussed. The Chair's instinctive view was that the fast track rules should not be changed. It was **AGREED** to:
 - delete the disclosure provisions under sub-rule (1);
 - revisit the drafting of sub-rule (2) so that it is limited to the multi-track and intermediate track;
 - amend sub-rule (3) to add in "**if any**" before "party must file and serve a report..."
20. The recoverability of, separately, (a) inquest costs and (b) restoration proceedings. An amended rule 45.1(3)(b) regarding the contracting out of fixed recoverable costs was **AGREED subject to** replacing the last proposed word "otherwise" with "that this Part should not apply". The inclusion of the text "each" ["unless the paying party and the receiving party have each expressly agreed that this Part should not apply"] has been incorporated in light of the Court of Appeal judgment in *Doyle*. The intention being to make it clear that when a contract allows for it, the CPR Part can be disapplied.
21. The current formulation of the proposed new rule 45.1(9), raised some concern that it may suggest that inquest costs are not recoverable at all. This led drafting lawyers to suggest it be recast to read, "This Part does not apply to costs incurred in respect of, or in connection with, inquest proceedings." and this was **AGREED**.
22. The rules under Part 45 concerning entitlement to costs where there is more than one claimant, has a modest revision proposed at rule 45.5(6)(b) to replace "amounts" with "costs" in the interests of consistency and this was **AGREED as drafted**.
23. A new rule 45.15A to provide for restoration proceedings was **AGREED as drafted**. It was **FURTHER AGREED** that it be included in a Table (even if that was a one line table within the rules). It was also **NOTED** that rule 45.56 (restoration proceedings in noise induced hearing loss (NIHL) claims) will be omitted in consequence of the amendment.
24. The recoverability of advocates' preparation fees, in cases which (a) are settled late or (b) are vacated. In the fast track, 100% of the advocacy fee will be recoverable on the day of trial and the day before trial, and 75% will be recoverable up to two days before trial. In the new

intermediate track, this will be extended to 100% on the day before trial, and 75% up to *five* days before trial. A suite of amendments to PD 45 and the Tables were **AGREED as drafted**.

25. It was **RESOLVED** to:

- **prepare a revised rule 28.2(1): general provisions** and for it to return to the committee when ready;
- **approve in principle, subject to the above points and final drafting**, amendments to the following:
 - rule 26.7: allocation and assignment;
 - rule 26.9(10)(a) and (f): clinical negligence and actions against public authorities;
 - rule 28.12: case management conference;
 - rule 28.14(3)(c): expert reports – “20 page limit”;
 - rule 31.5 – disclosure;
 - rule 45.1(3) and new paragraph (9) regarding (i) contracting out of FRC; and (ii) exclusion from Part 45 of costs in inquest proceedings;
 - new rule 45.15A for restoration proceedings;
 - PD 45 – Table 12 and Table 14: trial advocacy costs.

26. It was **NOTED** that a recent article had given rise to a concern in relation to the transitional provisions within the amending statutory instrument (SI) and the application of FRC in (i) non-personal injury (PI) cases (ii) which arise before 1st October 2023, (iii) where proceedings are never issued but (iv) which settle after 1st October 2023. The Chair made some initial comments and the matter was discussed. HHJ Bird emphasised the importance of costs only proceedings, in contrast to a costs application, namely that, for costs only, an application is considered proceedings and this was **AGREED**. The CPRC further observed that:

- the new FRC regime comes into force on 1st October 2023;
- absent transitional provisions, the FRC regime would apply from 1st October to any proceedings within its scope;
- for non-PI claims, the transitional provision in rule 2, paragraph (1) of the SI, provides that the new FRC regime does not apply where proceedings have been issued before 1st October;
- parties may expressly agree to costs on a non-FRC basis and there will be an amendment to rule 45.1(3) to clarify this;
- where proceedings have not already been issued on or after 1st October and the parties do not expressly agree to costs on a non-FRC basis, but they agree on the incidence, but not the amount, of costs, then they may issue costs only proceedings for the determination of those costs (in respect of FRC, costs only proceedings under rule 46.14 amount to *proceedings*);
- if those proceedings are issued on or after 1st October, FRC would apply to all costs in respect of that claim, irrespective of whether they were incurred before or after 1st October.

27. MoJ also provided an update on the Judicial Review proceedings and this was duly **NOTED** as was the undertaking that MoJ will publish a response to the July 2023 consultation in due course.

28. It was **FURTHER NOTED** that work continues on:

- producing the new/updated standard directions in consequence of the new FRC regime. **THANKS** were expressed to District Judge Clarke for his assistance with this;
- fixing costs on assessment (as covered in the 2023 consultation on FRC issues);
- fixing costs in Part 8 (costs only) claims (as covered in the 2023 consultation on FRC issues);
- revised drafting of rule 45.5(8), in the effort to provide further clarity as to the calculation that is required; and
- the intention is for the remaining amendments to be settled at the December 2023 meeting, with figures updated for inflation between January and October 2023, in time for implementation in April 2024, subject to Ministerial approval.

29. **Actions:** (i) Secretariat and drafting lawyers to incorporate into the next mainstream Update (due to be published in the new year as part of the April 2024 common-commencement cycle); (ii) MoJ may relay the CPRC's observations regarding transitional provisions, as part of any MoJ response to recent correspondence they have received (iii) HHJ Bird and DJ Johnson to consider rule 28.2(1) and (iv) matter to return in December; papers to be with the secretariat on/by 17th November 2023.

Item 4 PD 52C Appeals to the Court of Appeal: housekeeping amendments CPR(23)52

30. The Chair explained that, following an out-of-committee discussion with Civil Appeals Master Sally Meacher the matter was being deferred to a later date (provisionally, the December meeting). Additionally, a wider point concerning a review of the E-Working Pilot PD 510 (which is currently due to expire in April 2024) and the plan to move the provisions into the mainstream rules, was also raised. This work was previously being led by Master Cook, but given the weight of other work associated with his appointment as Senior Master, a volunteer was sought to take on the review of PD 510.

31. **Action:** (i) volunteer to be identified out-of-committee, in consultation with the Chair to conduct review of PD 510 (ii) Secretariat to provisionally schedule in time for the matter to return to the December meeting.

Item 5 Penal Notices CPR(23)53

32. Mr Justice Trower presented the matter, which had been jointly prepared by His Honour Judge Bird, to whom **THANKS** were conveyed.

33. A proposed clarificatory amendment was tabled in light of the recent decision in Taray Brokering [2022] EWHC 2958 (Ch) which concluded that the wholesale reforms to Part 81 (in October 2020) changed the law as to their nature, giving rise to the issue of whether a penal notice forms part of an order. The matter was discussed.

34. It was explained that the intention of the amendment is to make clear that the penal notice is not part of the order itself, it is a warning notice. The proposed text uses the language of adding a penal notice to an order rather than language which suggests that the penal notice is to be included within the order itself. This is considered to have the effect of reversing the decision in *Taray*.

35. It was **NOTED** that Mr Justice Kerr, who led the Contempt Sub-Committee which framed the 2020 contempt reforms, has been consulted. Kerr J recalled that the issue had been raised previously and the view at that time was that either no change to Part 81 was needed, or that the Lacuna Sub-Committee could be asked to look at it. However, if the issue was one of substantive law, changing Part 81 could not alter substantive law and there may be good reasons for omitting a penal notice from an order of the court; for example, if the order is to be served on a terrified vulnerable party. Nevertheless, he has no objection to the proposed amendments to Part 81.

36. It was **RESOLVED** to:

- amend the definition of penal notice within CPR 81 as follows:

A “penal notice” is means a prominent notice on the front of an order warning added to the front of an order by or at the request of a party warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.

- amend CPR 81.4(e) as follows:

(e) confirmation that whether a penal notice had been added to the front of any order allegedly breached or disobeyed ~~included a penal notice~~;

37. The resolution is also **NOTED** in the context of the Simplification Sub-Committee's work and the proposed revision of CPR 25.9 (para 82 - final bullet point - in minutes of 6th October 2023 refers). The final draft of the proposed Part 25 reforms are due to return to the December meeting prior to consultation (see also para 55 under Item 8 below).

38. **Actions:** (i) Secretariat and drafting lawyers to incorporate the amendments to Part 81 into the next mainstream Update (due to be published in the new year as part of the April 2024 common-commencement cycle) (ii) Ben Roe to note in the context of the Part 25 simplification proposals.

Item 6 Costs Matters

39. This comprised two elements:

The Civil Justice Council's (CJC) Costs Report

40. HHJ Bird provided a brief oral update to advise that a working group has been formed to review the recommendations therein. The group has held one meeting and will report back more fully in due course. This was duly **NOTED** with thanks.

41. **Action:** HHJ Bird to keep the secretariat apprised for programming purposes.

Costs Capping for Patent Cases in the Shorter Trial Scheme CPR(23)54

42. Mr Justice Mellor (Judge in charge of the Shorter Trial Scheme in the Business & Property Courts) was welcomed to the meeting.

43. It was explained that the proposed pilot practice direction flows from the CJC's Costs Report (published on 10th May 2023). The scheme was initiated by the Intellectual Property Lawyers' Association (IPLA) which is a member of and secretary for the Intellectual Property Users' Committee (IPCUC). It has been the subject of consideration for some years (delayed by the pandemic) but the proposal has renewed impetus following the supportive recommendations in the recent Final Report from the CJC's Costs Review. Thus, it follows consultation with the

Intellectual Property Court User Committee (IPCUC) and from whom a letter of support was duly **NOTED**.

44. It was **FURTHER NOTED** that the proposal has been considered by the IP Federation (which represents about 50 UK-based companies in IP-intensive industries) who have indicated their support as have the IP Bar, the Chartered institute CIPA, the Law Society IP committee and numerous respondents to the CJC Costs Review. It is also supported by the Chancellor of the High Court and the Patents Judges, both at High Court and Court of Appeal levels.
45. The two main reasons for the proposal aim to improve access to justice for “mid-tier” patent cases and to make the jurisdiction more competitive by enhancing the attractiveness of the UK as a forum for patent disputes (which can be brought in different international jurisdictions, including the new Unified Patent Court).
46. The draft proposed PD provides a costs cap for “mid-tier” patent disputes brought in the Shorter Trial Scheme (STS). Mid-tier cases are less complex and valuable but, for which the Intellectual Property Enterprise Court procedure, is not appropriate.
47. The proposal adopts the procedures of the STS in the Business and Property Courts’ PD 57AB and adds a costs cap of £500,000 for the liability phase and a costs cap of £250,000 for any quantum phase. The existing Rules on the STS in PD 57AB would continue to apply, subject only to these changes for Patent cases in the STS.
48. A discussion ensued, which raises various points of detail as well as the suitable operative length of the pilot, together with how and by whom the pilot scheme will be evaluated. The difference between the nature of patent cases and cases subject to the general fixed recoverable costs regime was observed. The discussion highlighted that patent cases tend to be handled by professional parties and a specialist group of judges, whereas other cases are before a much wider range of judges. The drafting reflected the specialist nature of the patents jurisdiction well.
49. It was **RESOLVED to approve, subject to final drafting**:
 - PD 51ZD – Pilot scheme for capping costs in Patent cases in the Shorter Trial Scheme;
 - pilot scheme to commence on 1st January 2024 for a period of three years (until 31st December 2026), unless extended;
 - the Intellectual Property Court User Committee be requested to arrange, in consultation with Mellor J, the pilot scheme’s evaluation and to report back to the CPRC accordingly and no later than June 2026.
50. **Actions:** (i) In consultation with Mellor J, the secretariat and drafting lawyers to facilitate a standalone PD Update in good time for 1st January 2024 in-force (ii) Chair to discuss with Mellor J any options to extract statistical data from the CE File database or elsewhere (iii) IPCUC to arrange for the pilot scheme to be evaluated (iv) Secretariat to provide promulgation and future programming etc information to Mellor J/IPCUC.

Item 7 Court Documents Sub-Committee

51. It was **NOTED** from the Chair that the work of the cross-jurisdictional sub-committee, chaired by Lord Justice Bean, considering the issues arising from the UK Supreme Court judgment in Cape Holdings -v- Dring, is progressing well and a report will be forthcoming in due course.
52. **Action:** Secretariat to provisionally schedule in time for the December meeting.

Item 8 Any other business & possible items for future business

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

54. **Civil Procedure (Amendment No.3) Rules 2023 (S.I. 2023/788) - Joint Committee on Statutory Instruments' Report and MoJ's response:** Alasdair Wallace spoke to the MoJ's response to the JCSI's request for information concerning a specific technical point regarding the last SI and this was duly **NOTED**.

55. **Simplification Sub-Committee:** Isabel Hitching KC gave a brief update on future work plans which was duly **NOTED**. Trower J also raised a related point concerning the proposals within the Part 25 reforms to produce two standalone prescribed forms using the existing text of a Freezing Injunction and Search Order in the annex of PD 25A (para 82 the minutes of 6th October 2023 meeting refer). As model orders, they do not lend themselves to the conventional form structure. This raised the possibility of a clarificatory amendment to CPR Part 4. It was **RESOLVED in principle** to produce a proposed rule amendment and to incorporate it within the anticipated consultation on Part 25. **Action:** Ben Roe to produce revised consultation material to return to the December meeting for consideration/determination.

56. **Review of PD 51ZC Small Claims Paper Determination Pilot:** It was **NOTED** that HMCTS are preparing an evaluation report and possible proposals for expansion of the pilot scheme. **Action:** In consultation with the Chair, the secretariat to provisionally schedule in time at the December meeting.

57. **Form revisions in consequence of the Environment Act 2021:** Senior Master Cook advised that the Forms Sub-Committee have approved a suite of new and revised forms, at the request of Mr Justice Holgate, the judge in charge of the Planning Court and following consultation with the judge in charge of the Administrative Court, Mr Justice Swift. CPR 54.25 to 54.35 and PD 54E were introduced to deal with the new environmental review or "ER" procedure, set up by the Environment Act 2021. These are claims which may only be brought by the Office for Environmental Protection and are not subject to any permission filter. Three forms for ER now exist (claim form (N466PC), acknowledgement of service (N467PC) and urgent applications (N468PC)). The existing Planning Court forms for JR have been adapted so as to give effect to the procedure set up by the rules on ER. Form PCPF244, the Planning Court form for non-urgent applications, has also been updated, although this is not limited to ER. This was duly **NOTED**.

C B POOLE
November 2023

Attendees:

Carl Poole, Rule Committee Secretary
Master Dagnall, Chair, Lacuna Sub-Committee (attending remotely)
Nicola Critchley, Civil Justice Council
Alasdair Wallace, Government Legal Department
Andrew Currans, Government Legal Department (attending remotely)
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) (attending remotely)
Mr Justice Mellor (Item 6)