

## Approved

### Minutes of the Civil Procedure Rule Committee

Friday 5<sup>th</sup> July 2024, 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

Master Sullivan

His Honour Judge Bird

His Honour Judge Hywel James

District Judge Clarke

District Judge Johnson

Dr Anja Lansbergen-Mills

David Marshall

Isabel Hitching KC

Tom Montagu-Smith KC

Ben Roe

Ian Curtis-Nye

Elisabetta Sciallis

**Apologies:** Mr Justice Pepperall (sitting); Mrs Justice Collins-Rice, DBE, CB (Item 8).

#### Item 1 Welcome

1. The Chair **NOTED**, that although this meeting is taking place on the day after the general election, the new Lord Chancellor and other Ministerial appointments were not yet known.
2. **Minutes:** the minutes of the last meeting, on 7<sup>th</sup> June 2024, were **AGREED**.
3. **Action Log and matters arising not covered by later items.** The following was duly **NOTED** from the Chair:
  - **CPR SI & PD Update - progress report:** In consequence of the general election, Parliamentary business is being reviewed and unlikely to be confirmed until after the State Opening of Parliament, later in July. At this stage, the working assumption is that this will mean, a later than anticipated laying date for the CPR amendment SI. However, it is hoped that it will be prioritised in order to preserve the 1<sup>st</sup> October 2024 common-commencement date. **Action:** Secretariat to update members out-of-committee.
  - **Committee Papers (AL(24)52) - new front sheet:** The final draft proforma was tabled and will be introduced for the next round of papers (October meeting). It is to be used by members and officials each time papers are submitted. **Action:** Secretariat to circulate an annotated version to serve as a worked example.

#### Item 2 Alternative Dispute Resolution (ADR) Committee (CA Churchill -v- Merthyr Tydfil) CPR(24)30

4. Lady Justice Asplin was welcomed to the meeting and the Chair made some introductory remarks. **THANKS** were conveyed to all concerned, which included the Sub-Committee members, District Judge Johnson, Elisabetta Sciallis and Isabel Hitching KC, from whom thanks were reciprocated in recognition of Asplin LJ's enthusiasm for the work.

5. It was explained that this matter was last before the April meeting, when draft amendments to the rules were approved in principle, subject to consultation.
6. The consultation closed on 28<sup>th</sup> May 2024 and received 17 responses which are overwhelmingly positive. **THANKS** were conveyed to everyone who took the time to respond.
7. Revised drafting has been prepared in light of the consultation responses, along with a table summarising the consultation responses, which was explained, discussed and duly **NOTED**. Some comments have been adopted. However, following careful consideration, very few of the proposed textual amendments were ultimately thought necessary. One consultee raised whether, 'order' and 'encourage' are different and if so what they mean is unclear. This point has also been carefully considered by the Sub-Committee who found that the standard meanings of these terms make the fact and nature of the difference clear; this was **AGREED**. Many consultees wished to emphasise that whether or not ADR is appropriate in any given case, is a fact specific decision. Nonetheless, they rightly did not suggest that this needed to be expressly stated in the rules and this was **AGREED**.
8. Notwithstanding the optimistic responses overall, it was recognised that there was some opposition towards encouraging and ordering alternative dispute resolution. However, this was settled policy and the Committee was not in a position to change the agreed approach.
9. Mr Justice Pepperall had provided comments on the drafting, in advance of the meeting, which were duly **NOTED**. Each was reviewed in detail and revisions incorporated.
10. Interaction with pilot PD 51ZE (small claims track automatic referral to mediation) was also raised. It was **NOTED** that ADR is wider than mediation alone.
11. Various other broader policy points were also aired by some respondents, but which fell outside the scope of this project. The points included: quality control of ADR practitioners; funding provision for ADR pre action (akin to the family voucher scheme); implementation of the CJC's PAP Review; interplay with Ombudsman processes (albeit that the Dispute Resolution Ombudsman did not suggest the proposed amendments require any revision in this regard at this stage); producing an ADR protocol or best practice and further guidance on how a court will approach particular scenarios; adopting the practice of a, 'stock-take' pre-trial in every case (as per Scotland) being an equivalent to the pre-trial review (PTR) in Business and Property Court cases; introducing a compulsory first mediation at a pre-action stage; judicial training. Each was duly **NOTED** and discussed. It was **RESOLVED** to consider, out-of-committee any onward referral to the MR and/or MoJ for consideration, subject to wider policy implications and resourcing priorities and in co-ordination with developments for the Online Procedure Rule Committee/Digital Justice System, together with any consultation with other jurisdictional Rule Committees. This is also with an aim to ensure any resourcing and cost implications do not conflict with existing policy, such as the FRC regime.
12. In respect of judicial training, Asplin LJ explained that this was under active consideration.
13. In response to a question from Ian Curtis-Nye regarding protections and affordability for litigants in person to participate in ADR, Asplin LJ added that this was also something which was being considered and whether any further guidance would assist.
14. It was **FURTHER RESOLVED to approve**, the suite of amendments in relation to ADR, subject to the above points and to final drafting, which is to include the following:
  - r.1.1(2)(f) – re-order text and further revise thus: “promoting **and** or using alternative dispute resolution **methods**; and”. It was decided to remove “methods” because it is not used elsewhere in the Rules;

- r.1.4(2)(e) – further revise the text thus: “ordering or encouraging the parties to use, ~~and facilitating the use of, an~~ alternative dispute resolution ~~procedure if the court considers that appropriate and facilitating the use of such procedure;~~”. The inclusion of, “if the court considers appropriate” was not deemed necessary in an inclusive list of things that active case management includes. The revision was also made in the interest of consistent drafting;
- r.3.1(2)(o) – remove, “procedure” as it is superfluous;
- r.44.2(5)(e) – further revise thus, in the interests of consistency: “whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to ~~participate~~ engage in alternative dispute resolution ~~proposed by another party or as encouraged to do so by the court.~~”
- PD 29 (the multi-track), paragraph 4.10(9) – further revise to (i) substitute, “engage” in place of “participate”. This is to provide consistency with CPR Part 3 (the court’s case management powers) and (ii) use the acronym, “ADR” once it has been spelt out in full;
- amend the Pre-Action Protocol for claims for damages in relation to the physical state of commercial property at termination of a tenancy (the ‘Dilapidations Protocol’), in consequence of the above reforms;
- review, out-of-committee, any other remaining consequential amendments, including to Pre-Action Protocols.

15. **Actions:** (i) Drafting Lawyers/Secretariat to incorporate into the next available CPR Update, if possible, this will be the summer cycle for in-force in October 2024 (ii) Referral of wider policy points to the MR/MoJ as appropriate.

### **Item 3 Victims and Prisoners Act 2024: referral of parole cases to the High Court CPR(24)31**

16. Abi Marx (MoJ Policy) and Lia Middleton (Lawyer) were welcomed to the meeting.
17. The Chair made some introductory remarks and **NOTED** that engagement with the President of the King’s Bench Division (PKBD) was already underway.
18. Ms Marx explained that CPR amendments were envisaged in consequence of the parole referral measure contained in Sections 61 and 62 of the Victims and Prisoners Act 2024. This measure allows the Secretary of State (SoS) for Justice to refer certain parole cases to the High Court for a fresh release decision, following a release decision by the Parole Board. The original policy intent was for the SoS to have an executive power to veto a Parole Board decision, however, during the Parliamentary debate, concerns were raised with the scope of such a power, given that a Parole Board decision was judicial in nature. The legislation was, therefore, revised into this new measure for the SoS to refer a decision to the High Court. The measure is expected to include “Top-tier” cases, namely, where the offender’s index offence is murder, rape, serious terrorism and causing or allowing the death of a child. Around 15-16 cases each year are expected to be referred to the High Court; 1-2 of which may contain evidence that will be subject to the closed material procedure. The indicative implementation date was April 2025. Current thinking is to either prepare a new self-contained Section for incorporation into CPR Part 77 (provisions in support of criminal justice) or to introduce a new CPR Part 90. To assist in this, the MoJ produced a table containing initial suggested content of new Rules, which was divided into five proposed sections: the referral, hearings, onward appeals, timelines and miscellaneous points. This was duly **NOTED**.

19. A discussion ensued. A summary of the points made is as follows. The preliminary view was that it would be appropriate for amendments to be incorporated into CPR Part 77 and although there were various points of detail to be clarified, the usual practice is to avoid putting prescriptive detail in the Rules. His Honour Judge Bird made a number of observations, which include the need to review the Parole Board Rules. Officials confirmed this was being considered, as are any changes to legal aid secondary legislation, alongside some other practical policy points.
20. A concern regarding vires, in the context of timing of the referral was also raised, because while the SoS was considering whether to make a referral, the prisoner would still be in prison. It was not for the CPR to prescribe how long a prisoner should be kept in prison. It was **AGREED** that until the SoS refers the Parole Board decision to the High Court, the CPR is not engaged.
21. Pepperall J had provided comments, in advance of the meeting, which were duly **NOTED** and were shared with officials for consideration as part of the Sub-Committee's work.
22. It was **FURTHER NOTED** that the MoJ has also conducted some consultation, and more is planned, with interested parties, such as the Association of Prison Lawyers and the Victims Commissioner.
23. It was **RESOLVED** to:
- establish a Sub-Committee to consider the proposed reforms, draft the necessary CPR amendments and make proposals as to any consultation;
  - appoint Master Sullivan to the Sub-Committee;
  - settle membership out-of-committee – volunteers to self-nominate to the Chair/Secretariat by 31<sup>st</sup> July 2024;
  - agree, in principle, to the matter returning to the November meeting.
24. **Actions:** (i) any member wishing to volunteer to serve on the Sub-Committee to contact the Chair/Secretariat by 31<sup>st</sup> July 2024 (ii) officials to keep the Secretariat apprised of developments for programming purposes.

#### **Item 4 Lacuna Sub-Committee (LSC) CPR(24)32**

25. This item comprised the following two matters, which were discussed.

#### **Ryan Morris -v- Williams & Co Solicitors [2024] EWCA Civ 376 (LSC2024/6)**

26. District Judge Clarke presented the matter. A chronological overview of the proceedings was given and it was explained that the Master of the Rolls (MR) invited the CPRC (at paragraph 8 of the judgment) to consider whether, the current CPR provisions regarding multiple claimants using a single claim form, are working well or whether a test contained in the old Rules of the Supreme Court (RSC) should be reintroduced. The LSC considered the matter carefully, concluding that the current rules are flexible and appear to be uncontroversial; there is no other authoritative judgment and no evidence that the rule is not working well. This was further endorsed by the meeting. The Court of Appeal's decision makes it clear that each case must be considered on its own facts. As such, for the reasons identified by the MR in *Morris*, the LSC did not consider it necessary to elaborate on the existing wording; to do so may complicate matters and have unintended consequences.
27. It was **RESOLVED** that:

- no further amendment of either r.7.3 (using one claim form to start two or more claims) or r.19.1 (joining parties to a claim) is needed.

28. It was **NOTED**:

- some associated practical issues, regarding identification of multiple claimants and filing generally, are being considered as part of the review of PD 51O (E-Working Pilot);
- MoJ Policy are alive to the potential wider issues concerning any implications as regards court fees, which is not a matter for the CPRC;
- developments in practice concerning Group Litigation Orders (GLO) may necessitate a review of CPR Part 19 (Parties and Group Litigation), in consultation with the Senior Master.

29. **Action:** Secretariat to add CPR 19 (GLO) to the future work programme, to be considered when time allows.

### **Fit Kitchens -v- Relx 2023 EWHC 1954 (LSC2024/7)**

30. Master Dagnall presented the matter. It was explained that the issues arose in the above judgment and concern: the status of signposts in the CPR, service of Part 8 claim forms and challenges to jurisdiction.

31. Master Dagnall set out the background and a discussion ensued. Pepperall J had provided comments, in advance of the meeting, which expressed his view that Part 8 should be amended in two respects (i) to put the cross-reference to r.7.5 into the body of the rule and (ii) to regularise the position in respect of Part 11 (jurisdiction) challenges.

32. Ian Curtis-Nye raised a question regarding implications for the new fixed costs determination (FCD) procedure for costs only proceedings. However, the proposed drafting solution addressed this by virtue of the, “except where other rule/PD applies” provision and this was duly **NOTED**.

33. Isabel Hitching KC observed that signposts have been inserted into the CPR in the interests of brevity during the course of the simplification project.

34. Alasdair Wallace (MoJ Legal) confirmed that the view of the Joint Committee on Statutory Instruments is that signposts are not operative and, in any event, it is perfectly acceptable to make amendments to bring them up to date.

35. It was **RESOLVED to agree, in principle, subject to judicial consultation and final drafting**, to make the following clarificatory amendments:

- amend r.8.2 (contents of the claim form) to (i) remove the signpost and (ii) insert a new sub-rule, thus:

“(2) Except where some other rule or practice direction applies, Rules 7.5 and 7.6 shall apply with regard to the service of the claim form.”

- amend r.8(3) (acknowledgement of service) because the rules under Part 7 and Part 8 operate differently. The amendment adds the following text to r.8(3):

“(unless the defendant has indicated an intention to contest jurisdiction in which case the evidence is to be filed within fourteen days of the acknowledgment of service if no such application is made)”.

36. **Action:** Chair to facilitate internal consultation with the judiciary prior to confirmation of incorporating into a CPR updating instrument.

#### **Item 5 Simplification (Section 2(7)) Sub-Committee: Part 25 and Part 4 reforms**

37. Ben Roe provided a brief oral update, which was duly **NOTED**. Thanks were conveyed to all involved to date. Part 25 is a particularly important CPR Part and it was right to allow extra time to complete the informal internal consultation and to work through the points raised at the June 2024 meeting and subsequently. This work is nearing completion. Some points of detail remain and there may be some outstanding consequentials/cross-referencing to be finalised. The aim is to return with settled drafting to the October meeting, for final approval.
38. **Actions:** (i) Members/Drafting Lawyers to provide any further feedback to Ben Roe by 12<sup>th</sup> July (ii) Ben Roe to circulate final draft (by 31<sup>st</sup> July) in readiness of next meeting.

#### **Item 6 PD 51ZC Small Claims Paper Determination Pilot CPR(24)33**

39. Her Honour Judge Melissa Clarke was welcomed to the meeting with **THANKS** and the Chair provided some introductory remarks.
40. The Small Claims Paper Determination Pilot, PD 51ZC, was introduced with effect from 1<sup>st</sup> June 2022 and applies to all small claims (with some exceptions) in the County Court sitting at Bedford, Luton, Guildford, Staines, Cardiff and Manchester. The Pilot PD is due to end on 1<sup>st</sup> December 2024, unless further extended.
41. This matter follows the evaluation report provided to the last meeting (paragraphs 36-39 of the June 2024 minutes refer) and raises whether paper determination should become a permanently available option in the County Court for the two types of cases identified at paragraph 4.4(a) and (b) of PD51ZC, namely flight delay/denied boarding claims, and claims relating to parking tickets on private land. If so, it would require a shift of the operative wording of PD 51ZC into the mainstream CPR in respect of such claims.
42. HHJ Clarke explained that the preliminary view to achieve this, is to amend, r.27.10 (the long-standing provision allowing for determination of small claims on paper with the parties' agreement) and PD 27A (small claims track), with consequential amendment to r.5.4C(1) and the explanatory text in Section D of Form N180 (small claims track directions questionnaire) and this was **NOTED**.
43. Options for those types of cases which remain within the pilot were also explained and discussed. They include (a) continue the Pilot in the existing Pilot Courts; (b) continue the Pilot in an expanded number of Pilot Courts or nationally; (c) end the Pilot on 1<sup>st</sup> December 2024 without extending it and remove references to the Pilot from form N180.
44. The Chair's view was that consultation is desirable, although its scope is not yet determined.
45. During the discussion, Elisabetta Sciallis asked about the impact on the courts and HHJ Clarke confirmed the expectation that data collection and judicial training will continue. Ian Curtis-Nye enquired about the interaction with the digital systems, raising a concern as to whether relevant claims currently within/destined for the online damages claims portal would need to become paper claims. The Chair endorsed the need that this needed to be looked at further, before a final decision was made.
46. It was **RESOLVED** to revisit the matter – and whether to extend or vary the current pilot PD – at the October meeting, or as soon as the position regarding interaction with the digital systems has been clarified.

47. **Actions:** (i) HMCTS to clarify implications vis-à-vis the digital claims system (to be raised at the next DMCC meeting) (ii) Secretariat to provisionally allocate time at the October/November meeting/s (before the current end date of PD51ZC on 1<sup>st</sup> December 2024).

#### **Item 7 Possible items for future business**

48. The following was **NOTED** from the Chair:

49. **Correspondence from the Civil Enforcement Association** has been received, for which thanks are conveyed. The issues therein are being considered by MoJ Policy, who will revert in due course. **Action:** MoJ (Enforcement Policy) to keep the Secretariat appraised and agree a timetable for the matter to be programmed in for CPRC consideration as necessary.

50. **Litigants in Person - costs under Part 46.** Ian Curtis-Nye enquired as to whether a review of the litigant in person recoverable hourly rate under CPR 46 could be carried out, following inflationary increases on legal representative's costs. This was last considered in December 2014 when the current sum of £19 was set and came into effect from 6<sup>th</sup> April 2015 (prior to that it was, from 1<sup>st</sup> October 2011, £18 and before then £9.25. It was **AGREED IN PRINCIPLE** that a review should be undertaken and this should be discussed with MoJ Policy in the first instance. **Action:** Amrita Dhaliwal to refer to the relevant officials in MoJ Costs Policy.

51. **Civil Procedure Act 1997.** The issue of whether other qualified legal roles, such as Chartered Legal Executives (CILEX) and Costs Lawyers, could be represented as CPRC members alongside Solicitors and Barristers had been raised by Ian Curtis-Nye. The Chair explained that the CPRC's composition is set out in primary legislation, the Civil Procedure Act 1997 and there should already be scope within the Act, because it provides for persons with the appropriate authorisation to conduct litigation or Senior Courts qualification to apply. However, more focused outreach activity and advertisement promotion may assist in encouraging applications. **Action:** Ian Curtis-Nye to provide the Secretariat with relevant contact details in order to discuss the matter with MoJ and the Public Appointments Team.

#### **Item 8 Any other business:**

##### **Strategic Litigation Against Public Participation (SLAPPs) Sub-Committee CPR(24)34**

52. The Chair introduced the matter with **THANKS** to Mrs Justice Collins-Rice, co-opted chair of the Sub-Committee, and to the external members: Caroline Kean of Wiggin LLP (until May 2024), Matt Dando of Wiggin LLP (from May 2024), Dan Tench of CMS and Gavin Millar KC of Matrix Chambers.

53. It was explained that the Sub-Committee, which was established at the October 2023 meeting, met twice in plenary session, in February and May 2024, and conducted additional business out-of-committee. The Sub-Committee's first interim report was tabled, it provided an update on the progress to date and sought a steer as to its future work programme.

54. Pepperall J had provided comments, in advance of the meeting, which included his view that no rule changes are appropriate until a commencement date is known.

55. A discussion ensued, during which the following was **NOTED:**

- the Economic Crime and Corporate Transparency Act 2023 (ECCTA) introduced anti-SLAPP legislation into the UK legal system. Section 195 ECCTA provides a statutory definition of a SLAPP claim. The powers and duties to make rules of

court were understood to be in section 194 ECCTA. Neither have yet been commenced.

- the Chair sought clarity on the duty to make rules. Mr Wallace advised that the legislative power concerned the making of Regulations, rather than rules of court;
- additionally, prior to Parliament dissolving due to the general election, a Private Members Bill was before Parliament which sought reform of the ECCTA definition of a SLAPP claim. This attracted intense interest and debate during its Parliamentary passage, focusing principally on the role played in the ECCTA definition by the subjective mindset of a claimant.
- a draft amended version of CPR 3.4(2) (power to strike out a statement of case) was tabled for information. The drafting reflected a 'copy-out' implementation by reproducing the statutory language in the ECCTA;
- CPR 3.3 already makes unlimited provision for a court to act of its own motion in the exercise of its powers. Accordingly, no amendment was proposed. However, there may be an expectation that bespoke wording should appear in the CPR to put the matter beyond doubt, or to draw attention to it;
- draft amended version of CPR 44.2 (court's discretion as to costs). As with the preliminary draft amendments to CPR3.4(2), the draft amendments to CPR 44.2 are limited to a 'copy-out' implementation, by reproducing the statutory language;
- consideration has also been given to the possibility of a Practice Direction or guidance note dealing with SLAPP claims in the round;
- consultation may be required in due course;
- there was no material value in advancing further work at a time of uncertainty concerning the future of both the existing legislative provision and any plans to commence it, and conversely of amending legislation and its ultimate practical application. This uncertainty is likely to remain for some time, given the change of Government.

56. It was **RESOLVED** that, there be no further action unless and until the legislative situation is clarified. Should the Sub-Committee be reconvened, consideration be given to appointing an additional member, from the CPRC itself, to serve thereon.

57. **Action:** MoJ officials to advise the Secretariat for programming purposes if the legislative position changes and the matter is due back for amendments to the CPR to be considered.

58. **Members' Register of Interests – Annual Review:** The Chair requested members to submit an updated Register of Interests (including nil declarations) before the end of term. **Action:** Members to file a fresh declaration of interest form by 31<sup>st</sup> July 2024.

59. **Closed Material Procedure (CMP):** The Chair provided an update. It was **RESOLVED** to **ESTABLISH A SUB-COMMITTEE** to consider the CPR implications in consequence of the (then) Government's response to the Ouseley Report on CMP. The Sub-Committee will be chaired by a Lord Justice of Appeal. One or two CPRC volunteers were sought to join the Sub-Committee. **Action:** Members to notify the Chair/secretariat by 31<sup>st</sup> July 2024, if willing to volunteer.

60. **Date of Next Meeting:** The provisional, ad-hoc, meeting date for September was **NOTED** in the event that any urgent business needs to be conducted before the first meeting of the new term on 4<sup>th</sup> October. **Action:** Secretariat to confirm by 31<sup>st</sup> July.

61. **CPR 21.10 - Infant Settlement Hearings:** District Judge Johnson relayed a point that had been raised with her by a Deputy District Judge, concerning court hearings for infant settlements made under the Civil Liability Act 2018 tariffs. The matter was discussed. Overall, the view was that approval hearings remain important and should continue. The Judicial College guidance indicates some degree of judicial discretion and, given the potential for wider issues to be considered, such as the court being satisfied that the matter had been properly conducted, the correct categorisation of tariff had been applied and to make a determination as to investment. It was **RESOLVED** that the CPR did not require amendment in consequence.

C B POOLE  
July 2024

**Attendees:**

Carl Poole, Rule Committee Secretary  
Nicola Critchley, Civil Justice Council  
Amrita Dhaliwal, Ministry of Justice (MoJ)  
Kate Aujla, MoJ  
Andy Caton, Judicial Office  
Crystal Hung, Judicial Office  
Alasdair Wallace, Government Legal Department (MoJ)  
Andrew Currans, Government Legal Department (MoJ)  
Katie Fowkes, Government Legal Department (MoJ)  
Rosemary Rand, HM Courts & Tribunals Service  
Lady Justice Asplin (Item 2)  
Abi Marx, MoJ Policy (Item 3)  
Lia Middleton, Government Legal Department (MoJ) (Item 3)  
Her Honour Judge Melissa Clarke (Item 6)