

# PILOT TRAINING

Business & Property Courts

Capped Costs Pilot  
PD 51W

# PETER PETTS

7<sup>th</sup> March 2019

# Aim

To improve access to the B&PC, through:

- streamlining the procedures of the Pilot courts;
- lowering the costs of litigation;
- increasing the certainty of costs exposure; and
- speeding up the resolution of claims.

In short: B&PC Fast Track

# Fundamentals

- 2 years, from 14/01/19
- London Circuit Commercial Court; Leeds & Manchester Commercial Courts, T.C.C. & Ch. D.
- Only with agreement of all the parties
- Trial limited to 2 days (excluding reading & judgment)
- Exceptions:
  - Claims > £250,000.00
  - Fraud or dishonesty allegations
  - Extensive: disclosure; witnesses of fact, or expert evidence
  - Numerous issues or parties

# Pre-issue & Pleadings

- Letter of claim (proposing Capped Costs List).
- Response (agreeing/disagreeing)
- Statements of Case headed “Capped Costs List”
  - Accompanied by bundle of core documents relevant to issues
  - Particulars & Defence with Counterclaim < 20 pages. Others < 15 pages
  - In addition to r. 16.4:
    - Summary of dispute
    - List of anticipated issues
    - Statement of facts and arguments relied upon
    - Relief/remedies claimed
    - Detailed calculations of sums claimed
  - May stand as evidence in chief

# Timetabling

- Letter of claim
- 14 days – Response
- Promptly – service of Claim Form & Particulars of Claim
- 10 days after service – arrange CMC (10 – 12 weeks, T. E. 1 hour) (Difficult for D to provide dates to avoid)
- 14 days after service – acknowledgment of service
- 28 days after last date for acknowledgment of service – Defence & Counterclaim (Extra 14 days)
- 14 days after Defence – Reply & Defence to Counterclaim
- (Agreed extensions up to 14 days)

# At least 3 days before CMC

- ✓ Request any disclosure, beyond core documents  
(sensible to make request well in advance)
- ✓ Lodge:
  - ✓ Paginated bundle
  - ✓ Agreed list of issues
  - ✓ Any request for a disclosure order
  - ✓ Any request to be transferred out of pilot

# CMC

- ❖ Before trial judge
- ❖ Attended by senior legal rep or trial advocate
- ❖ Consider issues and approve
- ❖ Any orders for disclosure (generally none, particularly if voluntary disclosure not previously requested)
- ❖ Witness statements (limited to 2; <15 pages each)
- ❖ Expert evidence (generally none; possibly single joint report)
- ❖ Directions to trial (including trial timetable)
- ❖ Fix trial date, ASAP, in any event, not more than 8 months

# Applications

- ✓ Generally, dealt with on paper (Does not specify by who)
- ✓ Concise application notice & evidence
- ✓ Concise response – 7 days
- ✓ Reply – 2 business days
- ✓ Written reasons for the requirement for any hearing
- ✓ Cost reserved to trial, unless unreasonable conduct



# Trial

- ❑ Before CMC judge, unless impractical
- ❑ Trial timetable to be adhered to
- ❑ No materials other than those provided for at CMC or later order
- ❑ Cross-examination strictly controlled
- ❑ Only principal parts of case need to be put to witnesses
- ❑ Endeavour to hand down judgment within 6 weeks (No express provision for judgment at hearing)

# Costs

- ❑ Costs budgeting does not apply
- ❑ Costs capped for each stage
- ❑ Total costs capped at £80,000.00
- ❑ Summary assessment
- ❑ Schedules filed & exchanged within 21 days after trial, with sufficient details in respect of each stage (No standard form)
- ❑ May disapply cap in case of an abuse of the court's process
- ❑ Revised Part 36 (including: additional 25% on each stage; increased cap of £100,000.00; punitive interest, & additional 10% on damages)

Pre-action	£10,000.00
Particulars of claim	£7,000.00
Defence and counterclaim	£7,000.00
Reply and defence to counterclaim	£6,000.00
Case management conference	£6,000.00
Disclosure	£6,000.00
Witness statements	£8,000.00
Experts' reports	£10,000.00
Trial and judgment	£20,000.00
Settlement/negotiations/mediation	£10,000.00
Making or responding to an application	£3,000.00
Not covered above	£5,000.00
Total (capped @ £80,000.00)	£98,000.00

## **102<sup>nd</sup> UPDATE – PRACTICE DIRECTION AMENDMENTS**

New Practice Direction 51W, which supplements the Civil Procedure Rules 1998 is made by the Master of the Rolls under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and are approved by Lucy Frazer QC MP, Parliamentary Under-Secretary of State for Justice, by the authority of the Lord Chancellor.

New Practice Direction 51W – The Capped Costs List Pilot Scheme – comes into force on 14 January 2019

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The Right Honourable Sir Terence Etherton  
Master of the Rolls and Head of Civil Justice

Signed by authority of the Lord Chancellor:  
Lucy Frazer QC MP  
Parliamentary Under-Secretary of State for Justice  
Ministry of Justice

Date: 04 January 2019

### **PRACTICE DIRECTION 51W – THE CAPPED COSTS LIST PILOT SCHEME**

- 1) After Practice Direction 51V (*the Video Hearings Pilot Scheme*), insert Practice Direction 51W – the Capped Costs List Pilot Scheme as set out in the Schedule to this instrument.

## SCHEDULE

### “PRACTICE DIRECTION 51W – THE CAPPED COSTS LIST PILOT SCHEME

#### CONTENTS OF THIS PRACTICE DIRECTION

Title	Paragraph number
General	Para. 1.1
The Capped Costs List	Para. 2.1
Costs	Para. 3.1

#### General

**1.1.** This Practice Direction is made under rule 51.2. It provides for a scheme for piloting the use of a Capped Costs List in the courts in which it applies (“the Pilot courts”). The pilot scheme (“the Pilot”) is a voluntary scheme, the aim of which (“the Aim of the Pilot”) is to improve access to the Business and Property Courts, primarily through—

- (1) streamlining the procedures of the Pilot courts;
- (2) lowering the costs of litigation;
- (3) increasing the certainty of costs exposure; and
- (4) speeding up the resolution of claims.

**1.2.** The Pilot will last for two years, starting on 14 January 2019 and finishing on 13 January 2021 (“the Pilot Period”). Any cases proceeding within the Pilot at the end of the Pilot Period will remain subject to the procedure of the Pilot thereafter.

**1.3.** For the purposes of the Pilot where the provisions of this Practice Direction conflict with other provisions of the rules or other Practice Directions, this Practice Direction will take precedence.

**1.4.** The Pilot courts are—

- (1) the London Circuit Commercial Court;

- (2) the Circuit Commercial Court at Leeds and Manchester;
  - (3) the Technology and Construction Court (“TCC”) at Leeds and Manchester;
  - (4) the Chancery Division in the District Registries at Leeds and Manchester.
- 1.5.** Each Pilot court will maintain a list for cases proceeding within the Pilot (“the Capped Costs List”).
- 1.6.** The Capped Costs List in any Pilot court will be available for any case in that court, except—
- (1) cases with a monetary value in excess of £250,000;
  - (2) cases which, after appropriate case management, will require a trial of more than 2 days (excluding reading time and judgment); or
  - (3) cases which—
    - (a) include an allegation of fraud or dishonesty;
    - (b) are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence; or
    - (c) involve numerous issues and numerous parties.

## **The Capped Costs List**

### *Capped Costs List - General*

- 2.1.** A case may enter the Capped Costs List in the following circumstances—
- (1) where the claimant issues a claim in the Capped Costs List in accordance with paragraph 2.8; or
  - (2) where the case is transferred to the Capped Costs List by subsequent agreement of the parties in the circumstances set out in paragraphs 2.17, 2.20 and 2.22.

**2.2.** A case may leave the Capped Costs List in the following circumstances—

- (1) where the defendant indicates in the defence that it does not agree to the case continuing in the Capped Costs List, in accordance with paragraph 2.16;
- (2) by agreement between the parties prior to the case management conference (“CMC”), in accordance with paragraph 2.20(1); or
- (3) by order made at the CMC in accordance with paragraph 2.26(5).

**2.3.** Where a case is proceeding in the Capped Costs List—

- (1) the parties are expected at all times to further the Aim of the Pilot;
- (2) the court will further the Aim of the Pilot when exercising any discretion and/or considering whether to make any orders; and
- (3) before making any order which departs from the general principles set out in the Pilot, the court must be persuaded that the benefits that arise from the making of the order are likely to justify the cost of complying with the order.

*Pre-issue*

**2.4.** Unless there is good reason not to do so (such as extreme urgency), any proposed claimant who is contemplating issuing proceedings in the Capped Costs List must send to the proposed defendant a succinct letter of claim (“the Letter of Claim”), which—

- (1) gives sufficient details of the claim to enable the proposed defendant to understand and to investigate the allegations; and
- (2) notifies the proposed defendant of the intention to issue in the Capped Costs List.

**2.5.** The proposed defendant must respond to the Letter of Claim within 14 days or such longer period as may be agreed by the parties. In the response (“the

Letter of Response”) the proposed defendant must state whether it agrees to the claim being issued in the Capped Costs List.

- 2.6. If the proposed defendant indicates that it does not agree to the claim being issued in the Capped Costs List then the proposed claimant may still issue the claim in that list, subject to the right of the proposed defendant to have it removed subsequently as set out in paragraph 2.16.
- 2.7. If a proposed defendant receives a Letter of Claim from a proposed claimant which does not suggest issuing proceedings in the Capped Costs List, it may propose the use of that procedure in the Letter of Response. If the proposed claimant agrees then it may issue the claim in the Capped Costs List.
- 2.8. A claimant who wishes to proceed in the Capped Costs List must issue the claim form in that list.

*Statements of Case – General*

- 2.9. The following provisions apply to statements of case in the Capped Costs List—
  - (1) the words “Capped Costs List” must be included in the heading of the claim form and each statement of case;
  - (2) there must be appended to the particulars of claim a bundle of core documents relevant to the pleaded issues in the case. There must be appended to any subsequent statements of case a bundle of any additional core documents relevant to such issues;
  - (3) the statements of case must be concise. Particulars of claim and defences with counterclaims must not exceed 20 pages in length. Other statements of case must not exceed 15 pages in length. The court will not give permission for a longer statement of case to be served for use in the Capped Costs List, save in exceptional circumstances;
  - (4) the particulars of claim and any counterclaim must, in addition to the requirements of rule 16.4, contain—



- (a) a brief summary of the dispute, a list of the anticipated issues and a concise statement of the facts and arguments relied upon;
  - (b) a full statement of all relief or remedies claimed; and
  - (c) detailed calculations of any sums claimed; and
- (5) any party intending to seek an order at the CMC that the contents of a statement of case (or any part of it) shall stand as evidence in chief (see paragraph 2.26(4)) must ensure that the statement of truth is signed by a person or persons with knowledge of the facts alleged. In the event that a signatory does not have knowledge of all the facts alleged, the statement of truth must indicate which paragraphs are verified by that signatory.

#### *Statements of Case - Procedure*

**2.10.** The particulars of claim must be served with the claim form.

**2.11.** The claim form and particulars of claim must be served—

- (1) promptly after receipt of the Letter of Response; or
- (2) if no Letter of Response is received, promptly after the period allowed or agreed for the Letter of Response.

**2.12.** No later than 10 days after service of the claim form and particulars of claim the following steps must be taken to fix a date for the CMC—

- (1) the claimant must seek to agree with the defendant a list of suitable dates for a CMC with a time estimate of 1 hour in the period between 10 and 12 weeks after the date for filing the acknowledgment of service;
- (2) the claimant must inform the court of the agreed suitable dates and invite the court to list the CMC on one of those dates;
- (3) if the defendant does not respond to attempts to agree dates then the claimant must supply his dates of availability and invite the court to list the CMC;

(4) if the claimant does not supply dates of availability then the court will fix a CMC without reference to the parties and may take any further or other step it deems appropriate; and

(5) the CMC shall be listed to be heard by a Circuit Judge authorised to sit as a judge of the TCC, the Chancery Division or the Circuit Commercial Court as appropriate.

**2.13.** The defendant must file and serve an acknowledgment of service within the time periods prescribed by the rules.

**2.14.** If the defendant files an acknowledgment of service stating an intention to dispute the court's jurisdiction then the provisions in the Pilot shall not apply until such time as the Court has determined that dispute.

**2.15.** Save where paragraph 2.14 applies, the time for filing and serving a defence is 28 days after the last date upon which the defendant may file an acknowledgment of service.

**2.16.** If the defendant wishes a claim issued in the Capped Costs List to be transferred to the ordinary list then the defendant must so indicate in the defence. If the defendant does so then the claimant must notify the court and the claim will thereafter proceed in the ordinary list.

**2.17.** If the defendant to a claim issued in the ordinary list wishes to propose that the claim should be transferred to the Capped Costs List then the defendant must so indicate in the defence. The claimant must agree or disagree in writing with the proposal by no later than 14 days after service of the defence. If the claimant agrees then the claimant must notify the court, and the claim will be transferred forthwith into the Capped Costs List.

**2.18.** The time for filing and serving any reply and/or defence to counterclaim is 14 days after service of the defence and/or counterclaim.

**2.19.** Unless such extension would require the alteration of any date fixed for the CMC, the parties may agree to extend the time for serving and filing any statements of case subsequent to the particulars of claim by up to 14 days. The party requesting the extension of time must file a consent order recording the agreement.

*Before the CMC*

**2.20.** At any time before the CMC the parties may agree in writing—

- (1) that a case which has been proceeding in the Capped Costs List should be transferred to the ordinary list; or
- (2) that a case suitable for the Capped Costs List which has been proceeding in the ordinary list should be transferred into the Capped Costs List.

**2.21.** In either of the cases set out in the foregoing paragraph the claimant must promptly inform the Court of the agreement and the Court will give directions in writing for a CMC or case and costs management conference (“CCMC”) as appropriate.

**2.22.** During the Pilot Period any judge, including a District Judge, in a Pilot court may draw the Pilot to the attention of the parties to any claim not proceeding in a Capped Costs List and invite the parties to consider transferring the claim to a Capped Costs List. If the parties consent to such a transfer in advance of the first CCMC then—

- (1) they shall be excused from any obligation that would otherwise arise to file costs budgets in advance of the CCMC;
- (2) the court shall transfer the claim to the Capped Costs List; and
- (3) the provisions of the Pilot shall apply and the parties shall prepare for the CMC in accordance with paragraphs 2.24 and 2.25 below.

The court has no power to transfer a claim to the Capped Costs List without the consent of the parties.

*CMC*

**2.23.** At the CMC the court will actively manage the case so as to further the Aim of the Pilot and will have in mind the requirement set out at paragraph 2.3(3). The parties and, if they are represented, a senior legal representative or the trial

advocate should attend the CMC with a sufficiently detailed knowledge of the case to enable appropriate case management decisions to be made.

**2.24.** The claimant must provide a draft list of issues drawn from the statements of case to the defendant in sufficient time to enable the parties to use their best endeavours to discuss and agree the contents of the list of issues prior to filing the CMC bundle at court.

**2.25.** No later than 3 clear days before the CMC the claimant must serve and file a paginated bundle of documents which includes—

- (1) a list of issues, agreed if possible;
- (2) any requests in writing by any party for disclosure of documents not contained within the core bundles appended to the statements of case (see paragraph 2.29 below); and
- (3) any request by a party for the matter to be transferred to the ordinary list.

**2.26.** At the CMC the court will—

- (1) review the list of issues filed;
- (2) approve a list of issues;
- (3) consider whether to make any orders as to disclosure, witness statements or expert evidence which are necessary for the resolution of those issues (see paragraphs 2.30, 2.32 and 2.33);
- (4) consider whether to make an order that statements of case which are verified by a person or persons with knowledge of the matters alleged should stand as the evidence of that person or persons;
- (5) consider whether the claim should be transferred to the ordinary list, either upon the request of a party or of the court's own motion;
- (6) consider how it might best assist the parties to resolve issues without the need for a trial;

- (7) fix a trial date, which should be as soon as possible and in any event not more than 8 months after the CMC and with a trial length of not more than 2 days (excluding reading time and judgment);
- (8) give directions for trial including directions as to the preparation of a trial bundle and the service and filing of skeleton arguments; and
- (9) fix the timetable for trial or give directions for the fixing of the timetable.

### *Disclosure*

**2.27.** Rules 31.5(2) and 31.7 do not apply to cases in the Capped Costs List.

**2.28.** The general rule is that no disclosure will be ordered and the parties will be able to rely only on the documents contained in the bundles of core documents.

**2.29.** Any party seeking disclosure of documents not contained within the bundles of core documents must make a written request to the other party for disclosure of such documents by no later than the time for serving and filing the CMC bundle. If no request is made in accordance with this paragraph then the court will only make an order for disclosure in exceptional circumstances.

**2.30.** When considering whether to make an order for disclosure the court will take into account—

- (1) the requirements of paragraph 2.3(3);
- (2) how narrow and specific the request is;
- (3) whether the requested documents are likely to be of real probative value; and
- (4) the reasonableness and proportionality of any related search required, having regard to the factors set out in rule 31.7(2).

### *Witness statements*

**2.31.** Witness statements (or statements of case if so ordered) shall stand as evidence in chief at trial. Each witness statement shall be limited to 15 pages in length and shall deal only with issues set out in the list of issues.

**2.32.** The general rule is that a party may rely on the oral evidence of no more than 2 witnesses at trial. The court may only make an order departing from the general rule if—

- (1) the requirements of paragraph 2.3(3) are met; and
- (2) the court is satisfied that the oral evidence of more than 2 witnesses is necessary for the fair determination of the case.

### *Expert evidence*

**2.33.** The general rule is that expert evidence will not be permitted. The court will only make an order departing from the general rule where—

- (1) the requirements of paragraph 2.3(3) are met; and
- (2) the court is satisfied that expert evidence is necessary for the resolution of the case.

**2.34.** Unless otherwise ordered, expert evidence at trial shall be given in the form of a report of a single joint expert.

### *Applications*

**2.35.** Part 23 applies with the modifications set out below.

**2.36.** The court will deal with all applications (save for those dealt with at the CMC) without a hearing unless the court considers it necessary to hold a hearing. In appropriate cases that may be a hearing by telephone or by video link.

**2.37.** The following directions apply to applications in cases in the Capped Costs List—

- (1) all applications and documents filed in support must be concise;

- (2) the respondent must respond in writing within 7 days of service of the application notice. The response must be concise;
- (3) any reply from the applicant must be provided within 2 business days of service of the response and be concise; and
- (4) if any party contends the application should be dealt with at a hearing, it must give an explanation in writing.

**2.38.** Save in respect of the time limits for serving and filing statements of case, the time limits applicable to a case in the Capped Costs List under any rule, practice direction or order of the court may be extended by agreement by up to 7 days. Otherwise, the court will only grant an order extending time if it considers that this would further the Aim of the Pilot.

**2.39.** Save in exceptional circumstances, the court will not permit a party to submit material at trial in addition to that permitted at the CMC or by later court order.

#### *The Trial*

**2.40.** The judge hearing the trial will be the judge who heard the CMC unless it is impractical for that judge to do so.

**2.41.** The court will manage the trial to further the Aim of the Pilot and to ensure that the trial estimate is adhered to. Cross-examination will be strictly controlled by the court and shall be time limited as set out in the trial timetable. The trial timetable must be adhered to save to the extent that any deviation is permitted by the court.

**2.42.** The trial will be conducted on the basis that it is only necessary for a party to put the principal parts of its case to a witness, unless the court directs otherwise.

**2.43.** The court will endeavour to hand down judgment within six weeks of the conclusion of the trial.

## **Costs**

### *General*

- 3.1.** Costs budgeting shall not apply to cases in the Capped Costs List.
- 3.2.** The court will make a summary assessment of the costs of the party in whose favour any order for costs is made. Rules 44.2(8), 44.7(1)(b) and Part 47 do not apply.
- 3.3.** The parties shall each file and exchange schedules of their costs incurred in the proceedings not more than 21 days after the conclusion of the trial. Such schedules shall contain sufficient details of the costs incurred in relation to each applicable stage in the Capped Costs Table to enable the court to assess the costs summarily.
- 3.4.** The costs will be assessed in accordance with paragraphs 3.5 and 3.6, except where the court considers that a party has behaved in a manner which amounts to an abuse of the court's process.

### *Amount of capped costs*

- 3.5.** The maximum amount of costs that the court will award for each stage of the claim is set out in the Capped Costs Table below.
- 3.6.** Except insofar as otherwise provided in this section, the court will not order a party to pay total costs of more than £80,000.
- 3.7.** The amount in paragraph 3.6 applies after the court has applied the provision on set off in accordance with rule 44.12(1)(a).
- 3.8.** Subject to assessment where appropriate, the following may be recovered in addition to the amount of costs assessed in accordance with paragraphs 3.5 and 3.6—
  - (1) court fees;
  - (2) costs relating to the enforcement of any court order; and
  - (3) wasted costs.



**3.9.** Where appropriate, VAT may be recovered in addition to the costs awarded under this section, and any reference in this section to an amount of costs is a reference to those costs net of any such VAT.

*Summary assessment of the costs of an application*

**3.10.** The general rule is that the court will reserve the costs of an application to the conclusion of the trial, when they will be subject to summary assessment.

**3.11.** Where a party has behaved unreasonably the court may make an order for costs at the conclusion of the application. Costs awarded to a party under this paragraph are in addition to the total costs that may be awarded to that party under paragraph 3.6.

*Part 36 offers*

**3.12.** Subject to paragraphs 3.13 to 3.15, Part 36 applies to proceedings in the Pilot.

**3.13.** Where an offer is made in proceedings in the Pilot but is not accepted, rule 36.17 applies with the modifications in paragraphs 3.14 and 3.15.

**3.14.** Where an order for costs is made pursuant to rule 36.17(3), unless it considers it unjust to do so, the court will order that—

- (1) the claimant is entitled to costs assessed in accordance with paragraphs 3.1 to 3.11 to the date on which the relevant period expired; and
- (2) the defendant is entitled to costs assessed in accordance with paragraphs 3.1 to 3.11 from the date on which the relevant period expired to the date of judgment.

**3.15.** Where an order for costs is made pursuant to rule 36.17(4), unless it considers it unjust to do so, the court will order that the claimant is entitled to—

- (1) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

- (2) costs assessed in accordance with paragraphs 3.1 to 3.11 to the date on which the relevant period expired;
- (3) costs assessed on the indemnity basis in accordance with paragraphs 3.1 to 3.11 from the date on which the relevant period expired save that—
- (a) the maximum amount allowed under paragraph 3.5 for any stage of the claim on which work was done after expiry of the relevant period shall be increased by 25%; and
- (b) the total costs a court may order under paragraph 3.6 are not more than £100,000; and
- (4) an additional amount which is 10% of the amount of—
- (a) the sum awarded to the claimant by the court; or
- (b) where there is no monetary award, the sum awarded to the claimant in respect of costs.

*Capped Costs Table*

<b>Work done in respect of—</b>	<b>Maximum amount of costs</b>
Pre-action	£10,000.00
Particulars of claim	£7,000.00
Defence and counterclaim	£7,000.00
Reply and defence to counterclaim	£6,000.00
Case management conference	£6,000.00
Disclosure	£6,000.00
Witness statements	£8,000.00
Experts' reports	£10,000.00
Trial and judgment	£20,000.00
Settlement/negotiations/mediation	£10,000.00

Making or responding to an application	£3,000.00
Work done post-issue which is not otherwise covered by any of the stages above	£5,000.00.”