In Practice

Financial Orders Trial Bundles: An Ignored Art

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As someone who specialises in ancillary relief work (from 6 April to be called 'financial remedies' work) I continue to be dismayed from time to time at the poor quality of trial bundles. Inevitably such poor bundles increase preparation time and cause exasperation. The Practice Direction relating to the preparation of trial bundles was issued on 27 July 2006, see [2006] 2 FLR 199. This Practice Direction will continue in force unaltered by the new Family Procedure Rules 2010 (albeit renumbered as Practice Direction 27A).

It is now over 2 years since the legal profession was given a shot across the bows by Munby J (as he then was) in *Re X and Y (Bundles)* [2008] EWHC 2058 (Fam), [2008] 2 FLR 2053:

> 'My experience, which is shared by too many of my brethren, is that far too often the Practice Direction is still being honoured more in the breach than the observance. Too often bundles arrive late or not at all. Too often bundles are incomplete or not up-to-date. Too often skeleton arguments and other preliminary documents are handed in on the morning of the hearing – at a time when the judge is already sitting or is struggling to assimilate other documents which have also been handed in late ...
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> This continuing failure by the professions to comply with their obligations is simply unacceptable. Enough is enough. Eight years of default are enough. Eight years are surely long enough for even the most casual practitioner to have learned to do better. In the case of those who practise regularly in the family courts there is, and can be, absolutely no excuse for not being completely familiar with the Practice Direction and its contents and complying meticulously with its requirements.
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> It is convenient to refer at this point to part of a judgment which I delivered on 16 August 2007 in private and which has not hitherto entered the public domain:
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> "The bundle as prepared by them was lamentably deficient. There was no reading list. The chronology was virtually useless – it omitted many relevant events and was not cross-referenced to the bundle. The mother's skeleton argument was missing from the bundle. Most of the key documents, having originally been exhibited to various affidavits, were scattered through the bundle in neither chronological nor thematic order. The index to the bundle was virtually useless, as it did not condescend to list the various documents contained in the various exhibits. The consequence was that any kind of sustained pre-reading of the bundle, and in particular of the key documents, was virtually impossible. There was no excuse for any of this. The solicitors responsible for this deplorable state of affairs ought to know better. They are experienced family solicitors whose notepaper is festooned with the logos of virtually every relevant family law professional body or association. It is now over seven years since the Practice Direction in its original form was first promulgated. The Practice Direction in its present form was published a year ago. It is simply not good enough. Endless complaints by the judges of the Division seem to have had strikingly little effect. Enough is enough. In future, those guilty of comparable failings should expect to be publicly identified. Perhaps public naming and shaming will succeed where judicial exhortation has so conspicuously failed."

Paragraph 12 of the Practice Direction warns of sanctions penalising those who fail to comply with its

requirements. There is the sanction of costs, either orders for costs against the party in default or orders for costs to be paid by the defaulting lawyers. There is the risk that those who default may find their cases put to the end of the list – and I should like to emphasise that the plea 'but the case will only take 30 minutes, including reading time' will not necessarily save defaulters from this salutary fate. Why, after all, should others in a busy list who have complied with the Practice Direction be held up? Sometimes, as in the second of the cases I have mentioned, there will be no option but to take the case out of the list altogether – to adjourn to a date which may or may not be in the near future. In particularly egregious cases, defaulters may find themselves publicly identified in judgments delivered in open court.

It would not, in my judgment, be fair or just to expose a practitioner to this last sanction without fair public warning having been given that the sanction is available and that it may be applied in appropriate cases. I have, therefore, not identified anyone involved in either of the cases to which I have referred. But the professions have now been warned. Next time a defaulter may not be so lucky.'

Why are Trial Bundles Important?

The role of solicitors (and Counsel) is to achieve the best results for their client that they can within the law and rules that they can. In a contested matter this means persuading a judge to make the decision you want him to make. A judge is much more likely to follow your arguments if you can 'show him the way'. This means making the case appear simple and straightforward rather than causing him to get lost, muddled and confused (and no doubt irritated) because he is unable to follow your arguments as he is too busy trying (without success) to get to grips with the basic facts in a case. The classic example of this is trying to persuade a judge that the husband has dissipated assets from his bank account. In order to demonstrate this proposition it is necessary to analyse the details from his bank statements which, instead of being collated together in one place, are to be found scattered between Forms E, Replies to Questionnaire, Further Replies to Questionnaire and updating disclosure often spread across 2 or more lever arch files thus making the task, if not impossible, then certainly much more difficult than it needs to be.

Judges, certainly district judges, often do not have the luxury of time allocated for pre-reading a case. Even if time has been allocated it is the experience of many on the district judge bench that their reading time is eaten into with emergency applications or other duties. It is not uncommon for judges to be given the trial bundle either the afternoon before the hearing or even on the morning of the hearing when several other directions hearings have been listed prior to the main trial. So it is important that the judge is presented with a bundle which assists him to quickly and easily assimilate the information which is going to be relevant to his decision making process.

Other considerations which ought to encourage solicitors to invest their time and effort in the preparation of trial bundles are:

- Professional pride – what does the trial bundle say about you as a firm?
- Client/professional referral – if the bundle looks good and is well prepared then it is one of the hallmarks by which you will be judged by your clients and other fellow professionals and from which referrals of new work may be achieved.

On the flip side of the coin it is simply the case that the rules require trial bundles and there are sanctions for non-compliance (see Practice Direction para 12): 'Failure to comply with any part of this practice direction may result in the judge removing the case from the list or putting the case further back in the list and may also result in a "wasted costs" order in accordance with CPR Part 48.7 or some other adverse costs order.' What follows is an attempt to assist those charged with the preparation of trial bundles to prepare a bundle which both complies with the Practice Direction and more importantly one which enhances the preparation of the client's case.

Whose Responsibility is it to Prepare the Trial Bundle?

The applicant is responsible for preparing the trial bundle except where the applicant is a litigant in person in which case the responsibility falls on the respondent (or if more than one, the first respondent who is legally represented).

Do we have to Provide Copy of the Trial Bundle to the Other Side?

No, the obligation is to provide an index at least 4 working days before the hearing (see Practice Direction para 6.1): however, good practice is to offer to provide a duplicate bundle(s) upon payment of reasonable photocopying charges. This avoids everyone singing from different hymn sheets.

How many Trial Bundles?

The minimum is 4: 1 for the judge; 1 for Counsel; 1 for solicitor and (often overlooked) 1 for the witness (plus any other bundles you have agreed to provide the other party).

Different Approaches to Trial Bundles

In my experience there are two types of trial bundles:

(1) The well prepared bundles to which some thought has been applied. They are in a logical and thematic order, often in pristine A4 lever arch files bearing the firms logo (good marketing?);
(2) The 'oh my God! – the hearing is in 3 days' time – we need to do a bundle quick' simply photocopy the solicitor's file and put it in a lever arch file in whatever chronological order in which the file happens to exist with no other thought applied to the issue.

When Should the Trial Bundle be Prepared?

This is the key and fundamental point. A trial bundle should:

- be prepared at the outset of a case – at least as soon as Forms E are exchanged;
- be regarded as a working file which constantly changes and evolves as new and further information comes to light.

The advantage of this system is that:

- there is never the last minute panic to prepare a trial bundle;
- the solicitor has at any moment in the case the genesis of the trial bundle with all the relevant financial information in one place and readily accessible – this must surely help him review and prepare the case as he goes along and aid his understanding of what has been done, what needs to be done and to negotiate with the other side.

The 'we haven't got time' riposte: yes this involves some discipline and investment of time at the outset of the case but surely this is outweighed by the time and effort required doing the 'last minute' panic bundles for FDR and final hearings. As each new piece of information comes in how much time does it take to do a photocopy and insert into the bundle as well as the solicitors file?

The Trial Bundle

The bundle should be divided into sections. It does not matter greatly whether page numbering is re-commenced with each new section or is simply consecutive regardless of section (whatever is easier for the solicitor).

Section A	Any skeleton arguments, agreed schedule of assets/chronologies, etc.
Section B	Substantive divorce proceedings including petitions, answers/cross petitions, statement of arrangements, decree nisi and absolute (in my experience there is often much valuable information, albeit nuanced, in the substantive divorce proceedings not found elsewhere).

Section C

Applications and orders including Forms A, notice of FDA, orders made at FDA and FDR and any other interim applications/orders made (eg Maintenance Pending Suit (MPS) applications/s 37 orders). This will not include Forms E.

Section D

Ancillary Pleadings:

(i) MPS statements; Forms E less exhibits (which will be dealt with in next section). Each side's statement of issues, chronologies filed for FDA.

(ii) Questionnaires, including any supplementary questionnaires (also including any solicitor's correspondence dealing with questionnaires, ie raising new questions or complaining about defective replies to questionnaires, etc). It is helpful to have all questionnaires / replies / correspondence relating to one party first and then all questionnaires / replies /correspondence relating to the other party separate.

(iii) Replies to questionnaire – less exhibits (which will be dealt with in next section). NB If there is a need to establish what documents were disclosed at which time then simply place a sheet of paper after the Form E or questionnaire stating (for example) 'the following documents were attached to this Form E/ questionnaire [bank statements dated ...] which are now to be found in section X @ pages a-b.'

Section E

Applicant's financial disclosure

Sub-divided into sections with each section dealing with a different type of asset (these documents will be an amalgamation of documents exhibited to Forms E and disclosed pursuant to questionnaire) eg:

E1 Mortgage redemption statements (for each property if more than 1).

E2 Bank statements (arranged in strict chronological order – from oldest to newest so one reads the oldest statement first) obviously with each account being consolidated together and some means of dividing them in the bundle.

E3 Endowment/Insurance policies: surrender values.

E4 Other investments: such as premium bonds, investment bonds, stock/share certificates, employee option to purchase documents.

E5 Individual/company accounts (in chronological order).

E6 Pensions information.

E7 Documents relating to liabilities, eg loans, credit card statements (arranged same as for bank statements).

E8 Pay slips: P.60. P11D, up to date payslips.

E9 Other financial documents.

NB: these heading are guidelines and not intended to be exhaustive – there may be other headings which are appropriate for any individual case

Section F

Respondent's financial disclosure

Same as for applicant

Section G

Experts' reports

Sub-divided into categories eg:

G1 valuation of fmh;

G2 medical reports;

G3 valuation of companies/accountancy experts;

G4 CGT evidence

Section H

Any schedules dealing with issues of contents and note *K v K (Financial Relief: Management of Difficult Cases)* [2005] EWHC 1070 (Fam), [2005] 2 FLR 1137:

'Solicitors and counsel must not allow the problematic issue of division of chattels to be forgotten. As a matter of practice, division of chattels must be accomplished prior to trial, with a clear schedule denoting the destination of items, in order to ensure that all outstanding issues were resolved at the final hearing. If parties could not agree, then a Scott schedule must be completed with items marked as agreed or remaining in dispute, plus a short note giving the reasons why any particular item was sought.'

Section I

Estate agents' particulars showing alternative properties subdivided into those provided by the applicant followed by those provided by respondent:

(i) in ascending/descending order of value;

(ii) colour photocopies rather than the usual black and white blobs that one often sees which will not persuade a judge to any view other than that no care has been taken in the preparation of the case;

(iii) full copies of estate agents' particulars rather than thumb nail internet printouts which are devoid of detail.

Section J	Relevant solicitors' correspondence
Section K	Costs Costs estimates which have been filed by each party throughout proceedings: applicant's first followed by the respondent's.
Section L	Offers – not including without prejudice offers.
Section M	Any other documents.

When does the Trial Bundle need to be Lodged with the Court?

See Practice Direction paragraph [6.3]: 'The bundle (with the exception of the preliminary documents if and insofar as they are not then available) shall be lodged with the court not less than 2 working days before the hearing, or at such other time as may be specified by the judge.'

What about Other Documents?

If there are documents which you want counsel to see but don't want in the trial bundle? (eg correspondence passing between solicitors and/or lay client or any other undisclosed documents), then these should be put in a separate bundle – not the court bundle.

What about the Last Minute Flurry of Exchange of Documents?

Inevitably the other side wake up to the fact there is a final hearing 72 hours before the trial date and the fax machine goes mad and emails flood into your inbox. How do we cope with this?

- Firstly this should not delay getting the bundle out to counsel or the court.
- Any late documents can be made into a short supplementary bundle following the same order as the main trial bundle.

Other (Equally Important) Points

- Photocopying – a poorly photocopied document is useless.
- Removal of irrelevant/obsolete documents:
  (a) does the judge/counsel need to see:
    (i) every single historical surrender value of insurance policies, pensions CETV – surely the most recent ones will do – discard the old ones;
    (ii) pages of waffle which often come attached to disclosure, eg pensions and endowment information such as blank deed of nomination forms, etc.

  NB: important information is often to be found buried away in the small print and sometimes we do need to show historical documents. All I am suggesting is that some thought is given to what needs to be included and what does not.

Finally we all have experience of lever arch files being destroyed in the DX system so if you are not going to hand deliver your trial bundle to the court (and remember to get a receipt if you do) then I suggest you send it attached by India tags, take the file to court with you and offer to transpose the judges bundle into a file on the morning of the hearing.