Barristers' Chambers

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Issue 46
'Thick and Fast' – Obligatory Standards on Preparation of High Court Financial Remedy Cases – from the 'Money Judge' (Mostyn J)

The recent 'View from the President's Chambers' (No 12) has suggested that soundings are already being taken as to widening this mandatory Guidance to include the lower courts in all such proceedings – so 'forewarned is forearmed'.

The required standards have been tabulated below for ease of reference – I have also considered that you may be assisted by limited commentary from myself, where appropriate.

Standard Reference	**Content**	**Standard**	***Comment***
Para 2	Purpose	To enhance efficiency by High Court Judge and to ensure case allotted appropriate share of court's resources	*It is suggested that there is unnecessary 'over control ' and perfectionism wedded into these mandatory provisions and a perception of mistrust of the Profession to deal competently with basic Practice*
Para 3	PTR	Every case must have a Pre-Trial Review before the allocated trial judge (unless completely impracticable) approx 4 weeks before final hearing.	*The parties will eventually have to meet the extra cost of this additional hearing and its requirement in every case is highly debateable since any failure to comply with directions and/or Practice Guidance should be robustly condemned in costs at the final hearing in any event*

Para 4	PTR Template	At the PTR a final hearing template must be prepared. This should: a. provide a 'reasonable and realistic' time for judicial reading and judgment writing; b. not normally allow longer than one hour for opening; and c. not allow for any evidence-in-chief unless the court has expressly authorised this at the PTR within the terms of FPR rules 22.6(2)-(4). Hence by rule 22.6(2) the parties' section 25 statements will almost invariably stand as their evidence-in-chief.	*It would be wise for advocates to obtain the specific informed approval as opposed to 'a rubber stamp' of the Judge at such a PTR to the estimates given, the potential need for a longer opening and the requirement for some evidence in chief if appropriate – so that the Court is itself a full party to the preparation process and areas for complaint of under estimation or overrun are minimised*
Para 5	S 25 statements	The parties' section 25 statements must only contain evidence. Hence by FPR PD22A para 4.3(b) the statement must identify the source of any information and belief and must not contain argument or other rhetoric.	*This is a welcome requirement and will concentrate the mind of the party to the strengths or weaknesses within their case well before the final hearing.*
Para 6	Experts discussion	Where there is no existing direction for discussion between experts pursuant to FPR rule 25.16 and PD 25E then that matter must be raised at the PTR and good reason would have to exist not to make such a direction.	*Why not then include this as an automatic direction at an earlier stage – it should not be taking place within 4 weeks of the final hearing!*
Para 7	Agreed Statement of Issues /Sched of assets / Chronology	7. At all PTRs a direction should be made for the 'indispensible' agreed statement of issues to be determined as per FPR PD27A para 4.3(b). And to that must be attached: a. an agreed schedule of assets with any un-agreed items clearly denoted; and b. an agreed chronology with any un-agreed events clearly denoted. Under no circumstances are there to be competing asset schedules and chronologies.	*There will obviously be a need well in advance of a final hearing now to have got to grips with these aspects and this will represent a major task to marshall the schedules for agreement several weeks before the final hearing*

Para 8	Court Bundle	There must be 'scrupulous compliance with FPR PD27A. ie from 31 July 2014 this limits the Bundle to a single file of up to 350 pages only – including skeleton arguments (see para 9 below) and the agreed documents under para 7 above. The Bundle must contain only - documents relevant to the hearing and necessary for the court to read, or which will actually be referred to in the hearing. Any correspondence (including with experts), bank or credit card statements and other financial records must not be included without specific prior direction of the court at the PTR (PD27A para 4.1). A separate bundle of all authorities relied on must be prepared and agreed between the advocates (PD27A para 4.3).	*This again is to be welcomed in theory but represents a major shift in the present practice of later preparation and suggests that the advocate for the Final Hearing will need to make their final preparations substantially in advance of the hearing itself in order to identify areas of 'excluded' documentary evidence which will need to be referred to – hence the solicitor will need to prepare the draft Bundle and instruct counsel much much sooner than at present for those preparations to be made in compliance with these requirements.* *The President has suggested that the same requirements may be introduced to lower court pre trial preparations – such a suggestion is it is submitted wholly unrealistic and ignores both the everyday demands of a solicitor's office and the limited budget of the client in the majority of such cases.*
Para 9	Skeleton argument	Here the CPR PD52A para 5.1 and PD52C para 31(1) apply – so a skeleton argument must:	*Nothing wrong here and should already be part and parcel of a*

		a. be concise and not exceed 25 pages (excluding agreed documents under para 7 above, but including any other appended schedules); b. be printed on A4 paper in not less than 12 point font and 1.5 line spacing; c. define and confine the areas of controversy; d. be set out in numbered paragraphs; e. be cross-referenced to any relevant documents in the bundle; f. be self-contained and not incorporate by reference material from previous skeleton arguments; g. not include extensive quotations from documents and where necessary to refer to authority, the proposition of law the authority demonstrates must first be stated; and then the parts of the authority that support the proposition identified, but without extensive quotation from it.	*competent advocates preparation.*
Para 10	Longer Skeleton	If intended to exceed 25 pages then a specific direction should be sought at the PTR and very good reasons will be needed to justify such a direction. Any breach of this limit will result in the skeleton being returned unread for abridgement.	*Ditto*
Para 11	Hearing Template	At a final hearing the hearing template should be adhered to and 'spillage' will not be tolerated without 'very good reasons'. In cross-examination advocates follow the strictures of Lord Judge LCJ in R v Farooqi & Ors [2013] EWCA Crim 1649 at para 113, ie avoid "...the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination".	*Few advocates are Marshall Halls and there is an element again here of a Guidance based upon a perfectionism which does not exist. Many tribunals have an imperfect memory of their own forensic abilities in practice – the author of this Guidance being of course an exception! The primary emphasis should not be upon running the Courtroom like a railway timetable – the focus should at all times be about*

			coming to the correct conclusion and the delivery of justice – ultimately the Court has a public duty to perform for the litigants before it and not the other way round
Para 12	Penalties	Where advocates unreasonably fail to comply re: paras 7 (provision of agreed statement of issues, schedule of assets and chronology), 9 (length and content of skeleton argument) or 11 (adherence to hearing template) they risk an order being made disallowing a proportion of their fees under CPR 44.11(1)(b) and/or section 51(6) Senior Courts Act 1981. Cf comparable warning in CPR PD 52C para 31(4).	*The purpose of this warning could have been better expressed – clearly the use of 'unreasonable failure' implies there will still be 'reasonable failures' which will not be the subject of penalty.*
Para 13	Leave to Appeal	After receipt of a draft written judgment if either party wishes to seek leave to appeal, grounds of appeal must be filed at court and served on the other party at least one clear business day before the hearing of the application for leave.	
Para 14	Transfer of financial remedy cases to HC Judge	The guidance dated 1 December 2009 and modified in the announcement dated 30 April 2014 is confirmed. That modified guidance and certificate are attached - Sched A & B	

SCHEDULE A

Hearing by a High Court Judge

President's Guidance: Financial Proceedings, cases to be allocated to a judge of the High Court

1. This Guidance takes effect from 22 April 2014 and applies, as far as practicable, to cases commenced before, as well as those commenced on or after, that date.

A. Financial remedy applications pending in the Central Family Court (CFC) where the parties seek allocation to a judge of the High Court.

2. An application for a financial remedy will normally only be considered suitable for hearing by a High Court judge if it is exceptionally complex or there is another substantial ground for the case being heard by a High Court judge.

3. [Omitted]

4. Where the parties seek the allocation of the proceedings to a High Court judge before an allocation direction has been made both Counsel or, if Counsel are not instructed, solicitor(s) for the parties must complete and file a certificate in the form annexed to this Guidance, stating concisely the reasons for certifying that the application is suitable for determination by a Judge of the Family Division. The completed certificate must be filed with the Clerk of the Rules not less than 21 days before the date fixed for the First Appointment in the CFC.

5. The completed certificate will be referred to and considered by a Judge of the Family Division who will determine whether the certificate indicates that prima facie the case is suitable for hearing by a High Court judge. If so determined, the case will be allocated by the Clerk of the Rules to a Judge of the Family Division in accordance with paragraph 8. A date will be fixed for the First Appointment before the allocated Judge and the merits of the certification will be considered at that appointment.

6. If, at the First Appointment, the allocated Judge considers that the certification

was not appropriate, the proceedings will be re-allocated within the Family Court and the allocated Judge may give directions as to case management, including the level of judiciary before whom the case should be listed. The allocated Judge may make such orders as to costs as considered appropriate.

7. Where proceedings are allocated to a High Court judge under paragraph 4, it is the responsibility of the solicitor for the applicant to ensure that the First Appointment fixed in the CFC is vacated.

B. Financial remedy applications allocated for hearing by a High Court judge

8. An application for financial ancillary relief considered suitable for hearing by a High Court judge will be allocated to one Judge ('the allocated Judge'). The allocated Judge will, so far as practicable, manage the case from First Appointment through to final hearing, except that the financial dispute resolution hearing ('FDR') will be listed in an FDR week before a Judge of the Family Division other than the allocated Judge.

9. If the allocated Judge deems it appropriate, the date for the final hearing may be fixed at the First Appointment.

10. The FDR will be listed with a time estimate of 1 day unless (i) the parties certify, giving written reasons, that a lesser period is sufficient and (ii) obtain the written permission of the FDR Judge (before whom the case is listed for hearing) for the reduced time estimate.

11. Any application in the course of the proceedings should be made to the allocated Judge, unless to do so would be impracticable or would cause undue delay.

SCHEDULE B

Certificate

No

IN THE FAMILY COURT Sitting at the Royal Courts of Justice

[Mr/Mrs] Justice [Name] in private

The marriage of [Name of applicant]

And

[Name of Respondent]

Outline Factual matrix: a. The parties married on [Date]

b. The parties separated on [Date]

c. There are [Number] children of the family

d. The [Petition/Answer] was issued on [Date]

e. The Decree Nisi was pronounced on [Date]

f. The Decree Absolute was granted on [Date]

g. There is [not] a dispute about the jurisdiction of the

High Court of England and Wales. The reason for the dispute is [Give short reasons]

[Name] being [Counsel/solicitor] for the Applicant

[Wife/Husband]

[Name] being [Counsel/solicitor] for the Respondent

[Wife/Husband]

We certify that this application should be allocated to a judge of the High Court because:- Delete/complete as appropriate

(1) The assets in this case are currently estimated to be in the order of:-

(a) £10 - £15 million

(b) £15 - £25 million

(c) £25 - £50 million

(d) £50 million plus [State the figure]

(e) Other [State the figure]

If the assets are less than the figures set out in (a) – (d) above state the

Potential allegations/issues may arise which include:

(2) Non disclosure of assets [Yes / No]

(3) Assets are/were held through the medium of offshore trusts/settlements. [Yes / No]

(4) Assets are/were held through the medium of family/unquoted corporate entities. [Yes / No]

(5) The value of family assets, trust and/or corporate entities. [Yes / No]

(6) Expert accountancy evidence will be required [Yes / No]

(7) Assets are held offshore. [Yes / No]

(8) The parties' respective contributions. [Yes / No]

Give brief details of the potential dispute

[Details of potential dispute]

(9) There are/may be disputed allegations of "obvious and gross" conduct. Give a brief outline of the potential matters that may be in dispute.

[Details of conduct allegations]

(10) There are substantial arguments concerning the illiquidity of assets. Give brief details of the potential matters that may be in dispute.

[Details of illiquidity of assets disputes]

(11) There may be substantial arguments about:-

(a) which assets are “matrimonial assets” or “non matrimonial assets” [Yes / No]

(b) assets that were owned prior to the marriage [Yes / No]

(c) assets that were acquired after the parties’ separated [Yes / No]

(d) other – give brief details of matters that may be in dispute. [Yes / No]

[Details of dispute]

(12) The application involves a novel point of law. Specifically…(set out in outline the proposition of law that may be involved).