



GREENWAY CHAMBERS

Streamlining Construction Litigation: work more efficiently and your clients will love you

Richard Cheney SC and Ian Roberts SC

Introduction

- Construction cases are document intensive.
- Large volume of documentation = high cost \$\$
- Master the documents and you'll master the costs



What are we aiming for?

- Each of the steps in the life of a case is designed to get the matter ready for hearing. So we should be thinking about:
- The most efficient way to take each step;
- Ensuring we are in the best position when we get to the hearing.



The Four Main Document Moments

- At the outset, when your client brings to you the relevant (and often irrelevant) documents;
- Preparing the evidence;
- Disclosure;
- Preparing the documents required for the hearing. (eg, those required by the Practice Notes).



We will focus on two:

- Preparing the evidence; and
- Preparing the hearing documents



Focus on the end game

1. As you approach the hearing you will have to prepare a Court Book
2. The most important part of the Court Book is the chronological bundle



A quick look at the way it's commonly done

Preparing the evidence



A quick look at the way it's commonly done

Preparing the evidence

- a. Each witness swears an affidavit
- b. Each affidavit exhibits a bundle
- c. The exhibit includes all the documents relevant to the witness' evidence.



A quick look at the way it's commonly done

Preparing the evidence

Very often, each witness exhibits the same documents.

Each may, eg, need to refer to parts of the contract in their evidence so they each exhibit the contract.

That means there will often be multiple copies of the same documents in evidence.

Frequently, particularly in construction and commercial cases, those documents are very large.



A quick look at the way it's commonly done

Preparing the hearing bundle or court book



A quick look at the way it's commonly done

Preparing the hearing bundle or court book

The practice note relevant to the Commercial and T&C Lists is SC Eq3 and it requires the preparation of a Court Book.



A quick look at the way it's commonly done

Preparing the hearing bundle or court book

The purpose of the Court Book is to bundle the relevant documents into one location accessible to all hearing participants. Those relevant documents will include:



A quick look at the way it's commonly done

Preparing the hearing bundle or court book

(a) The pleadings;

(b) The evidence comprising:

(a) The affidavits;

(b) The experts' reports including joint reports;

(c) Any other relevant documents.



A quick look at the way it's commonly done

The practice note also requires the Court Book to include a **chronological bundle** of the documents to be relied on at trial



A quick look at the way it's commonly done

Two options for Court Book. Either:

- a) simply bundle up the affidavits and the separate exhibits; or
- b) pull the exhibits apart and put the documents that they contain into chronological order.



A quick look at the way it's commonly done

Option 1:

- a) less expensive (although still not cheap);
- b) contrary to the practice note; and
- c) next to useless.



A quick look at the way it's commonly done

Option 2:

- a) is time consuming;
- b) is expensive;
- c) because of the time and cost involved, tends to be produced very late, often on the eve of the hearing; and
- d) the duplicates caused by multiple witnesses' exhibits are usually left in the chronological bundle making it is far bigger than it needs to be, thereby increasing the cost further.



A better way to do it

1. What is our goal?

To get to hearing with the best preparation possible



A better way to do it

The chronological bundle is:

- a) not just something that the court requires you to include in the Court Book; but is

- b) the single most important thing you will produce



Practice Note SC EQ 3

33. With the exception of evidence in support of interlocutory applications, the former practice of filing evidence as case preparation occurs is to cease. Timetables for case preparation should include provision for the serving of evidence on the other parties but not filing it with the Court. Evidence to be relied upon at trial will only be filed with the Court at the time provided for in the Usual Order for Hearing.



Practice Note SC EQ 3

34. Evidence to be relied upon in support of interlocutory applications is to be served on the other parties and filed with the Court. Timetables for preparation of such applications should include provision for that process.



Practice Note SC EQ 3

35. The former practice of annexing or exhibiting documents to affidavits or statements will only be permitted in interlocutory applications and otherwise with the leave of the Court or pursuant to agreement between the parties.
36. In the preparation of evidence to be relied upon at trial any documents referred to in any statement or affidavit are to be placed into the proposed Court Book in chronological order.



Practice Note SC EQ 3

37. Subject to an order of the Court or unless otherwise agreed between the parties, the Proposed Court Book is to be established in electronic form.



Practice Note SC EQ 3

38. Prior to the preparation of a timetable for the serving of evidence the parties are to agree on the manner in which the electronic form of Court Book (the Electronic Court Book) is to be established including, where it is to be established; which party/parties (or third party) will manage it and its format. Such agreement should be recorded in the Short Minutes of Order for the preparation of the evidence in the proceedings.



Practice Note SC EQ 3

39. Electronic Court Book is to be produced at trial. A hard copy of only those parts of the Electronic Court Book that will be essential for the Court to consider in determining the dispute between the parties is also to be produced at trial.



Practice Note SC EQ 3

1. [35] and [36] provide what has to occur;
2. [37] to [30] provide how the parties are to achieve it.



The plaintiff serves its evidence together with a bundle of documents in chronological order.

The defendant serves its evidence and adds to the chronological bundle any additional documents to be relied upon, each placed in the correct chronological position.

The cross defendant serves its evidence and again supplements the bundle with any additional documents in the same way.



An automatic chronological bundle

- built as evidence is prepared
- without the need for any additional work.
- When it comes time to prepare the Court Book, the task of preparing the chronological bundle has been completed



-
1. Start thinking about it from the outset
 2. Get all parties involved as [38] requires
 3. Decide on the manner and format with your opposite numbers



Order for Evidence

A proposed usual order for evidence

1. At the commencement of preparation of its evidence in chief, the plaintiff is to prepare a chronological bundle of all documents to be referred to in any affidavit or statement proposed to be served (Evidence Bundle).



Order for Evidence

2. The Evidence Bundle:

- a) may be in hard copy or electronic copy;
- b) must identify each document by a unique identifier;
- c) must use a format for the unique identifier which ensures that the unique identifiers used do not change;
- d) must be accompanied by an index which records the title, date and unique identifier of each document.



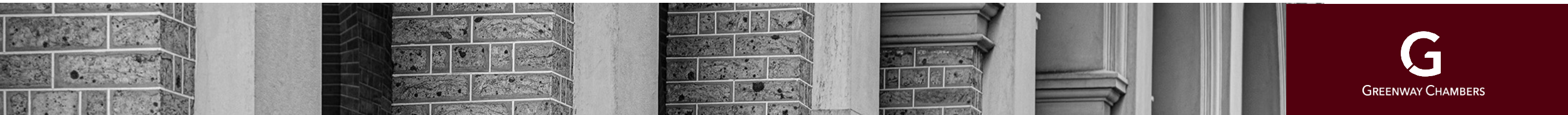
Order for Evidence

3. The plaintiff must:
 - a) in each affidavit or statement, refer to the documents in the Evidence Bundle by the unique identifier; and
 - b) serve the Evidence Bundle and the index on the other parties together with its affidavits or statements.



Order for Evidence

4. In responding to the plaintiff's evidence, the defendant must:
 - a) update the Evidence Bundle and its index by inserting any additional documents in the correct chronological place;
 - b) use the existing unique identifiers and allocate unique identifiers consistent with the existing format to any additional documents;
 - c) in each affidavit or statement, refer to the documents in the Evidence Bundle by the unique identifier; and
 - d) serve the updated Evidence Bundle and the index on the other parties together with its affidavits or statements.



Order for Evidence

5. In replying to the defendant's evidence, the plaintiff must:
 - a) update the Evidence Bundle and its index by inserting any additional documents in the correct chronological place;
 - b) use the existing unique identifiers and allocate unique identifiers consistent with the existing format to any additional documents;
 - c) in each affidavit or statement, refer to the documents in the Evidence Bundle by the unique identifier; and
 - d) serve the updated Evidence Bundle and the index on the other parties together with its affidavits or statements.



Order for Evidence

6. The parties must take the steps described in paragraphs 4 and 5 for any further evidence served including any evidence on any cross-claim.
7. The Evidence Bundle will form part of the Court Book in accordance with the Usual Order for Hearing.



Aspects to Consider

1. Keep everyone in the loop
2. Talk to counsel about the document format and preferences
3. Naming the documents - short is good
4. Combining or splitting documents
5. Volumes to match the hard copies
6. Volume file sizes
7. Ensure the documents are the right up.



-
1. Assess what needs to be included
 2. Avoid dumping everything into the bundle “just in case”.
 3. Email chains - how should they be included?
 4. Can documents be inserted after the event?
 5. Or is a supplementary bundle a better option.

