Bullfry and the 'tennis circuit'

Bullfry put down the paper of record, and leant back ruminatively in his chair. It was quite clear – the economic demand for the 'top' counsel was a classic example of a 'Thorstein Veblen good' – the more expensive it was (like a fine wine, or a branded watch), the more an eager clientele was prepared to pay for it!

No wonder that they so grossly misapprehended the earnings of the Bar generally! There were, or so it seemed in the warped view of the press and its reading public, only two types of barrister: one who flew all over the country, charging, and receiving, a king's ransom for appearing in court; the other, persistently down on his uppers, who fought creditors and ex-wives while featuring in the gossip sections of the tabloid. The egregious reporting of the 'earnings' of the first type meant an outpouring of public *Schadenfreude* at the financial, and marital, misfortunes of the second.

The Bar is very much like the professional tennis circuit. At the top, the best players compete for public esteem and high daily fees; but below, say, the top 200 advocates across the nation, was a vast legion of more modestly remunerated journeymen and women, going about their business before the lower judicial officers, and administrative tribunals, of the Commonwealth, and states. They never played at Wimbledon – it was all they could do to get a modest outing, if they were lucky, 'unseeded', in the Gundagai Open! A survey conducted in Victoria some years ago had revealed that a very large percentage of the newest entrants to the profession were earning less than $50,000 per annum.

These lesser 'players' trudge from tribunal to tribunal, hoping eventually to be paid.[1] And yet, in 95 per cent of cases it would make little

It is reported that to appear at the Commission, Blenkinsop QC (one of Australia's leading barristers) is charging $25,000 per day from 8 am to 5 pm, and $3,000 for every hour thereafter in what is a 'bet-the-company case.'

The Daily Beast 10 May 2018.

But nothing in this chatter about the Bar is more erroneous than the talk of the tremendous incomes of counsel.

Baron Brampton, *Reminiscences*.

or no forensic difference at all who was briefed to appear! How could that be the case? On the Veblen principle. An anecdote concerning Sir Edward Carson KC explains the matter completely. A solicitor who is stunned by the amount demanded by Carson's clerk in a

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matter in which he was opposed to Sir Rufus Isaacs KC, asks to see him to discuss the fee.

'For a moment or two Carson said nothing. Then got up from his chair, and taking the solicitor by the arm led him to the window. He pulled up the blind to reveal a sight familiar to every inhabitant of the Temple. There were scores of other barristers' chambers, each one with its lighted window, through which could be seen men poring over their books and papers, holding conferences or consultations with their clients, or just idly talking and waiting for the work to come in. These were the gentlemen of the Bar, making their fortunes or with their fortunes to make.

`D'yee see all those rooms?' said Carson. `In every one of those rooms there's a light, isn't there?' The solicitor nodded. `In all of them', Carson went on, `you may assume there's one man, probably two or three, who'll do the case as well as I'll do it myself, and most of them will charge a far more reasonable fee'.

`Oh, no', answered the solicitor, `that's not my point. I wouldn't dream of letting anyone but you do it, with Mr Isaacs on the other side'.

`Well, if you're such a fool as that, after all I've shown you', rejoined Carson, `you'll just have to pay what my clerk asks you to pay'.'

Thus, while the 'average' income of the Bar is immense to a lay reader, it is greatly inflated by a few outriders – the median income of counsel as a class (once the cost of chambers and a secretary had been deducted) is far more modest. This median income was considerably lower than the average because of a few superstars whose fees were the subject of daily envious and fawning comment in the press. What was the relevant standard deviation?

Still, it was all a matter of comparison – when the fees charged by the large firm instructing him, and the salary and shares vouchsafed to the directors in the firing line, were compared with the modest daily demands of even the most expensive of counsel, those fees seemed very reasonable indeed.

Bullfry thought back to his solicitorial youth. Then, fees had seemed lower – indeed, the then pre-eminent counsel 'rationed' their availability – the fee in those far gone days, to use an unpleasant economic concept, was not 'price-elastic' – offering to pay more would not have increased availability.

Thus, it was hard to be overly censorious about the success of the most sought-after counsel when those performing secretarial, solicitorial, and other company functions for the largest corporations were on north of $2.5 million per year – and for doing what? Massaging the corporate message – outsourcing serious legal matters back to the largest law firms where they had been previously deployed – editing and advising on various internal documents. It is unpleasant to have spent one's life working for personally minded-men (and women) for reasons you know to be base – but in the modern world to do so is very handsomely remunerated.

Also, and often overlooked, the emolument of the corporate functionary came in to the relevant bank account each fortnight,

on time, with all necessary and appropriate fiscal deductions made! (Nor were the share options, certain to vest in due course, to be overlooked in the equation.) Contrast that with even the most sought-after counsel. Bullfry had once had a conversation with an old companion, a leading banking junior. Bullfry had rung to congratulate him on his further appearance in a controversial matter.

> 'I'm only doing the further hearing to get paid' said his companion.
>
> 'What do you mean?'
>
> 'Well, I did the first hearing sixteen months ago and the fee note was still outstanding so I said I would appear again only upon condition of payment!'
>
> 'But you were being briefed by Megafirm on behalf of Megalopitan Bank – what's going on?'
>
> 'Megafirm said it sent me a lot of work which I should be grateful to get, and there was a large internal fight in the Bank about which division was to bear the cost of the matter – so I had to wait!'

Henry Hawkins had a conversation about the lack of timeliness of payment at the Bar once with a famous money-lender.

'Why, Mr Hawkins,' said he, 'you seem to be in almost everything. What a fortune you must be piling up!'

'Not so big as you might think,' I replied.

'Why, how many,' he rejoined, 'are making as much as you? A good many are doing twenty thousand a year, I dare say, but – '.

Here I checked his curiosity by asking if he had ever considered what twenty thousand a year meant. He never had.

'Then I will tell you, Lewis. *You* may make it in a day, but to us it means five hundred golden sovereigns every week in the working year'.

Given that there are less than 200 hearing days in the legal year, it is hard for any except tax counsel to earn as much as a successful company secretary.

In the longer run, the skyrocketing earnings inside the largest companies (and delay in payment inherent in the economic realities of the Bar) was likely to reduce it to a 'commercial rump' which was very highly paid, while the remainder subsisted on the 'crumbs' from other forms of practice. Only the largest businesses could afford to pay very high fees (which were, in any event, tax deductible); the company and its solicitors gained the protection of an independent 'expert' view about a matter; and, if questions were raised about the credibility of the adviser, recourse could be had to one of the 'specialist' works which now purported to evaluate the skills of the 'bet-the-company' men (there was no extant category of 'bet-the-company' women because as soon as a woman attained that eminence the Executive would insist on her taking a senior judicial post).

It is vulgar to point it out, but it will likely take her five years (at the least) to reach the income level she enjoyed at the law firm where her success was guaranteed, and the workplace far more congenial to satisfying both demanding professional and domestic obligations.

What did that foretell for the future of the profession? Consider a young woman commencing practice nowadays at the Bar. She has previously worked for some years as a senior associate in a large law firm, acquiring a wide experience in matters commercial. She might, within a couple of years, aspire to a partnership if the risks inherent in that shared liability did not dissuade her. She starts again at the Bar, at the very bottom, as a reader on a good floor – and the Bar is very lucky to get her.

No detailed study has yet been published of her likely *cursus honorum* (and it remains perplexing why there is no detailed information obtained or published on the raw amount of barristers' fees – probably because the truth would be too unpleasant for most who read it. The new Strategic Plan makes no mention of the need to obtain and publish detailed, current, information from barristers on basic matters. Without such information, how can an intending Reader begin to make an informed decision?)

But for our neophyte to succeed ultimately as an advocate (as opposed to a mere producer of detailed memoranda and copious submissions) she will need to make the unpleasant economic choice of appearing in a wide range of unimportant and trivial matters, before tribunals and courts she cannot find (to paraphrase Sir Patrick Hastings) – all the time slowly acquiring the forensic skills to be able, twenty years on, to run the largest and most complex litigation. (It is an open question whether this sort of 'training' work is still available to the junior Bar, on whether it has not already been seized by the cadet branch of the legal profession).

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Now let us suppose she takes a more calculating approach, and decides to stay with the firm and forego the eclat of waiting to be reached before a District Court arbitrator on a cold Wednesday afternoon. Chances are, she can then leap seamlessly across from the firm to join the Megalopitan Bank in some important role – her future is then even more assured, and she has a far greater chance of earning more than all those at the Bar except a very small number at the top of the tennis circuit.

This simple cynical economic reality is the central threat to the continuing independent existence of the Bar as its ageing captains and kings depart.

In the past, the lure of a potential judicial post ('the glittering prizes' of FE Smith) might have provided some vocational attraction. But, once again, the Bar has done itself in its institutional eye. Once the judicial 'gene pool' had perforce expanded to take in senior solicitors (all of whom quickly demonstrated immense expertise in specialised legal areas) the game was up – the notion that to adjudicate you needed to have been constantly in court for twenty years was exposed for the mirage it always had been. As a result, a horde now clamber for some minor judicial or tribunal approach as senility approaches.

At some stage, it may be safely predicted, even payment of the 'top counsel' on the 'tennis circuit' basis will come under downward economic pressure – and where will the Bar be then? *Ou sont les neiges d'antan*?

END NOTES

1 See, Jason Donnelly, 'Five Lessons of a Reader at the NSW Bar' *Bar News* Winter 2012 page 59.