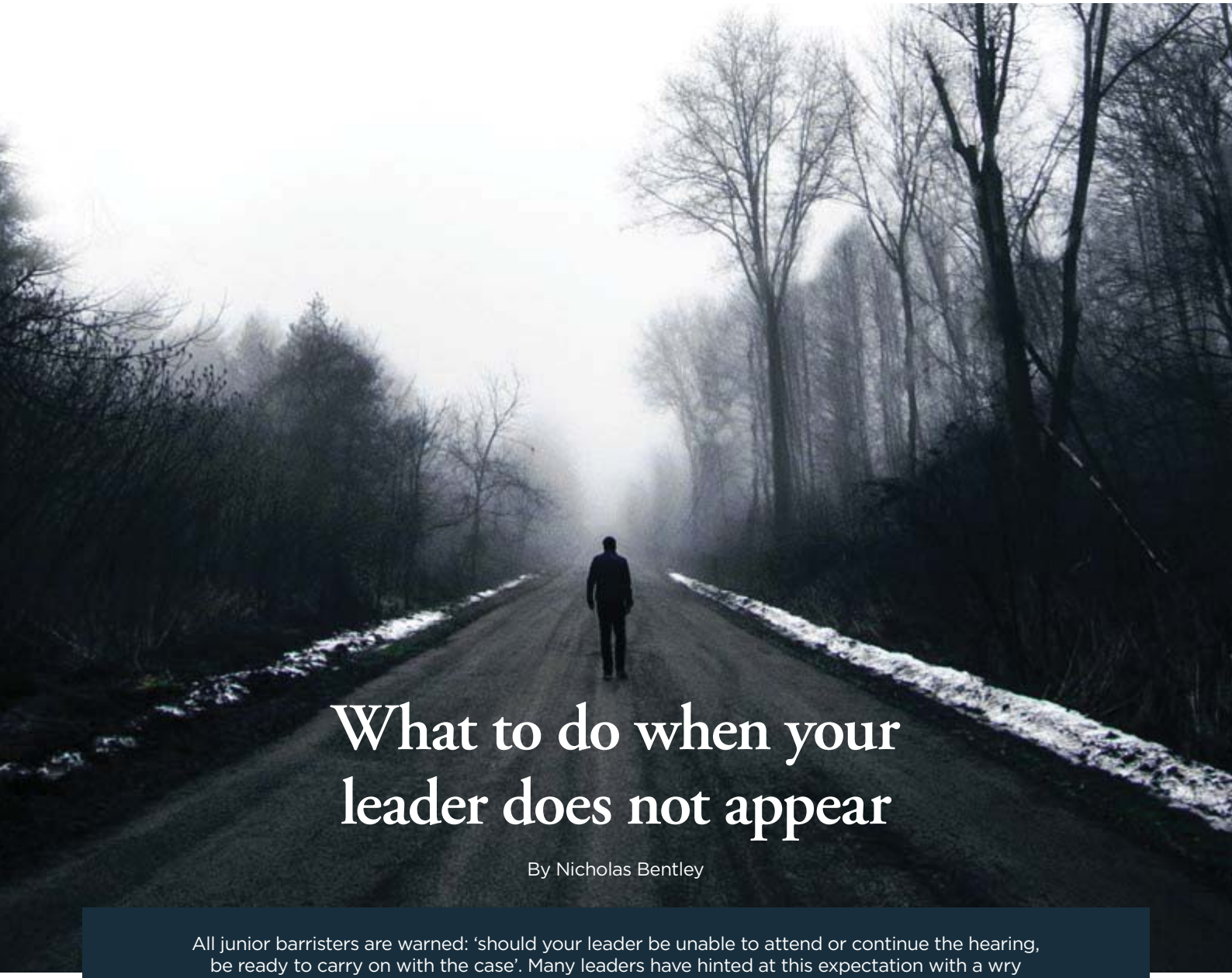

What to do when your leader does not appear

By Nicholas Bentley

All junior barristers are warned: 'should your leader be unable to attend or continue the hearing, be ready to carry on with the case'. Many leaders have hinted at this expectation with a wry smile the day before court; some even pretending to have a sore throat. For certain juniors this nightmare/dream scenario (depending on how prepared they were) has indeed eventuated.

On 13 October 2022 the New Barristers Committee ran an online CPD with Geoffrey Watson SC, Justin Hogan-Doran SC and Anna Garsia focussed on what to do when your leader does not appear. The CPD can be viewed on the Bar Association's online CPD platform. Having explored this topic over the past few months in preparation for the CPD (after it was kindly suggested by Sophie Callan SC) I share here some anecdotes and lessons that will hopefully assist the junior bar when left leaderless.

The general expectation: all juniors should be ready to appear unled

A striking example of a junior having to appear unled happened to Justin Hogan-Doran SC in the High Court a year after he completed the Bar Practice Course. His leader became unavailable the day before the appeal. As the two-day transcript shows, Justin seized the occasion, making detailed oral submissions that led to a successful result for his client: see *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331.

What Justin experienced is not common, but it is a prime example of a junior seeing a challenge as an opportunity, rather than a burden, and meeting the general expectation of pressing ahead. This expectation was stated in *Wiggins (No 2) v Department of Defence – Navy* [2006] FMCA 969 at [11] where McInnis Fm refused to adjourn a costs hearing in circumstances where senior counsel was unavailable and was apparently privy to negotiations that may have been relevant to the question of costs:

> During the course of the submissions made by both parties the court raised with junior counsel for the applicant the proposition that where two counsel are employed on behalf of a party then it is

presumed the junior counsel should have the capacity to undertake the conduct of part, or indeed all, of an application should senior counsel not be available.

A similar view was expressed in the criminal context by the Queensland Court of Appeal in *R v Gudgeon* (1995) 133 ALR 379; [1995] QCA 506 when an adjournment sought by a legally-aided accused was refused in circumstances where only the junior counsel was available.

Greg James AM KC experienced his trial by fire when Clive Raleigh Evatt QC (youngest brother of Dr H V Evatt, QC, PC, KStJ), the Friday before a murder trial, invited Greg to be his junior. That same day Mr Evatt, with Greg by his side, explained to David Yeldham J that he was presently engaged in a defamation trial concerning former dominatrix 'Madame Lash' and that he needed the murder trial adjourned. Yeldham J said words to the effect: 'Let me get this right. Are you telling me that if I refuse your application, you won't be able to appear in this trial on Monday?' 'Yes,' said Mr Evatt. 'Well,' said Yeldham J with a rueful smile, 'in that case your application is refused.' Greg, now leaderless, spent the weekend reviewing the brief and proceeded to appear on the Monday. Despite successfully arguing that three of five confessions by his client were inadmissible, the last two confessions sealed his client's guilty fate.

There is no set rule that, in circumstances such as the above, criminal trials take preference over civil hearings. A short while after facing the murder trial alone, Greg was interrupted during a rape trial and asked to attend the courtroom next door for a special leave application that his leader Kenneth Handley AO QC was to be doing before he was rushed to hospital. Greg obtained a one day adjournment of the rape trial so that he could argue, and successfully obtain (with the assistance of Kenneth Handley's notes), special leave.

In some rare instances a junior may need to appear even when their leader is in court with them. Ingmar Taylor SC recalls being told about a case in the Court of Appeal many years ago where, after a short period of questions directed to the silk, the court asked the silk if he would mind if his junior, Richard Kenzie (now KC), might assist the court (having presumably determined that the leader had not drafted the written submissions and did not understand them), which Kenzie then proceeded to do.

Despite the general expectation that junior counsel should always be prepared to run the case, Greg James AM KC and Geoffrey Watson SC have confirmed that, whether in the criminal or civil context, there is nothing wrong with a junior seeking an adjournment if the junior considers it appropriate.

Seeking an adjournment

In *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd* [2012] QSC 102 an adjournment of a six-week hearing was granted five days before it was listed to commence because senior counsel for the defendant became ill. It was considered 'unreasonable to expect junior counsel for the defendants to run the matter alone.' Together with *Wiggins* and *R v Gudgeon* cited above, there are few published decisions recording adjournment applications when a junior's leader has become unavailable.

Noting the limited case law that can be referred to, the steps taken by Anna Garsia when her leader became unavailable is a model that the junior bar can follow. Anna was told halfway through a multiweek hearing in the Class 5 jurisdiction of the NSWLEC that her leader was too unwell, following a COVID-19 infection, to continue for at least the rest of the week. A central part of the case concerned an application under s 65 of the *Evidence Act 1995* (NSW) because a witness had died during the hearing – an application that her leader had prepared while Anna worked on other allocated parts of the case. In response to the situation:

- Anna obtained instructions (one) to inform the other side and (two) that her client wanted Senior Counsel to make the s 65 application and thus an adjournment should be sought;
- Anna's leader contacted the opponent counsel who appropriately agreed that any adjournment application would be consented to (Geoffrey Watson SC says that opposing counsel should be informed and should not take advantage of the situation);
- Anna had a different silk on standby to call if any issues arose during the hearing that she needed assistance with;
- Anna informed the court of the situation and obtained its permission to proceed with dealing with other aspects of the case that could advance the hearing in the silk's absence, in this case an application for leave to rely on additional evidence (in other cases this might include addressing objections, making submissions about particular issues, calling other witnesses, or even allowing the other side to advance a part of their case with a right to reply in due course);
- after Anna had advanced alternative parts of the case as much as she could, she proceeded to make the adjournment application orally and an adjournment of two days was granted; and
- if the adjournment application had not been granted, Anna was ready to ask for a 45 minute adjournment to give herself time to pivot and prepare to proceed with the rest of the hearing.

Conclusion: factors to consider when your leader cannot appear

Any adjournment application will turn on its own circumstances – including (a) the explanation for the adjournment, (b) the detriment to other parties and (c) the detriment to the court and other litigants (see *AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, [5], [26]-[27], [112]). Section 56(1), (3) and (4)(a) of the *Civil Procedure Act 2005* (NSW), or the equivalent provisions in other jurisdictions, also have to be considered (see ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) and ss 67-69 and 190-192 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth)). As will your duties to the court, the client and your opponent (see, in particular, Bar Rules 23, 35 and 59).

More specifically, an adjournment application premised on your leader not being available will potentially turn on factors that you cannot control, including the attitude of the presiding officer, the complexity of the dispute, your level of seniority as a junior, how your leader has prepared the case (including whether they have involved you in oral submission drafting and witness examination preparation) and whether the case has a statutory deadline (for example, an expedited review of a decision under ss 501 and 501CA of the *Migration Act 1958* (Cth) must be determined by the AAT within 84 days of the applicant being notified of the reviewable decision).

Having regard to these various factors and reflecting on the stressful but practical examples cited above, all leaders and juniors need to be cognisant of what may happen if their leader is unable to appear. Since it is never guaranteed that an adjournment application will be granted juniors should, as much as possible, be exposed to all parts of the case, particularly for hearings since they are ordinarily less confined than appeals. If faced with having to appear unexpectantly and an adjournment application is refused or not sought, juniors should take the approach of seizing the opportunity to shine. As Greg James AM KC concludes on the topic: 'At the end of the day, if you are placed in the situation where the case must go on, you do what the Bar has always done and do the best you can. That is all anyone can ask of you.' BN