AUSTRALIAN BAR ASSOCIATION CONFERENCE
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"THE INSTITUTION OF SILK"

BY

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1. The Historical Background:

1.1 Professor Holdsworth was able to detect the emergence by the end of the 16th century of a body of 'Her Majesty's learned counsel' retained by the Crown to assist the Law Officers [see #359, Halsbury's Laws: 4th Edition: Vol.3(1)]. Francis Bacon was the first King's Counsel to be established by patent. By the 18th century there were three ranks of counsel in the profession: the serjeants with a monopoly of advocacy in the Court of Common Pleas in London, the apprentices of the Serjeants (the forerunner of the modern barrister) who practised around the country in the King's Bench, and the counsel appointed by the Crown.

1.2 As the number of appointments grew, the connection with the Crown diminished, though until 1920 King's Counsel required a licence from the Crown to appear against it. By the latter part of the 19th century QCs had become (in Halsbury's words) "simply a class of counsel who, by eminence or favour, had been given a rank superior to that of ordinary barristers". The distinguishing mark of their rank was not so much their silk gowns as the practice which also emerged in the 19th century that a QC would not appear in court unless a junior was instructed with him. By 1935 this practice had hardened into a rule of professional conduct.

1.3.1 The precise nature of the office of Queen's Counsel has twice been considered by the English courts. In 1898 the Privy Council ruled that on the true construction of the British North America Act 1867 the Lieutenant Governor of Ontario had power to create members of the provincial bar Queen's Counsel by letters patent in the name of Her Majesty under the Great Seal of Ontario. Ontario accepted the exclusive authority of the Governor-General of Canada to appoint QCs in
the courts of the Dominion, but did not concede his right to appoint QCs for the province from the provincial bar.

1.3.2 In giving the Opinion of the Privy Council [AG for Dominion of Canada v. AG for Province of Ontario (1898) AC 247], Lord Watson remarked that in England the creation of counsel for the Crown was a matter of prerogative in the sense that it is personally exercised by the Sovereign with the advice of the Lord Chancellor, the appointment being made by letters patent under the sign manual.

Lord Watson conceded that the exact position occupied by a QC was "a subject which might admit of a good deal of discussion" [ibid. at p.252]. He went on:

"It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred."

1.4 In a tax case in 1932 a Chancery Judge ruled that on taking silk a junior barrister does not set up a new profession. The point arose when the future Mr Justice Croom-Johnson took silk in March 1927. For the following year he was assessed to tax on income of £7,934.10s. Finding that his earnings in the year of assessment were substantially less than in the preceding year, he appealed, arguing that he had given up his old profession, since on taking silk he had been given to understand that his application would not be considered unless he gave up his Bristol chambers and practised from London alone. The Commissioners favoured this argument, but the Attorney General (Sir Thomas Inskip) successfully appeared on the appeal to Rowlatt J: [Seldon v. Croom Johnson (1932) KB 752].

The Judge described Silk as a titular rank conferred by the Sovereign, which is recognized in the Courts "by giving the holder precedence, a seat within the Bar and by entitling him to wear a silk gown" [ibid. p.763]. "Both the junior barrister
and the King's Counsel", he said, "carry on the same profession, but the latter occupy a higher rank or degree within it".

1.5 Incidentally, as regards silk gowns, many English Silks do not own them, and so-called mourning gowns are commonly worn. It is only in the Chamber of the House of Lords (though not on appearances in the committee rooms where appeals are normally heard) that QCs must wear silk gowns and full-bottomed wigs [see fn.11, #418, Halsbury's Laws, Vol.3(1)].

1.6 Apart from conferring a right of precedence over junior barristers (whose sole practical effect today is to allow leaders precedence by virtue of seniority on unlisted motions in the Chancery Division: see Practice Direction: (1980) 1 WLR 751 at p.753B), the one substantial consequence of elevation to silk is that it affects the instructions which a barrister holds himself out as willing to accept. This I deal with later.

2. The Two-thirds rule:

2.1 In the past the two-thirds rule made the employment of leading and junior counsel an expensive proposition. Twice towards the end of the 19th century the Bar Council said that the proportion of 2/3 or 3/5 was a long established and well settled custom. In 1900 it was ruled that a junior should refuse a brief marked with a lower proportion, and should be supported by his leader in such action [Abel-Smith & Stevens: Lawyers and the Courts: Heinemann: 1967: p.224]. The Law Society disputed the existence of any such custom stating:

"As far back as we can trace, the practice has been for the solicitors in marking fees not only to have regard to the nature and importance of the case, but also to the standing and eminence of the counsel retained, and not to treat a prominent advocate of the day (say the Attorney General) and a young man only recently called, as entitled to the same proportionate fees."
In 1912 the Law Society protested again, saying that if the Bar maintained its position, "litigation would be killed".

2.2 Nonetheless, in the 1920s taxing masters in England automatically allowed a junior two-thirds of the leader's fees when awarding costs: [In re Park Bott v. Chester (1921) WN 259]. In 1932 the Labour Attorney General (Sir William Jowitt) attacked the two-thirds rule as indefensible, whereupon the Bar conceded that in cases where the leader's fee exceeded 150 guineas, the amount by which the junior's fee exceeded 100 guineas might be a matter of arrangement. The then Chairman of the Bar Council (Sir Herbert Cunliffe) defended paying juniors high fees for services which were on occasions purely nominal on the ground that they were grossly underpaid for preliminary paperwork [p.241, Abel Smith & Stevens]. There are some in England who even today think that in civil cases there remains an imbalance between juniors' fees in interlocutory work and those marked on briefs for trial.

2.3 The Bar's concession in 1932 seems to have made very little difference to the demands of their clerks. Only in 1965 did the Bar, by a bare majority, agree to re-examine the rule, and that was at a time when they were fighting tenaciously to justify the two counsel rule [p.453, Abel Smith & Stevens]. Nowadays there seems to be acceptance that a fee for a junior which is automatically linked to that of his leader cannot be justified. Solicitors demand cogent justification for the junior's fee which is quite likely to be only half the leader's, and may be less in the case of an inexperienced junior. Only a junior himself on the verge of taking silk can expect two-thirds, and even then a solicitor will want to satisfy himself that the junior has put in sufficient work on the preparation for trial to justify the fee. The situation in England would seem to be different from Australia, where (as the Law Reform Commission of Victoria observed), although the
two-thirds rule has been abolished, "it provides a general rule of thumb in practice" [50, Discussion Paper No.231].

3. The Two-Counsel Rule:

3.1 According to Abel-Smith & Stevens ([ibid. p.223]), before the advent of the Bar Council there appears to have been no rule specifying when a QC should be accompanied by a junior (though see Cock: (1976): 92 LOR 512 who regards the practice in circuit messes as of longer standing). An editorial note in the Law Times in 1871 [51 LT News] commented that "the system which dispenses with juniors is not altogether discouraged among the silk gowns or at any rate their clerks". In 1889 a QC appearing without a junior in the Queen's Bench Division was questioned by Lopes LJ and able to quote the opinion of the Attorney General (Sir Richard Webster, later Lord Alverstone CJ) that this was quite proper where there was no jury [see Sir Alexander Johnston: (1977) 93 LOR 190]. This was a significant point of distinction since by the 1890s nearly half of defended cases in the Queen's Bench were heard by judge alone. (Incidentally the practice of the plaintiff's junior counsel opening the pleadings to the jury in libel actions continued until after the last war. For example, in the Laski libel action in 1946 Mr Peter Bristow opened the pleadings to the jury, even though he was led by both Gerald Slade KC and Sir Valentine Holmes KC).

Nevertheless, in 1890 the Bar decided that it was a generally recognised rule of etiquette that a QC should not appear for the plaintiff in a civil cause without a junior; but only in 1935 did the Bar Council formally make it a rule of conduct that a KC should not appear in any court without a junior.

3.2.1 The two-counsel rule was abolished by the Bar Council with effect from 1st October 1977. In July 1976 the Monopolies and Mergers Commission had recommended that all the
then existing provisions which restrict the freedom of a QC to supply his services without being accompanied or assisted by a junior should be abolished [#208, Cmnd.4463, HMSO].

3.2.2 To English ears the recent tenacious defence of the two-counsel rule by the Victorian bar seems a little old-fashioned. "It hardly needs saying," they said in their Response to the Law Reform Commission, "that no one has ever been forced to become a QC" [#110; p.56]. The same point was made just as trenchantly by Sir John Young CJ in a memorandum of 31st October 1989:

"If it be said that a Queen's Counsel should be allowed, if he chooses, to accept a brief without the assistance of a junior, then the assumption upon which he applied for, obtained and accepted the honour and dignity of being one of Her Majesty's counsel, is at once denied. He would be in effect authorised to avoid the risk involved in taking silk."

In a free market, Sir John regarded the risk involved in taking silk as a salutary restraint upon unjustified applications.

3.3 The present rule in England is that a QC is not obliged to accept instructions:

(a) to settle alone any document of a kind generally settled only by or in conjunction with a junior, or

(b) to act without a junior if he considers that the interests of the lay client require that a junior should also be instructed [#503, Code of Conduct of the Bar of England and Wales, effective from 31st March 1990].

3.4 This rule is broadly the same as the Queensland and NSW rule adopted by the Victorian Bar Council on 20th February 1992, though there is a difference of emphasis in that part of the Victorian rule which reads:

"Queen's Counsel shall (my emphasis) refuse to accept instructions in a matter without a junior if the interests of the client require that more than one counsel be instructed."
3.5 In one respect the English Code of Conduct goes further than that in Australia. In any matter where more than one advocate is instructed, each barrister must consider whether the best interests of the client would be served by:

(a) his representing the client together with the other advocate or advocates, or
(b) his representing the client without the other advocate or advocates, or
(c) the client instructing only the other advocate or advocates, or
(d) the client instructing some other advocate.

In cases (b), (c) and (d) the barrister must immediately advise the client of the view he has formed: (see §503A.2/3, Code of Conduct).

3.6.1 In cases where two counsel are briefed together on the same side, it is perhaps unnecessary to say that it is the leader who has the conduct of the case and the court will not generally allow a junior barrister to pursue a different argument from that taken by the leader. In 1813 there was an embarrassing difference of view between Serjeant Best and Serjeant Marshall over the conduct of the plaintiff's case for deceit in the sale of a ship: Pickering v. Dowson (1813) 4 Taunt 779, 128 ER 537. At trial Serjeant Marshall offered to call as a witness a surveyor who had examined the ship prior to the sale in the presence of one of the defendant vendors and shown that the beams were rotten. According to the report the trial judge had "repeatedly called for evidence of this sort", but the leader, Serjeant Best knew better and declined to call it. The Court of Common Pleas declined to allow Serjeant Marshall a new trial on the ground that he was prepared with evidence that his leader had repudiated, saying that "the junior counsel must confine himself to the line taken by the leader".
3.6.2 But whilst in a case of differing views the Court will not protect the client from the folly of the leader, it will protect him from the folly of his junior. At a trial in British Columbia in 1914 leading counsel had declined to make any admission concerning the applicability of the Workmen's Compensation Act. However his junior insisted on making the admission -- a disastrous move which resulted in judgment for the other side. The British Columbia Court of Appeal overturned this judgment, ruling that the court "must accept the attitude of the leader as representing the true attitude of the client": Atkinson v. Pacific Stevedoring Co. (1915) 24 DLR 400.

4. How appointments are made:

4.1 The Chairman of the Bar, Gareth Williams QC, has recently said that the system for selecting silks "causes more unhappiness than anything else I have to deal with" [The Times: 4th May 1992]. An editorial in the New Law Journal [8th May 1992: p.625] supported Mr Williams saying the system was quirky:

"There are far too many barristers whose court record and demeanour merit the honour but whose private life has fallen foul of the hierarchy and who consequently have not been given the recognition they deserve. A messy divorce here, a piece of perhaps unsubstantiated gossip there, a face that does not fit at the table has hampered and occasionally ruined the professional life of many a good man."

4.2 It is the system of oral recommendation, which gives rise to the fear (merited or not) that unsubstantiated gossip may influence the selection, and this is aggravated by the fact that the disappointed barrister never really knows why he or she has been turned down. Gareth Williams wishes to see wider consultation, with the shortlist being shown to the Chairman of the Bar, as well as access to files for aggrieved applicants.

4.3 Save in the case of the grant of Honorary Silk to lawyers not in practice but of legal distinction in the academic world or civil service, application has to be made for
silk. Each September a paragraph appears on the Court Circular page of The Times announcing the availability of application forms from the Lord Chancellor's Department ("the LCD") in the House of Lords. These have to be completed by the end of October, and the list of new silks is traditionally announced on Maundy Thursday. The new silks are normally sworn in wearing court dress by the Lord Chancellor at the House of Lords on the first day of the Easter term (the second Tuesday after Easter). This year, as though to emphasise the political nature of the Lord Chancellor's office, the ceremony was postponed lest there should have been a change of government after the general election on 9th April 1992.

4.3 Professor Heuston is only one of those who has commented on the paradox of the English Bar, which has always asserted its independence of the Government seemingly seeing nothing inconsistent in "entrusting to the uncontrolled discretion of a senior Cabinet Minister the advancement of its members within the profession". He suggests that "perhaps the system works because each Lord Chancellor has taken so much trouble over applications": [Lives of the Lord Chancellors: 1940-1970: RFV Heuston: OUP: 1987].

4.4 Members of Parliament of whatever party are normally given silk on application, but there has been no suggestion in recent years that appointments are a matter of political favour (as, for example, in the Canadian provinces). Nor has there been any incident like that in South Australia in 1969 when the Liberal State Government rejected an active member of the Communist party, who was one of three candidates recommended by the Chief Justice [see Kelly & Fisse: Political Influence in the Appointment of Queen's Counsel: (1976) 44 ALJ 318].

Another incident in Australia would seem to indicate that a greater role in appointments by the Bar Council is not necessarily the answer to Gareth Williams' concern. In 1979 the NSW Bar Association recommended fourteen barristers, but the

4.5 Until relatively recently applications for silk required to be supported by references from two High Court Judges. Now the Lord Chancellor relies on the information about the applicant's practice contained in the application form, together with extensive consultation among the judiciary, circuit leaders and leaders of the specialist bars. Sometimes, but only in the case of those whose practice in mainly advisory or of a very specialised nature, references are sought if the Lord Chancellor still requires additional information after his consultations.

Comments on the whole list of applicants are sought from every English Lord of Appeal and Supreme Court Judge, as well as some Circuit Judges in the case of applicants from circuits.

4.6 The form provides some 2 1/2 inches in which to provide "a brief description in your own words of the development and present nature of your practice (including examples of the types of cases and clients involved, the courts in which you appear and the balance between court and paperwork)". Apparently as important in terms of space provided on the form are details of gross professional fees in the previous three complete financial years. The last page seeks details of any criminal offences committed, negligence actions, disciplinary proceedings, bankruptcy and non-payment of taxes.

4.7 The LCD has publicly announced that there is no fixed age limit, "but it is unusual for Silk to be granted to anyone much younger than 38, and experience has shown that few applicants are successful over the age of 50": [Judicial Appointments: The Lord Chancellor's Polices and Procedures: HMSO: October 1990]. This year, the oldest practising silk in a
list of 69 new appointments was a Chancery expert on the law of receivers and of charities. Apparently he was successful on his 15th successive application: he had applied every year since 1977 [Sunday Telegraph: 10 May 1992]. According to the Department, they place no limit on the number of applications, "nor is the fact that a candidate has been unsuccessful on previous occasions taken into account". Those who wish to discuss their future prospects with a senior member of the Department are welcome to do so, and it is said that "at such meetings, while preserving the confidentiality of consultees, the aim is to be as frank as possible". Gareth Williams has pointed out that the willingness to have such discussions is hardly a realistic remedy, since "people are unhappy about rocking the boat".

4.8 The Lord Chancellor apparently has an eye to current demands in particular fields of practice in settling the number of new silks, but the number of existing or potential silks in an applicant's chambers is said not to be a consideration which usually weighs in the decision. Nor is the relative seniority of applicants in a set of chambers.

In order to ensure that silk is treated as a working rank, QCs are normally expected to practise for two years before being considered for a full-time judicial appointment.

4.9 In October 1991 the practising Bar in England and Wales numbered 6,901 (of whom 4,748 practised in London). There were then 736 silks (of whom 649 practised in London and 34 were women).

In 1992 the number of applications for silk was 420, of whom 69 (16%) were successful. The Lord Chancellor has stated that he particularly wishes to encourage applications from suitably qualified women and members of ethnic minorities. This year 34 applications (8%) were from women and 14 (3%) from members of ethnic minorities. Seven women were appointed (21% of women applicants) and one man from an ethnic minority (7% of
such applicants). Mukhtar Hussain QC in Manchester is apparently the first ethnic minority Silk practising outside London.

4.10.1 The possibility of indirect (not direct) racial discrimination in the system of appointments for silk and the judiciary has in the past led to controversy between the Lord Chancellor and the Law Society. An article in the Law Society Gazette by Geoffrey Bindman, a solicitor with great experience of race relations cases, raised the possibility that the system of oral recommendations used might be indirectly discriminatory. In the past the Commission for Racial Equality ("CRE") has held that word of mouth recruitment for employment vacancies (for example, in North London bakers' shops) amongst a predominantly white workforce has an indirectly discriminatory tendency.

4.10.2 The LCD was sufficiently stung by the allegations to seek, and then publish [The Guardian: 30 July 1991], the opinion of David Pannick (incidentally one of the 1992 crop of new silks). Mr Pannick thought the views of Mr Bindman wrong in law and in fact, but he acknowledged that there was a risk of those whose views were sought undervaluing (whether deliberately or not) the talents of black lawyers. He therefore suggested that the LCD (if it did not already do so) should be alive to this possibility, should be aware of relevant guidance from the CRE and should look especially carefully at candidates from ethnic minorities.

5. Does the Institution of Silk still serve a useful purpose?

5.1 In his provocative book "The Advocate's Devil" [p.47, (1957): Stevens & Sons], Cyril Harvey QC defended the employment of leading counsel in heavy cases by saying:
"It is not that silks are more able than juniors—they are often less so. The point is simply that they have less to do and therefore more time to think".

Without his junior's burden of paperwork, the leader will be working just as hard as the junior, but on the case in hand, not some other case. When Harvey was called to the Bar before the War, fashionable leaders (such as Patrick Hastings KC) were in several cases simultaneously and moved from court to court picking up first one and then another case at whatever stage it had reached. Nowadays it is the juniors who leave court to attend to other matters.

5.2 Amongst successful juniors in the civil field, the prime motive for taking silk must surely be to avoid the crushing burden of paperwork which ruins the enjoyment of those occasions when they are in court on their own. Few applicants for silk in the civil field would be justified in thinking that on taking silk their income will substantially increase.

In his memorandum of October 1989 Sir John Young CJ thought that there could not be any rational objection to junior counsel letting it be known that without being appointed silk he proposed to restrict his practice to cases which merited two counsel. Whatever may be the position in Australia, Sir John's proposal would present practical difficulties here:

(1) In the civil field the cab-rank principle effectually compels a junior to accept paperwork at a proper fee having regard to the complexity, length and difficulty of the case and to his ability, experience and seniority. It is only the silk who is not obliged to settle pleadings and the like.

(2) In the criminal field, the Legal Aid Authorities will not pay for two counsel where both are juniors. This is a rule which requires reconsideration, since (as an editorial in the New Law Journal recently pointed out [8 May 1992; p.6251):

"In practice it means that those who have not had preferment have to languish behind those of much less
experience and frequently much less ability...... (The rule) should not be used either to ensure that inadequate Silks are kept fed and watered or to deprive clients of the best available counsel, whether they have the magic letters QC after their names or not."

5.3 The status argument sometimes used to justify the institution of silk is the least convincing reason of all for the retention of the office. As recently as 1965 the Bar Council argued that:

"The status of a QC exemplified by the trust reposed in him and the further responsibilities which may devolve upon him is dependent upon his professional function being different from the majority of the Bar."

Within the past year the Law Reform Commission of Victoria [#51, Discussion Paper No.23: July 1991] has described silk as "a mark of distinction that provides clients and solicitors with the assurance that counsel appointed have the ability to conduct difficult and complex cases of the sort ordinarily requiring the services of two counsel." Given how knowledgeable solicitors are about the abilities of counsel they instruct, this argument would carry really very little substance in England. In any event (as the Commission point out), it does not on its own provide a rationale for restricting the practice of QCs to such cases. It certainly seems that with the abolition of the two-counsel rule and QCs appearing more and more frequently on their own, the time has come to question seriously whether the division of the Bar into two ranks serves any useful public purpose. Silk cannot simply be justified as a refuge for civil juniors from overwork or as an accolade for those who have not put a foot wrong in fifteen to twenty years of practice.

DESMOND BROWNE QC

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