Stars and Bars[1]

Lee J. W. Aitkin, Solicitor of the Supreme Court of New South Wales.

Stars, I have seen them fall,
But when they sink and die,
No star is lost at all
From all the star-sown sky

Henry Erskine, the Scottish barrister, reproved by George III for his relative lack of success when his finances were compared with those of his brother, the greatest English pleader, replied, "Your Majesty will please to remember ... my brother is playing at the guinea table and I am at the shilling one".

Compared with those days,[2] the emoluments which may be commanded by the bellwethers of the Australian Bar[3] are modest indeed, particularly when the depredations of the Commissioner are taken into account. That has not discouraged the Commonwealth Attorney, profiting politically from the public distaste for lawyers, from suggesting that "it is the restrictive trade practices and high fees of the legal profession which are the greatest single inhibitor to access to justice".[4]

It is, perhaps, some psychical comfort to those QCs who do not obtain preferment that at present, with judicial salaries effectively frozen,[5] their earnings surpass those of the Bench by a factor of 6 or 7 in the larger States.[6] (Even at a governmental level, we are told, those exercising important forensic functions on the behalf of the Commonwealth[7] are receiving much less than their due in return for a putative reversion to a puisne judgeship.)[8]

Competition, fungibility and saucers of milk

It has been suggested by the ill-informed[9] that some form of "cartel" is operating which deliberately aims to limit the number of Queen's Counsel created; this, it is said, drives up the fees those silks may charge. That allegation implies an unlikely conspiracy by the Federal and State Attorneys-General, some of whom have launched inquiries into legal fees[10] and the

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1. With apologies to William Boyd.
2. Heuston, *Lives of the Lord Chancellors* Vol I p.xxii, "... the worldly rewards of the Bar have greatly diminished in the last two centuries."
3. The jurisdiction of the Federal Court, especially in complicated company matters, means that for "top silk" the Bar is national in scope; nothing is now more likely, for example, than the sudden intervention of Bullfry QC from Sydney or Melbourne in some benighted takeover in Perth or Adelaide.
4. Comments of Mr Duffy, quoted in the *Financial Review* of 19 September 1991, p.7. See, too, the Senate's inquiry, noted by Professor Starke, "Discussion of barristers' fees by Senate Standing Committee on Legal and Constitutional Affairs" (1991) 65 ALJ 579.
5. A fact which has led, we are informed, to an unfortunate exchange of correspondence between the Chief Justice of the Commonwealth and the Attorney-General.
6. I have suggested elsewhere that this will lead to a drop in the standards of the Bench: see, "Success at the Bar: Lessons from Literature and Prosopography" (1990) 6 Aust Bar Review 169.
7. It had been announced that the Solicitor-General was being granted leave for one year in a "highly unusual arrangement approved by Cabinet" to repair fortunes depleted by the London insurance market, but after an outcry the Attorney revoked his decision.
8. There is a profound paradox here which the Attorney, inveighing against the low salary vouchsafed by the legislature to the Solicitor-General while simultaneously complaining about the high fees of the profession, fails entirely to address. Why is it, if he may by departmental ukase control the fees offered by the Commonwealth to the private Bar, that he expects that the present S-G would command a multiple of six times his present salary were he to resign as S-G and then, presumably, appear for the Commonwealth in a private guise. Although he does not explain this (perhaps because he has not considered it), the answer is surely the "peanuts principle" explored in depth in the text below.
9. The exchange in the letters page of The *Financial Review* may be briefly outlined. On 7 August 1991 (p.15) under the misleading rubric, *Economics Extra*, Mr Michael Stutchbury wrote an article entitled "Rigged Market for Queen's Counsel" which picked up some suggestions of Mr Chris Sumner, Attorney-General of South Australia. Senator Schacht weighed in on 13 August with a letter in which he spoke of a system "riddled with vested interests and primarily concerned with protecting its position". Mr De Carvalho, NSW Law Society President, replied to the Senator ("Sporadic Activity a Cause for Concern", 19 August) with an *ad hominem* suggestion that the latter rarely attended his own inquiry. Frank Stevens, warming up for subsequent quotation in the *Herald*, commented on 29 August ("Weaknesses in process for Selecting QCs") and Senator Schacht rebutted Mr De Carvalho on 30 August. Barry O'Keefe QC, President of the NSW Bar Association, provided details of the selection process for QCs with figures on 3 September ("Appointment of QCs on Merit").
10. One obvious way of driving down fees for "top silk" would be for the Crown law offices to offer less for appearances; the litigators for the Crown, however, are as susceptible to the "peanuts" argument outlined below as any other instructing solicitors. It is this point which Mr Marshall Perron fails to address in his recent suggestion that the title of QC be abolished: see Stutchbury, "The States may not have a bar of making silks", the *Financial Review*, 1 June 1992.

profession generally. The existence of those inquiries must make the objective observer doubt any "conspiracy" to limit supply. Moreover, for reasons explored below, any attempt to "improve" the supply-side by the introduction of "Ersatzsilk" would be doomed to failure. The South Australian Attorney has suggested just such a course: "First, the title of QC could be abolished. Alternatively, the market could be flooded with QCs in an attempt to devalue the title."[11]

After all, what determines legal fees? "Competition", which is, no doubt, why barristers in certain States strove for so long to keep out brethren from southern climes.[12] The problem is that "competition" necessarily requires *that like be compared with like.* For that simple reason, it will not matter a jot how many professors emeritus or superannuated senior partners are created Queen's Counsel since they are not in any relevant market to provide a forensic service. Even amongst QCs there exists a category of the unbriefable,[13] known to all *cognoscenti* in the jurisdiction, [14] whom in the immortal words of Barwick CJ, "you could float on a saucer of milk".

The situation is different with solicitors. With respect to the cartel which fixes the "hourly rate" of the largest firms of solicitors, there is no doubt that competition[15] is the fundamental factor, try as each might to differentiate its products,[16] since those services are essentially fungible. (The actual "hourly rate" itself is a function of the overhead which must be paid by the firms for their addresses in the CBD, the employment of a large number of back-room staff, and the provision of waterfront homes and sabbaticals for the more senior partners. Only some of this may be clawed back in the photocopying fees[17] levied on unsuspecting clients and unfortunate opponents by the firm's inaptly titled "service company".)

The consequences of 'non-fungibility'

It is a fundamental but rarely recognised fact that the doctrine of fungibility, as a determinant of selection (and therefore payment) of counsel, does not hold true for the top end of the Bar. (The stress is on top end: there is a huge disparity between the fashionable and favoured few and the Rumpolesque journey-man plodding his way through the list at the Manly Local Court.) Although most experienced litigation solicitors recognise that for all routine matters[18] the services of advocates are completely fungible, so that one person will do as well as another, at the top end this is not the public perception at all, a perception sedulously fostered by the fawning media,[19] which love the involvement of "top silks". Accordingly, a premium is charged and paid for their services in a gullible marketplace. Although the directors of Pan-Australia Holdings Ltd all love the screen-image of Rumpole, they would not want him opening for them in a contested takeover, or (to be more realistic nowadays) scheme of arrangement.

Furthermore, if the stakes are very high, the modest demands of top silk will be but a token to be put in the equation. The fact that someone wants, say, $4,000, $5,000 or $6,000[20] a day for a fortnight when Pan-Australia Holdings may be faced with paying on a guarantee worth $32 million is not likely to cause any consternation whatever to those asked to remit the funds.

Solicitors, for reasons explored below, foster this feeling in clients. Nothing would disturb a lay-client more than to be apprised of the appearance-reality gap between a firm's publicly expressed view of "leading counsel" and those of instructing solicitors over their sandwiches. Litigation solicitors have a

11. Mr Michael Stutchbury quoting Mr Chris Sumner. The title, of course, has been devalued in Canada by the wholesale politicisation of the appointment process, but that has not affected Edward Greenspan's fees by one dollar.
12. See, now, *Street v Queensland Bar Association.* Similarly, it is argued that restrictive admission is necessary to develop and maintain the indigenous quality of some Asian Bars - which a cynic may doubt.
13. Some, because of prandial extravagance, only fall into this category *after* lunch.
14. For this reason Mr Perron is wrong in regarding taking silk as a licence to print money. For a percentage of silks, the preferment marks the beginning of the slow but inevitable decline in their practice since they may be quite competent at paperwork but unfitted to advocacy; the latter weakness is very soon publicly revealed.
15. Which now involves "fashion parades" and tendering for the legal work on large projects.
16. All mega-firms now use extensive public relations campaigns to convince clients that their own services are different and superior to those of their competitors. Like airlines, the differences usually go no deeper than the colour of the waiting room and the view of the Harbour unless, of course, you poach a proven "rain-maker".
17. For a full exposition of how, in the United States, charging disbursements may be made into an art form, see "Skaddenomics: The Ludicrous World of Big-firm Billing", the cover-story in September 1991 *American Lawyer,* which details the extraordinary items (photocopying, overtime, staff lunches) which managed to find their way into Skaddern, Arps bills. Are our own mega-firms any less adept?
18. There are only so many styles and so many different results which may be used and achieved in standing a summons over for three weeks.
19. Consider the risible article in *The Sydney Morning Herald's Good Weekend* of 26 October 1991, "The Money Belt - Inside the Privileged World of the QC" which, while purporting to examine the QCs critically, in fact lionised them: "Machiavellian tactician", "tenacious engaging larrikin air", "patrician", "part-time vigneron"(!).
20. In the depressed capital of the South, a silk *and* junior may be had for about $6,000 all up: see the suggested security for costs in *Interwest Ltd (receivers and managers appointed) v Tricontinental Corp Ltd* (1991) 9 ACLC 1,218 1,222-1,223 per Ormiston J: "... Included in those costs are estimated preparation fees to senior and junior counsel at a rate (for both) of $6,000 for 40 days ..."

love-hate relationship with counsel (especially leading counsel) since only counsel can, by a sort of *viva voce* examination in conference with the lay-client, demonstrate to the client what dolts, from a legal viewpoint, he or she has been unfortunate enough to retain as solicitors. Should the solicitors disagree, or be displeased, with the way the matter is conducted, they are hoist on their own petard *since much of their "litigation expertise" rests on their access to and a discerning choice of counsel.* How, then, do the solicitors explain to the client that they have made a completely inappropriate (negligent!?) choice?

But this is, perhaps, to be overly psychological and to discuss perceptions best left unexamined. For the most part, solicitors are exceedingly grateful to counsel for arguing a case which they are temperamentally averse to doing themselves. Differing levels of moral fibre and the reluctance of most people to bear ultimate responsibility for their opinion or face judicial ridicule for expressing it[21] are potent reasons why any endeavour to *fuse* the professions will never occur as a matter of reality.[22]

Counsel provides the solicitor with an excuse if matters go bad, as well as a modest protection for the firm's indemnity policy. As to this last, the solicitor will always bear in mind the paradoxical rule that solicitors may be liable for negligence *even if they act on counsel's advice* whereas counsel is not normally liable for actions inside court.[23]

Peanuts, monkeys and wounded bulls

In selecting a Star to brief, the solicitors whether they do little litigation or a lot, will act, in an important case, on the "monkeys and peanuts" principle,[24] expressed in saloon-bar vernacular as: "He charges like a wounded bull, but by God, he's good!"

The phenomenon is perfectly described in the following passage, in which a solicitor, appalled by the fee suggested by Sir Edward Carson's clerk in a matter against Rufus Isaacs KC, asked to see the great man himself to negotiate a lower fee.

"For a moment or two Carson said nothing. Then he 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 windows, 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 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.'"[25]

'Get me Bullfry!"

There is a strong commercial underpinning to the "peanuts" principle. All large litigation firms maintain a "soup list"[26] of preferred counsel who, with luck, will be available as a priority to the firm should a suitable or urgent matter arise. Counsel are well aware of this. As the barrister-hero of the late Mr Justice Glass's novel, *Discord within the Bar*[27] notes, "Solid practices could not be built on random briefs from solicitors with occasional litigation. They depended upon *an established connection* with firms *who had access to an organised flow of work*".[28] The mega-firms pride themselves on being able to obtain access to the "stars" *because such access is demanded by their largest commercial clients* with whom, by judicious directorships, they have the closest relationships.[29] Woe betide, then, the *litigation* partner[30] who is unable upon demand

21. Weaker counsel, as well, will often wish to be "on the right side" of any dispute. Walter Monckton KC was not in the highest flight of counsel because, as MacKenna LJ said, "He was not a great fighter and he did not like unpleasantness. Nor did he like to fight uphill battles": Birkenhead, *Walter Monckton* (1969) p.76.
22. As the Victorian, Canadian and United States experiences amply demonstrate.
23. So, for example, solicitors will be negligent if they fail to instruct suitable counsel for a matter, notwithstanding that counsel hold themselves out as able to handle the matter.
24. "If you pay peanuts, you get monkeys."
25. Marjoribanks, *Carson*, p 151.
26. Theoretically, of course, there is a "cab rank" and solicitors make a detailed appraisal of the problem before instructing any counsel - in fact, human nature and habit mean that the same counsel will be retained by the firm to handle any matter generically within his or her practice.
27. Benjamin Sidney, *Discord within the Bar* (1981) Law Book Co. How prescient that title appears in present circumstances!
28. P.10 (emphasis supplied).
29. Better still, they may have a former associate or partner "in-house" as legal counsel.
30. In a mega-firm, they will, as a matter of partnership-politics (a simple function of billing), invariably carry less weight in the partnership so their "position" to some extent depends upon access to counsel. True, in straitened economic times, the litigation team may carry the firm, but usually because of the amount they may premium bill, the commercial partners are the most powerful in any partnership. In good times, businesspeople doing deals are less likely to scrutinise a bill for premiums which will, after all, be "absorbed" by someone somewhere along the line. Not so with litigation, since any wise businessperson abhors being in court and rigorously inspects all accounts rendered.

to produce for the managing director of Pan-Australia Holdings an immediate conference with Bullfry QC when some unfortunate internal memorandum is leaked to the press by a vexatious ex-employee or off-shore currency borrower. The managing director, by definition, *has no professional opinion on who should be retained.* He knows he has a serious problem and Bullfry QC is, so the *Financial Review* informs him, the doyen of the Sydney Bar - "Get me Bullfry!"

One may simply multiply the call for Bullfry's services across a city of several million[31] to appreciate the wisdom of Sir Garfield Barwick's apothegm that the only protection a leading silk has against overwork are the fees he charges. The wonder is not that Bullfry charges so much but that he charges so little! He is a monopolist since the Pan-Australia perception, vigorously encouraged by the firm with access to him, is that no-one else can do what he does.

The mind of Bullfry

Now, Bullfry QC, despite his junior's views,[32] is no fool in matters financial, if only because the Commissioner, his ex-wives, and his factor on the property at Scone, constantly focus his attention upon them.[33] Bullfry knows well that his own *per diem* charge will appear modest when compared with that of those instructing him, if three or four[34] young thrusters[35] and two partners are charging their "usual hourly rate".[36] Yet, ultimately, Bullfry is bearing all the responsibility. Only the most naive would expect Bullfry not to charge a "king's ransom"[37] to hose down Pan-Australia's problems before the next shareholders' meeting. Since the Pan-Australia board will comprise many who know the price of everything and the value of little, the "peanuts principle" will mean Bullfry's fee-note evokes small concern (and, more likely, admiration), *win, lose or draw.*

That simple construct is the reason why (short of price-control) all the inquiries and tribunals and commissions in the world will have absolutely no effect on the fees commanded by the Stars of the Bar.

The soup list: Remarkable Rocket or Young Comet?

As a consequence of client pressure for access to *la crème de la crème*, junior litigating solicitors face a perennial problem: the "soup list" of the firm rapidly becomes outdated. The neophytes of five years ago who were happy to attend a mention for a few hundred now find it *infra dig* to saunter out to a District Court beyond easy reach of the CBD's luncheon venues. Even worse, the competent juniors (whom we will call without hyperbole, "young comets") have become fashionable and are beyond reach, tied up in some monstrous receivership in the South, land ike Bullfry QC, publicly perceived as being at the peak of their powers, may only be retained for very large fees and with months of advance notice. (The giants of yesteryear have retired to the nursing home in Moss Vale, or gone to that last great call-over in the sky.)

Litigators, then, will be constantly scanning the firmaments in the hope of surprising new comets with whom they can develop an abiding relationship before their merits become generally recognised and well-known. There is a simple test to determine whether one has attained "comet" status: may you, with impunity, charge the largest firms of solicitors a "cancellation" or "commitment"[38] fee or not? If you cannot, you may still be merely what Wilde described in *The Remarkable Rocket* - ie you will be actively fostering a certain hauteur, and like the Rocket, you will believe that the "only thing that

31. If a Pan-Australia approach is taken, the possible problems requiring Bullfry's expertise are legion.
32. "No-one is a hero to his pupils": C P Snow, *Time of Hope*, p. 344.
33. When young, I raised with diffidence the question of fees for arguing a matter which had gone beyond its fixed time with a distinguished silk, now a judge, who had come south for the case. (His clerk, of course, was still at base in Sydney.) I thought to catch him off-guard by broaching the topic while he was in his underpants and about to put on his striped trousers. "There's nothing I like discussing more than my fees," was his disarming response. He did, subsequently, turn down a High Court brief to go skiing with his family ("a promise I cannot break") and, consequently, I have always thought the more highly of him.
34. In order to avoid such "overmanning" many large corporations in the U.S. now specify that no more than two attorneys may work on a matter without specific client approval.
35. In a heavy matter, a pair of reasonably senior associates at 10 hours a day will cost in the region of the silk on their own.
36. An observation recently confirmed by a barrister acquaintance who, by mistake, was sent by the client both his own cheque *and* that of the solicitors, a mega-firm: the latter was six times his own, although he had drafted all the relevant papers and argued the matter.
37. One can well understand Sir Garfield Barwick using a similar expression when describing the fees he charged for saving the banks from nationalisation.
38. The term in Sydney is "cancellation" fee; in England, "commitment" fee. "A commitment fee is now quite a common feature of the terms under which Counsel accept instructions in a substantial case - at least at the Commercial Bar": per Phillips J in *Norjal v Hyundai* [1991] 1 L1.L.R. 260, 267 deciding that a barrister-arbitrator should agree such a fee in advance of appointment. On appeal ([1991] 3 All E.R. 211, 225) Leggatt LJ noted the strong resistance of firms to paying such a fee; in the long run he felt this would be "as hopeless an endeavour as the experiment of King Canute". In *Commissioner of Police v Rizzi* (21 June 1991, unreported - noted by E F Frohlich in October 1991 ACT Law Society Newsletter pp 20-21) Wilcox J deprecated the charging of such fees and is reported as saying: "In 21 years at the Bar, from 1963 to 1984, I never heard of such fees being asked ... " - how times have changed.

sustains one through life (as a Junior) is the consciousness of the inferiority of everybody else ...".[39]

The young comet

In Sydney, the "young comets" will have found themselves saddled[40] with a huge financial burden if they have been unwise enough to purchase company title shares in a select centre in the central business district. They will have been working frenetically for seven-odd years to service the debt and roll-over 180-day bank bills, hoping that interest rates will fall. If commercially astute, they may have decided it is more profitable to engage in "chamber work" by wisely buying and selling the chambers themselves as a business,[41] rather than drafting pleadings. In a rising market, they have enjoyed the success (and dangers) of other better-known entrepreneurs. Having now at last begun to reduce their principal debt, they should be in a position to enjoy the fruits of their labours.

There is nothing avaricious in their own fees since the larger part of them will be going to service loans and provisional tax. The only way in which their fees for the majority of matters would be much less would be for matters to be taken on contingency, or for some charity to erect a large, purpose-built office block next to the courts in which rents were pegged, and amortise its cost over 400 years - in other words, establish a counterpart to the Inns of Court. Yet, even the Inns of Court are faced with the pressures of occupying a prime site in the middle of London and obtaining far less than an open-market return upon it.[42]

Is Melbourne any better? There, barristers must have chambers approved by the Bar Council. "A practical effect of this rule is that most barristers must lease their offices from Barristers Chambers Limited (BCL), a company that is beneficially owned by the Victorian Bar and directed by appointees of the Bar Council.[43] The wisdom of this "exclusive dealing" has been doubted since it is hardly conducive to camaraderie for 1,200 barristers to be "spread among seven city office towers."[44] Although costs are reduced, at the expense of existing members of the Bar, the cheapness is only relative to the astronomic costs payable in Sydney.[45]

Barriers to entry

The NSW Bar Association has been astringently described by a lay-commentator as the "most exclusive and highly-paid trade union closed shop".[46] But to know all is to forgive all. As a matter of *training*, there are few barriers to entry at all. Some, of course, come to the Bar with their academic honours thick upon them as Dean of some great law faculty, but others may simply leave their dairy farm, or the motorcycle branch of the NSW Police Force, and enjoy equal success. (Grip is more important than mere erudition. The concept of "legal genius" is an oxymoron since law is but a social science; some may be more adept than others at "doing things with rules" but "stickability" is a far more valuable asset than brains.)

No, counsel are expensive simply because it costs a large amount to commence practice in the larger metropolises, especially Sydney.[47] In Sydney, this has been due to the prices paid for certain sets of chambers which are perceived to attract a lot of work. Their popularity is a result of the "soup list" mentality among the largest firms. There is, accordingly, much to be gained by being in a building full of Bullfrys who will, naturally, suggest a contiguous "young comet" as junior *faute de mieux*. How nice to be in a spot where "all the work is kept on the floor".[48]

The Marie Celeste

The present price structure threatens to break down in Sydney as the physical plant itself collapses. The relevant buildings are devoid of amenity.[49] With wholesale desertions to more modern premises, some floors have been likened to the *Marie Celeste* aboard which only a few "cabin-boys", coming late to the Ponzi, now find themselves adrift.

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39. Wilde, *The Fairy Stories of Oscar Wilde*, "The Remarkable Rocket", p. 70.
40. They may, of course, licence or "squat", but both are only short-term options. Equally, they may start in far-flung chambers but the "peanuts principle" will militate against their acquiring a large commercial practice.
41. To repeat an aperçu of Grieve QC.
42. Lord Benson, " The Future of the Bar", *Counsel*, July 1991, p. 14: "The Inns are in possession of a large and very valuable area of land and buildings in Central London, and the Bar is thus one of the best-endowed professions in the United Kingdom ... For a great many years, until recently, *proper commercial rents were not charged, with the result that instead of showing a substantial surplus of revenue each year and building up reserves to finance modernisation, the financial returns have been indifferent*" (emphasis supplied).
43. Law Reform Commission of Victoria, *Access to Law: Restrictions on Legal Practice* Discussion Paper No 23, July 1991 para 44.
44. Id para 46.
45. Id para 45.
46. Gosman, "Gloves off at the Bar", *Sun-Herald*, 22 September 1991, p. 19.
47. I once lamented this fact to a judge to whom I was an Associate. He looked at me acerbically and said, "When I came back from the war, the only time I had a room was when someone went to lunch. If you wanted to run a fish-shop you would have to invest some capital!"
48. An experienced clerk makes a great difference. On one occasion, when Bullfry wasn't available, a clerk managed to "sell me" on another silk whom I had used in an unrelated type of matter *after I had worked my way through the unavailability of three other silks on the same floor.*
49. It would be comical, were it not sad, to relate the joy a "young comet" experiences on moving to any outside room, or perhaps, obtaining a "light shaft" down which the occasional ray of winter sun finds its way. Only the author of *Bird Man of Alcatraz* could do justice to such emotion.

(Astute "comets" have recently been taking their capital gain, leaving the *Marie Celeste* and moving to rental premises because they no longer depend upon closeness with Bullfry QC to generate work. This situation can only continue while there are sufficient would-be "rockets" prepared to stump up the entry premium. When lenders become chary of financing such risks, the market will presumably collapse.)

It would be entirely wrong, however, to expect that things will change with a complete destruction of the premises, catastrophic as that would be to present shareholders. This has nothing to do with the alleged greed of counsel, whether they be "rockets", "comets" or "Bullfrys". It is a function of simple economics as explained above.

Moreover, there is no economic alternative. To rent a modern, airy, attractive office on a floor in the heart of the city, close to the courts, will cost about three/fifths of the carrying cost of a cabin aboard the *Marie Celeste without any premium for entry*. The sting lies in those last words.

Baron Brampton and the moneylender

Practice at the Bar is pre-eminently personal. No goodwill attaches to it. So as soon as a "comet" self-indulgently vanishes to become S-G of Vanuatu (tax-free) for 18 months, his or her practice disappears; if Bullfry is unavailable, his simulacrum will be "sold" by the litigation partner to the board of Pan-Australian.[50]

This has always been the case and laypeople fail to realise the consequences of it. Henry Hawkings once had a conversation on the topic with Sam Lewis, a famous moneylender.[51]

> "'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*".

As Baron Brampton acutely concludes, "nothing in the chapter of the Bar is more erroneous than the talk of the tremendous incomes of counsel".

It is the very fact that *practice is entirely personal* which contributes indirectly to the high price of chambers. In olden times, the premium which a "cabin" commanded had a large element of "goodwill" built into it. It could rightly be regarded as a sort of superannuation fund to support a modest retirement annotating unreported judgments of the Court of Appeal.

Things will not change if the *Marie Celeste* founders, flinging its passengers out into surrounding office blocks. Within a short time, *key money* or some *entry premium* will be payable there as well.[52] The amount to be paid will depend entirely on how much work a particular set of chambers is perceived to attract, and the level of commercial rents generally. Commercial rents will rise inexorably without the prospect of an assured capital gain, and the absence of the latter at retirement will mean that the level of fees charged here and now will include some provision for the future.

Unless, therefore, those present members of the Sydney Bar generously decide to erect at the Bar's expense a multi-storey edifice capable of accommodating every barrister with room for growth, it will continue to be as expensive for average people to retain counsel as it is for them to shop at Cartier. Most of the cost is a direct function of the price of renting or purchasing a room with payment of the entry fee.

Why, then, the Bar?

A most distinguished commentator,[53] editorialising, has suggested that increasingly the cleverest graduates from university will avoid the Bar and enter, for life, the largest firms of solicitors. But that view ignores the reality that the ranks of "remarkable rockets" and, subsequently, "young comets", are drawn almost entirely from those who have served, *ex necessitate*, a doleful apprenticeship as a solicitor. Only those scions of the greatest legal houses, with the most impeccable connections, may forego the "rite of passage" involved in travelling steerage as a deck-hand for several years aboard a mega-firm.

The scions[54] may do so because family or other connections will help them find a ready place aboard the *Marie Celeste* with Bullfry, no doubt a family retainer of many years' standing, to assist their faltering steps; since the lowliest matters are fungible in the skills they require, a scion needs to do no more than avoid gross negligence to advance to rocket status, at least.[55]

In this scheme of apprenticeship, Australia is (fortunately) entirely unlike England, where ideas of "class" still predominate[56] and most barristers commence immediately into practice from university. Lord Hailsham has candidly admitted that "for the first four years I must, but for the indulgence of my opponents and the occupants of the Bench, have been something

50. See footnote 47.
51. Baron Brampton, *Reminiscences of Sir Henry Hawkins*, Volume I, p. 179.
52. This happens now in chambers in many commercial office towers.
53. Professor J G Starke, "Current Topics - Growing preference of talented law graduates to become solicitors rather than barristers" (August 1991) 65 ALJ 435.
54. For those desperate non-scions, marriage to the second daughter of a managing partner may be hazarded.
55. Preferment beyond that level depends on legal talent, but our novice will already be high up many "soup lists".
56. Which seem to flow from the quaint 19th century social distaste that a common attorney may support himself from commencement of practice while a "gentleman" of the Bar must, perforce, have independent means to see himself over four or five briefless years at the start. The Bar in England now offers scholarships for pupillages, and rent relief. Most juniors survive on overdraft for their early years.

of a danger to the public, deeply mortified as I would have been to be told it at the time".[57]

At the Australian Bar, unsurprisingly, that usually does not occur *because no-one here is prepared to pay you while you learn your job at their expense*. By definition, if you think you have reached "rocket" status you have at least as much knowledge as the most junior tier of litigation solicitors who will be instructing you in "rocket" matters. Your advice then counts for something - moreover, given the cost structure of the firm it is usually cheaper for the client to instruct you (with a para-legal in attendance) than to have even the most junior sailor[58] from the mega-firm appear.

For this reason, despite recent suggestions, there is no chance of any mega-firm developing a genuine "in-house" advocacy section.[59] What large corporate client would want an associate, rather than a partner, from the mega-firm arguing its matter? Yet "rockets", to gain experience, invariably first appear in a court which no-one can find in a matter of no importance to anyone - a mega-firm will not let such a small-scale claim walk through its marbled portals; it cannot afford to. And if only large matters are taken in-house, how will the junior solicitor advocates obtain any training? No-one of any ambition or self-respect will wish at the age of 32 to be a "bag-carrier" or trolley-pusher, watching some senior partner's being mauled by an unsympathetic Bench.

"No-one here is prepared to pay you while you learn your job at their expense."

Furthermore, the cost structure of the mega-firm depends upon leverage: ie, the litigation partners may safely pay themselves more than they bill because they manage a "team" of five assistant solicitors; they can earn much more by such management[60] than by inducing a massive heart attack by actually *arguing* a matter for several hours of the day.

The Capital E

Furthermore, although it is true that "the mega-firms specialise in a multiplicity of branches of the law, to a depth which most members of the Bar are not called upon to reach in their practices",[61] that comment ignores two Capital Es: Economics and Ego, which may be decisive of career choice.

Economics: the vaunted "specialisation" they achieve is forced on solicitors if they are to be *profitable*[62] and may represent no more than a life devoted to the leveraged lease. Ego: if a "shooting war" breaks out, it will be the opinion of Bullfry QC which is beseeched by the firm and its client on the operation of that very lease, not the befuddled insights of the senior partner, located at last by portable phone on a Li-Lo at the IBA Conference in Caracas.

Why throw over the chances of "the chairmanship of statutory bodies", "overseas travel or extended leave"?[63] The matter is essentially one of perception and temperament. Bernard Shaw contrasted two sorts of life with characteristic pungency:

> "This is the true joy in life, the being used for a purpose recognised by yourself as a mighty one; the being thoroughly worn out before you are thrown on the scrap heap. ... And ... the only real tragedy is the being used by personally minded men for purposes which you recognise to be base."[64]

We will leave it to the reader's own experience, to determine which description better fits someone who has enjoyed for a lifetime all the perquisites and advantages of working as purser (or perhaps even second officer) aboard a mega-firm as opposed to risking an independent though vicissitudinous existence at the Bar. ❑

57. Hailsham, *A Sparrow's Flight* (1990) p. 100.
58. This is so because the "rocket's" overhead is much lower than even the most junior sailor's.
59. It has been suggested that the mega-firms are banding together to attack the "restrictive work practices" of the Bar. See, Gosman, *"Rumpole vs LA Law" Sun-Herald*, 10 May 1992, p. 33 in which Mr Graham Bradley is quoted as saying: "Large firms will develop an internal bar of lawyers specialising in such areas as environmental advocacy, intellectual property law, taxation law and in arbitration and alternative dispute resolution." Interestingly, these are all "boutique" areas of practice where inconveniences such as strict rules of evidence are unlikely to apply.
60. In the present economy, it may be that a firm will make more by attempting to deploy the partner in court. Such ideas will disappear with the first economic upturn which permits full leveraging.
61. J G Starke loc cit p. 435.
62. Accordingly, anyone aspiring to partnership will want two year-long, mundane matters upon which it is possible to bill ten hours a day, rather than 55 interesting matters per week which are completely "unbillable".
63. Professor J G Starke loc cit p. 436 listing some of the advantages of being a senior solicitor. With respect, some of the professor's comments are hard to follow, unless he is speaking tongue in cheek. For example, what does he mean by noting that a senior partner may earn "a much larger income than might be earned either as a Queen's Counsel *or even as a member of the judiciary* (emphasis supplied) when the present salaries of the latter group are universally regarded as far too low?
64. George Bernard Shaw quoted by Cooke in "Bertrand Russell" in *Six Men* (1977) p. 200.