QC, or not QC?

By Lee Aitken

'QC, or not QC? That is the question'.

Bullfry looked meditatively at the label on the bottom of the bottle as he sipped his second tincture – 'Green Dragon'? It seemed more soothing than his usual oolong.

Was it all, indeed, no more than a storm in a teacup? Bullfry thought back to his East Asian days, when he had enjoyed the fleshpots of the South China Sea. He had then been used, as a callow solicitor, to instruct Hong Kong's leading counsel, now sadly long deceased, who had come out from England to the colony with the Irish Rifles in 1945 to prosecute war-criminals and others, and had never returned to Munster. Indeed, he was rumoured never to have left the confines of Hong Kong Island itself at any time after his arrival. Yet, despite fifty years of practice as the acknowledged leader of the local bar – *he never took silk*.

A younger Bullfry had frequently instructed him in 'redomiciles' in the run up to '97 – many local *hongs* had decided to move to Bermuda, and other less risky places. The papers in support of the restructuring applications were four foot high – but such was his standing, the companies judge would simply ask: 'Is there anything I should note, Mr Wright?' In a voice etiolated, and refined, counsel would draw attention to one or two minor matters and then – 'Order in terms!'

So then, when a local billionaire found himself in a very sticky situation indeed, to whom did he turn for advice, and to appear before the commission? The billionaire could have had his pick of the cream of London's most highly-paid QCs – but he hastened quickly to Hang Chong Building and the sage counsel there to be had. His choice proved to be a wise one because after a lengthy hearing, he was completely exonerated.

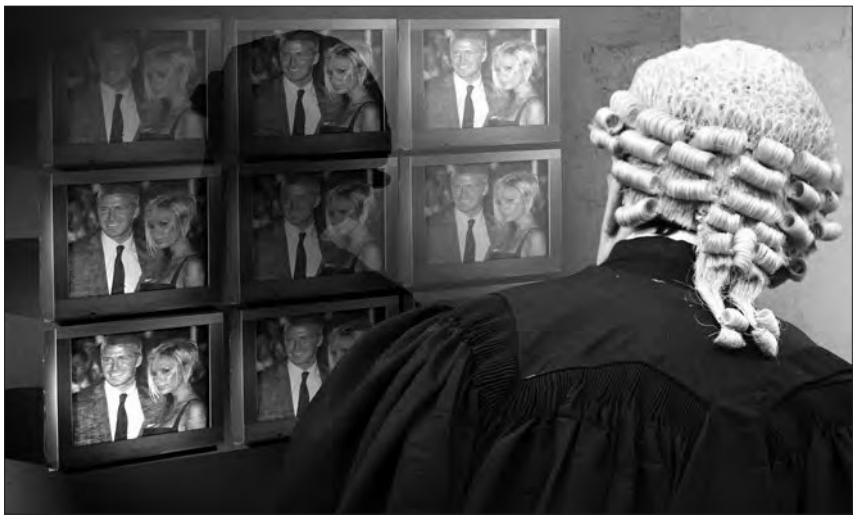

Photo: Karl Hilzinger / Fairfaxphotos

In a small enough bar like Hong Kong it does not really matter what baubles and post-nominals wafted around. Sir Garfield Barwick once talked of a class of silks 'you could float on a saucer of milk'. The present local system, which permitted (indeed, invited) multiple applications by failed aspirants, had severely denatured the quality of the honorific.

And at a baser level, a purist would complain that it was simply rent-seeking in a virulent form – what had changed in the applicant's ability from the day before the application was successful? What stringent examination had he or she passed? What objective test demonstrated beyond argument that here was a one worth, and now entitled to charge, a substantial amount more than he or she had charged just the week before? Nothing had changed; no examination had been passed; no objective test had been satisfied.

Far better surely, to let the market sort out those who were to be preferred without the suppositious 'glamour' of an extra title; like a trooper in a large pack of Barbary apes, a member of the Sydney Bar constantly in court against his fellows knew to a precise degree the respective abilities, weaknesses, and standing of each.

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But, of course, the solicitors, and those who employed them were simple men. They did not have the benefit of daily forensic intercourse and observation to permit them to make nice judgments on the ability of counsel. There were now, as Bullfry had been surprised to learn, 'annual surveys' (sic) of the bar in which various, but not disinterested,

commentators were invited to categorise and dilate on the abilities of counsel. Bullfry even believed it was possible, upon payment received, to garnish the recommendation, or reference, in the more meretricious of these publications. And if an in-house counsel had to tell the US head office why a particular 'trial lawyer' was being deployed, it no doubt helped to be able to state that he or she was a 'senior counsel' and regarded universally as a 'bet-the-company woman'.

Now, unfortunately, in the post-modern world, the very word, 'senior', had a markedly dyslogistic flavour. No-one, least of all Bullfry himself, wished to be regarded as 'senior'. 'Senior' connoted increasing decrepitude, diminishing powers, but happily not, in Bullfry's case at least, appetites. At a certain age one was eligible for a 'Senior's Card' but the notion of *seniores priores* did not find favour anywhere at all in the modern, distinctly non-Confucian, society – to be old, to be a 'senior', in the post-modern world was to be passe. And in the larger law firms, those unlikely ever to be 'elevated' to the partnership had to be content with a positional good like the title, 'senior associate', or 'special counsel'. It was no wonder that the laity was confused about exactly who a 'senior counsel' was, or what the title connoted.

Perhaps more importantly, as arbitration and mediation became transnational, it was increasingly difficult for a mere 'SC' to stand competition in zones further north when the competitors from Blighty continued to rejoice in the title of 'queen's counsel'. Despite the political

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appearances, those legal jurisdictions (often because of the educational background of those who controlled them) were frequently more English than the English, and they loved a Lord.

'Queen's counsel' carried more than a mere patina of honour – for centuries, and even now, it evoked a continuing connection with the Inns of Court, Lord Halsbury, and the glories of the common law. In olden times, with the 'two counsel rule' in operation, (now anathematised as 'anti-competitive') a successful aspirant for silk whose ambition had overreached his ability would find himself without any work to do at all. Now, in a grim legal iteration of *Gresham's Law*, an appointee could be found arguing – *sans* junior, of course – a costs argument, or seeking to call on a subpoena. (At least things had not yet reached the banal Canadian situation when almost anybody at all, whether accustomed to appearing constantly in court, or never going near a court at all, could apply for appointment as queen's counsel).

The original decision to do away with the appellation, 'queen's counsel', when the polity itself still had a viceroy, pointed to the underlying political schism which, in part, fuelled the present ferment. Just as some lamented the passing of the raillery of the old bar common room, so some looked nostalgically back to a time when a title actually meant something.

It was said that snobbery was playing a part in the desire to revive the old title – but that did not seem right. The restorationists must have some basis for the belief that the title would mean something more to the ill-informed members of the public than 'senior counsel', otherwise more grandiloquent titles ('grand wizard'? 'cyclops'? 'mikado'?) would have been pressed into action.

And was it not highly significant that there had been no great rush by those who held the Letters Patent prior to the redesignation to trade them in for a new title? Certainly, giving up his old title was not a course that Bullfry QC had ever contemplated. Furthermore, the numbers from the recusant bars to the north and south had revealed a massive amount of voting with one's feet! Almost every counsel there who had had the opportunity to do so had swiftly taken up the offer to use the old title, 'queen's counsel', in place of the new one.

Well, it was a muddle indeed, which even a third cup of 'Green Dragon' would not resolve. That old line so redolent of the present obdurate struggle, and equally applicable to both factions, recurred to him: '*Mens immota manet, lacrimae volvuntur inanes*' – 'Minds remained implacable, and still the tears flowed unavailing'.