The incredible shrinking Bar

By Anthony Cheshire SC

Each stage of my career at the bar seems to have been marked by arriving just after the bar's golden age, whether it was the fun of civil jury trials, the pre-mediation era of cases settling on the steps of the Court (followed by a long lunch), the pre-Civil Liability Act personal injury rural circuit bonanza or the Friday long-lunch that apparently everyone used to do in the olden days.

I do, however, miss the old level 7 of the Supreme Court building. The registrars all sat on that level at 9am, which meant that one could have several briefs in different lists and flit between the Courts. Apart from the fun of juggling several matters at once and the obvious monetary reward of doing so, there were many other advantages that flowed.

It was a good place to start a career and learn Court craft, not only from the personal advocacy experience (and mistakes) but from watching others (and their mistakes). Even those who had made those appearances as a solicitor were able to learn the difference in appearing as counsel.

It was also a good place to learn that cooperation and compromise on directions were unlikely to harm the client's interests, but in an appropriate case might well advance them. Apart from the client's interests, agreeing a timetable would allow a matter to be dealt with by consent at the top of the list and avoid the lengthy wait to achieve what was usually a similar result an hour or so later. There was also cooperation between members of the profession in holding a matter in the list or mentioning it by consent when the opponent was appearing in one of the other Courts.

Then there were the professional links that were forged: with the senior person on the floor who was too busy or important to appear in person; reporting back to a new solicitor on a job well done; establishing a reputation with opponents; and demonstrating competence to the Court.

Such appearances also often led to new contacts and an unexpected, but enjoyable and fruitful, new area of practice.

The Court renovations made it more difficult to flit between lists, but there are two other developments that have damaged this lifeblood of the junior bar and which seem to have passed without comment: online Courts: and solicitors doing their own appearance work.

Online Courts remove the opportunity to have that informal constructive discussion at an early stage; and mean that the settlement discussions often only take place after significant costs have been incurred and often unnecessarily so, making a settlement more difficult to achieve and more likely to leave the clients (justifiably) dissatisfied that the only winners from the litigation appear to be the lawyers.

The advantages I have discussed above were largely from the point of view of the bar and in particular the individual junior barristers, but there were also advantages to the client.

Many cases seem to start on a false basis, in an unnecessary and unproductive adversarial manner or in a rather haphazard way without much regard to the real issues (whether legal or commercial) or the real merits. Where that has occurred, a conversation between counsel pointing out a weakness in an opponent's case, identifying the real legal commercial issue for one's client or suggesting early settlement negotiations will often advance the client's interests far better than an adversarial discussion about timetabling. This is particularly so if it takes place at an early stage in litigation before costs have got out of control and become an impediment to settlement.

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Allied to this has been solicitors keeping their appearance work in-house, often to give young solicitors the opportunity to practise their advocacy as part of transitioning to the Bar.

Solicitors then carry out the online directions hearings and appear in person where required, so that barristers are being briefed less and briefed later. That is often not in the best interests of the client, but it is definitely not in the best interests of the junior bar.

However, rather than embarking on a marketing drive, stressing the advantages of the junior bar, including objectivity, a second opinion, cost and advocacy expertise, and seeking to expand into the lower Courts, the junior bar rushes to increase its rates and compete with established practitioners for the slim pickings of final hearings

in the higher Courts. This in turn makes it less likely that solicitors will engage junior barristers for directions hearings, with all the disadvantages discussed above.

There is only a finite amount of trial work in the higher Courts and thus the effect of this is to increase the level of competition between barristers and reduce the amount of work for many. This is especially so for the junior bar, who are being squeezed for work between solicitors and more established barristers. It's little wonder that there is an increasing number of grumblings from the junior bar about insufficient work and low earnings.

Add to this that Court filings are down and the feeling that a recession is on the way, and things are not looking particularly rosy for the bar and especially for the junior bar. It may not be time to panic yet, but it is time for a major rethink as to how the bar presents itself and its unique advantages. A good starting point would be an honest and frank conversation about levels of work and earnings; and a discussion about whether the bar wishes to be seen as providing specialist advocacy services for all appearances or whether it is content to limit its area of work to trials and contested motions.