

ENCOURAGING MORE CITY SOLICITORS TO JOIN THE HIGH COURT BENCH

INTRODUCTION

The High Court Bench has, in the past, been recruited predominantly from the Bar. Three factors have, with increased urgency over the last few years, fuelled a desire to recruit more solicitors, especially City Solicitors, into the senior Judiciary, these factors are:

- (i) increasing numbers of senior barristers choosing not to apply for appointment to the Judiciary, especially the High Court;
- (ii) significant numbers of senior judges expressing dissatisfaction with the job and its conditions and, in some cases, leaving or intending to leave early; and
- (iii) a welcome desire to improve the diversity of the Judiciary (and possibly its skills) by recruiting more solicitors working in City firms.

Solicitors join the Judiciary at junior levels in good numbers but, to date, few solicitors have been recruited to the High Court Bench. The recent appointment of five solicitors as Deputy High Court Judges is to be welcomed. However, it is no indication that there will be more applications to join the High Court. A part-time role as a Deputy High Court Judge, which can be held at the same time as another role, is very different to the full time role of a High Court Judge.

This paper serves to identify the reasons for this failure and to make some suggestions as to how the failure might be addressed.

"BAR REFUSNIKS"

The purpose of this paper is not to examine why there appears to be a growing trend of senior barristers refusing to apply for senior judicial posts or how that trend might be addressed.

However, given the historic dominance of the Bar in High Court appointments, the advantage an advocate has in the application process and the close contacts between the Bar and senior solicitors, it would be informative, in considering of the position of solicitors, to understand why increasing numbers of barristers are refusing to apply for High Court appointments. After all, an obvious source of information and advice to a solicitor, considering applying for judicial appointment, is his or her senior barrister colleagues. If that advice is negative, the task of persuading a solicitor to apply to become judge is made more difficult. Anecdotal evidence suggests the reasons why barristers are not applying include:

- **Judicial dissatisfaction** with the job and it's conditions, expressed through Judicial Attitude Surveys, by judges who have retired early and by personal contact. (Again, the obvious source of information for a barrister thinking of applying for the judicial appointment, is the judges he or she knows through chambers, an Inn of Court or otherwise.)
- **The loss of independence and the administrative burden.** Increasing judicial workloads - both Court-related and administrative - and demands for increasing judicial efficiency and the increased role of judicial managers, have led to a reduction (perceived or actual) in the ability of a judge to determine how he or she operates. This increase in administrative burdens and in being "managed", with the resulting loss of independence in how a judge works, are not attractive to a senior barrister who has been in control of his or her life and how he or she conducts his or her practice for about 25 years and who may have little love of administration.
- **The loss of respect for the Judiciary in Government and society** (as manifest - perhaps wrongly - by the popular press). Traditionally, a senior barrister would seek appointment to the Judiciary in the latter part of a successful career, partly as a way of

"giving back to society"; accepting a loss of earnings in return for societal recognition. This recognition has been eroded both by the loss of tangible benefits of being a judge and by the perceived or actual loss of respect for judges.

- **Pay and pensions.** Judicial pay and pensions have become steadily less attractive in absolute terms. They have also become increasingly less attractive as compared to the fees earned by a senior barrister. The reduction in earnings for a barrister becoming a judge, therefore, becomes greater each year. Changes to the judicial pension removes the previous significant benefit of a generous judicial pension, especially at a time when pensions and tax reforms mean that a barrister (or solicitor) is not able to build the traditional significant pension pot.

JUDICIAL DISSATISFACTION

Again, the reasons for the increasing judicial dissatisfaction with the job are informative in considering how to encourage more solicitors to apply to become judges. If those in the job are not advocates for it, then encouraging applications for the job will be harder.

The 2016 UK Judicial Attitude Survey is a dreadful base from which to encourage applications for the Judiciary. Focussing on the response of High Court Judges and only on the factors likely to be relevant to a City solicitor would-be applicant:

- only 45 per cent would recommend the job and 42 per cent would leave if they could;
- 47 per cent intend to leave early;
- 45 per cent and 32 per cent do not feel valued by the public and senior leadership respectively and a negligible per cent feel valued by the Government and the media;
- 70 per cent believe their working conditions have worsened since 2014;
- more than a third think their case and other workloads are too high;
- only 30 per cent believe administrative support is good or excellent;
- 56 per cent rate staff morale as poor;
- only 38 per cent think opportunities to interact with colleagues are good or excellent;
- only 20 per cent believe Court IT equipment, and only 30 per cent believe IT support, is good or excellent;
- 67 per cent do not believe they are paid a reasonable salary, 83 per cent believe they have lost earnings since 2014 and 61 per cent say salary issues are affecting their work
- 58 per cent say they are affected by the hours they have to work

APPLICATION PROCESS

If the experience of those in the job and those traditionally and professionally nearest to it is not encouraging of application, what about the process itself?

Here there are a number of barriers to discourage applicants or to make refusal likely:

- Solicitors are not, historically, part of the infrastructure that nurtures judicial applicants. In general they lack social and professional contact with judges. They are not part of Chambers or an Inn of Court. They do not appear in front of judges every day. In short, they are not barristers and some of the Bar's traditional "prejudice" against solicitors remains in the Judiciary. There is not, therefore, any institutional encouragement to apply to become a judge.

- Before an applicant can make an application to join the High Court, he or she has to sit as a judge to be "trained and tested". This is a significant time commitment (c 30 days p.a.) with no guarantee of success. It requires the applicant to take the significant risk of asking his or her firm to allow him or her to give this commitment. In a commercial setting, where commitment to the firm and one's partners is important, to make this request requires courage. It then requires the firm to agree to allow one of its top client-winning, fee-generating partners to give up firm time to train to leave the firm. That will require altruism from the firm which may actively discourage its partners from leaving to join other law firms.
- The target age for recruitment at the High Court bench is, apparently, 48 to 50 years. That would allow the applicant, if appointed, to aspire to serve in the Court of Appeal. However, that is the age when partners in City firms are at the peak of their careers – both in terms of attracting clients and earnings. They may also have significant family liabilities.
- Consistent anecdotal evidence suggests that solicitor applicants for High Court appointment fail because they lack "judicial skills". This is widely interpreted as "you are not a barrister and do not have court skills". The application system is aimed at testing barrister/advocacy skills. Most solicitors cannot demonstrate those skills through a history of court experience.
- Even if a solicitor were to obtain a more junior judicial position and succeed. History suggests that that is unlikely to lead to a High Court appointment.
- There is no track record of part time or flexible working as a High Court Judge.

OTHER DISINCENTIVES TO SOLICITORS

Solicitors see judges complaining about the job. They see barristers no longer applying and they encounter barriers to and rejection of application. That alone may explain why few City solicitors apply to become senior judges. The reasons judges complain and barristers opt out are equally applicable to senior City solicitors. There are then some reasons particular to those solicitors:

- There is no tradition of City solicitors applying to join the High Court. In fact, the experience of most solicitors who have applied for High Court appointments is one of failure.
- A City law firm partnership is a demanding and competitive environment. A partner who seeks time off to train for the Judiciary will fear that he or she will be seen not to show the necessary commitment to the firm and their career will suffer.
- He or she may be unwilling to take the risk of asking for "time off" to train without any guarantee of success.
- The target age of 48 to 50 is precisely the wrong age. In his or her 30's, a solicitor may be interested in an alternative career in the Judiciary. At 55 or 60, he or she may be looking for a change.

WHAT IS THE ANSWER?

There follows some recommendations for how to address these issues. It is recognised that the first few are matters of policy. However, unless the concerns of judges are addressed, it is unlikely that solicitors will apply.

Generally

1. The quality of the Judiciary is central to the success of English law and the choice of English Courts to hear commercial and other disputes. The pay and pensions of judges should reflect this.

2. The Government must recognise the importance and urgency of re-establishing the prestige and reputation of the Judiciary. A good start would be for Government Ministers to stop criticising judicial decisions and for the Lord Chancellor to be seen to act as the advocate for and defender of the Judiciary.
3. The number of judges must be increased or an alternative means must be found to relieve the pressures on them; especially of their administrative functions.
4. Judicial assistants should be available to all High Court judges and above along the lines of those in the U.S.A.
5. Judicial and court IT systems must continue to be improved.
6. The 70 year retirement age should be removed. That would avoid the waste in the current system when judges are forced to retire whatever their skills and faculties.

Specific to Solicitors

7. The application process must be radically reformed:
 - to recognise the importance of solicitor as well as barrister/court skills;
 - to test solicitor skills and remove the "barrister bias"; and
 - to remove the need for substantial on-the-job judicial experience prior to application. Where necessary, training could follow appointment.
8. Solicitors should be encouraged to apply in their late 50's or early 60's. That may mean that they are unlikely to progress to the Court of Appeal but it would address "short term" shortage of talent.
9. A few senior City lawyers should be "cherry-picked" and fast-tracked on to the High Court Bench. This will have a short term benefit on numbers. It will also set a good example to others.
10. Opportunities should be found to bring solicitors more into social contact with the Judiciary. One opportunity would be as members and benchers of the Inns of Court.
11. A career in the Judiciary should be seen as an independent job not just a career progression for barristers. It should be celebrated, advertised and marketed like any other job, particularly to younger solicitors. Many young City solicitors are choosing alternative careers and might be attracted by a career in the Judiciary. City law firms will never want to encourage the "flight of talent" just as they do not encourage associates and partners to move to U.S. or competitor law firms. However, they cannot (and do not) resist lawyers who seek a career change.

CONCLUSION

The objective of recruiting more City solicitors onto the High Court Bench is a good one; to increase diversity on the Bench and to increase the number of talented applicants. However, the task is challenging. City law firms cannot make partners and associates apply for judicial appointments. The most they can do - possibly against their own interests - is be supportive of suitable volunteers. The job and the process must be made more attractive and welcoming to would-be applicants. That will require a radical overhaul of the job to make it more attractive and of the application process to make it fairer for solicitors.

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