Clouded Judgement

There have been so many blogs over the last few days. The majority have been by barristers; some in the 'vote yes' camp some in the 'vote no camp'. This blog is neither. Not just because I don't have the right to vote but because I'd like to think of this as being a 'tell it how it is blog'.

Yes, I’m a solicitor and so some may view this with scepticism. Those voting 'no' might believe this to be another desperate attempt to get barristers to fight our fight for us. The simple fact of the matter is that this should not be a 'them and us fight'. I genuinely mean it when I say that it saddens me that our profession has become this fractured in such a short space of time. Solicitors and Barristers work side by side. They complement each other nicely. They each have different skills and it is undesirable to think of one existing without the other.

This piece is an attempt to remind the profession as a whole of why we are here and what we are fighting for.

In my mind this has always been about access to justice. In April 2013 Grayling announced his plans to cut 17.5% off criminal legal aid fees across the board. He recognised that the profession couldn't sustain a cut and so he sought to enforce market consolidation. Grayling’s initial proposal was to remove client choice from criminal legal aid. The profession as a whole were outraged. They instantly recognised that access to justice was about to be decimated. They stood strong and 16,000 consultation responses told him so.

Grayling then announced his plans for two tier. The profession remained united. They took a joint decision to make a stand in the form of no returns. Joint because it meant barristers forfeiting income and solicitors dealing with the wrath from the courts and the clients. Grayling panicked. A united profession was something that he couldn't deal with and so he bought one half off, something commonly referred to as "the deal". We’ve discussed the deal at length and it is pointless analysing it. In fact the only reason I mention it is because in my opinion this became the turning point for one half of the profession. The access to justice matter had vanished and for the CBA and Circuit Leaders this became about fees and self-preservation. They could have learned from the mistakes made in the past but they haven't. Instead they have allowed themselves to be drawn in to a point scoring exercise with the government, their view of the bigger picture having been clouded by the issue of fees and their own survival.
The Past

I and many others have tried to engage with the Senior Bar for some time now. We recognised the fact that Grayling's Achilles heel was unity. This year I offered to chair a joint committee of solicitors and barristers alike in an effort to lead us forward on a united front. Unfortunately it didn't happen because Tony Cross wouldn't entertain it. I offered on numerous occasions to sit down with Tony Cross and discuss any concerns that he may have generally about the profession as a whole. It was an offer that was never accepted. Ultimately I asked Tony Cross for an assurance that we would never allow ourselves to be divided again. I did so in an email. It was an email that led to a phone call from him ten minutes later to tell me that my email had "irritated him". I now know that this was because I had hit a nerve. Following this was a telephone conference between me, Bill Waddington, Jon Black and Mark Fenhalls QC. Tony Cross was supposed to join us but he was stuck on a tram. We had a conversation of some length during which I personally expressed concern about the unwillingness of the CBA to engage with us (CLSA and LCCSA) Mark Fenhalls agreed, assured us that we would work together and the phone call ended with an agreement that we would continue with the open lines of communication and endeavour to work together. Imagine our surprise when a week or so later we heard news that the AGFS was again to be ring fenced. Perhaps now you might understand why we feel so let down, efforts by us to engage and personal assurances that we would work together blown out of the water. Once again judgements clouded by fees and attempted self-preservation likely to be proven short lived once solicitors are culled by two thirds or more.

Since the 10th June there have been a number of disclosures that provide a clear indication of what has been going on. The Circuit Leaders and the CBA have sold Solicitors down the river. What they don't understand is that they have put the Junior Bar in the same boat. We are told there is "no deal" but the simple fact of the matter is that there has been. Why else would the AGFS remain untouched? What exactly have the Circuit Leaders and the CBA been saying to the government to make them think it is acceptable to take this level of risk with access to justice and the criminal justice system? One thing is for sure not one of them involved in the negotiations has fully understood or conveyed just what would happen if the government were to press ahead with the fee cut to Solicitors. I and many of my colleagues have continued to make open offers to sit down with the Senior Bar and explain our concerns. This offer is one that no one has accepted. We want to sit down and explain the bigger picture, this isn't just about fees and indeed what Michael Gove is doing will have a far wider impact than even they have realised. The sad reality is that since Nigel "not a penny less" Lithman QC took the reins those negotiating on behalf of the Bar have made this fight about money.

Quality

Unfortunately it is not just fees that have clouded judgement. The argument by the Senior Bar more recently appears to have focussed on the issue of quality. It has been something that Tony Cross has talked about in every Monday Message.

Quality is important but it is important throughout the profession as a whole. Tony Cross has used it as a stick to beat us with. Another "them and us" point. To be honest it's a bit like suggesting that solicitors are the poor relations of the profession. Quite simply that is untrue. I chose to become a solicitor. I spent my teenage years and every work experience opportunity I had thinking I wanted to become a barrister. I changed my mind when I did work experience with a firm of
solicitors and I realised the variety of work enjoyed by them. I did not change my mind because I couldn't 'cut it' at the Bar. I have Higher Rights; I choose not to use them. I appear in the Magistrates Court on a daily basis. I probably do more advocacy than most. I win trials and I secure bail for clients charged with serious offences. I mitigate and I conduct legal arguments. I attend at police stations to give advice to a suspect which is often the most crucial part of any Crown Court case. I take statements from clients and witnesses, statements used by Counsel in court. You see I am no less qualified or competent than the Bar. This is why I am always astounded and offended when I see the argument that HCAs aren't up to it and couldn't do the more serious cases. The fact of the matter is that I and many of my colleagues are no less capable.

The irony of becoming side tracked by the issue of quality is that the negotiations with the government by the Senior Bar have destroyed all hope of us ever having top quality Solicitors and Barristers involved in legal aid. This again is what happens when the issues at stake become clouded by self-preservation.

**Two Tier v Cuts**

This is the latest of all the smoke screens. The CBA and Circuit Leaders had been able to tell Gove, with a degree of certainty that Solicitors were unable to take action. They said unable because they didn't believe we could unite. To some extent this was in the past true. What they didn't factor in was the fact that cuts unite us all. How embarrassing then for them to watch unity amongst the Solicitors grow before their very eyes. Of course they feel this isn't good. It is bound to cause Gove to question their knowledge and judgement. This is bound to cause discomfort amongst them and so the question is how do they deal with it? Easy enough; cuts unite, two tier doesn't. What followed was evidence of the apparent complete misunderstanding held by the Senior Bar in relation to two tier and cuts. This started with a public questioning of CLSA and LCCSA leaders about whether their firms had bid for a contract. Continual questions from the CBA and Circuit Leaders about whether they should support Solicitors if their battle is about two tier, cuts or both. I don't intend to rehearse what has already been said but you can find the arguments here;


**Where are we now?**

The simple answer is in turmoil between the Leaders of the Bar and the Junior Bar and Solicitors. Sad but true. The only saving grace is that it doesn't have to be like that. The vote for the Bar will close this Tuesday. It is a vote that must be used. It is no longer acceptable to be apathetic. It is no longer acceptable to think that because you are busy in Court this won't affect you. Quite simply this affects all of us. That's right I said "us" and that is exactly what "we" are. We are two halves of a whole, a profession that we should never have allowed to become fractured.
If the government decides to press on with cuts to Solicitors fees and two tier then the outlook for all of us is bleak. Far from preserving the Bar, firms who have previously only ever briefed everything out will start to look in-house. Contrary to the beliefs of the Senior Bar and the CBA both cuts and two tier will decimate the Junior Bar. Not something we want but rather are forced into by necessity. It matters not which comes first or which one you perceive our fight to be about, the simple fact of the matter is that the majority of firms can sustain neither.

Solicitors have tried so hard to hold the profession together. To fight an open fight for the greater good of the criminal justice system, access to justice and both sides of the profession. The same cannot be said for the Senior Bar. I have been astounded at the lengths some QCs have gone to of late. There have been countless increasingly desperate attempts to publicly undermine my profession. Diversionary tactics to try and persuade the Junior Bar that they should choose not to fight for access to justice and instead should sit tight to preserve their own fees. Attempts to further ensure that we remain divided.

The Bottom Line

I personally have been engaged in this battle for two years. I have met Grayling on two separate occasions and I can tell you with my hand on my heart that no Solicitor involved in those meetings has ever allowed there to be any suggestion of cutting the fees of the bar in an effort to save solicitors. You see there appears to be a big difference in the motives of the Senior Bar compared to the motives of Solicitors and the Junior Bar. The Senior Bar have entered into defensive negotiations with the government to try, at whatever cost, to protect their own fees. Solicitors have always fought on the basis that if the cuts and the plans for two tier continue they will destroy access to justice.

Instead of a battle by the profession as a whole we are now left with two camps; senior barrister’s fees versus access to justice. Admittedly the refusal to take on new cases by solicitors stems from the rate cut and so for me to suggest that fees are irrelevant to solicitors would be disingenuous. However we see the bigger picture which is that if solicitors cannot afford to stay in business who will there be left to provide access to justice? It is a sad state of affairs when senior members of the Bar either don’t understand this or simply don’t care. It is a sad state of affairs when all that they can think of is ring fencing fees and forsaking the rest. It will spell disaster for the junior bar who rely upon those firms culled by the economic effects of cuts whether having bid or not.

The clouding of judgement is evident from Tony Cross's most recent Monday message and the recent blogs by Andrew O’Byrne QC, Leader of the Northern Circuit, Richard Atkins QC, Leader of the Midland Circuit and Mark Fenhalls QC, Vice Chair of the CBA. The only reference to access to justice is by Tony Cross when he says "I hear a lot of people talk about access to justice but then deny the client the best barrister in crown court". This is an interesting spin on the issue of access to justice, it completely ignores the fact that if the public can't access Solicitors it won't matter what Barristers are available. The negotiations that have taken place between them and the government have done so without the fundamental issue of access to justice featuring anywhere. It is a sad state of affairs and to those of you who have a vote you should consider this carefully. Voting no is a short term strategy to try and preserve fees but not to preserve your own existence. Voting yes is to try and ensure the bar’s survival, a unified profession and to preserve access to justice.
Gove is not the knight in shining armour that the CBA and Circuit Leaders would have you believe. The fact is he has inherited Grayling's mess and is compounding that mess by refusing to engage with Solicitors. Protecting the AGFS won't save the Junior Bar nor will it provide a criminal justice system that the public are entitled to expect from a civilised and democratic society.

We all entered this profession to uphold the rule of law, to provide access to justice for those who need it most. Somewhere along the line some have forgotten this. Having been bought off and divided they have lost sight of the real battle. This is not solicitors versus barristers. It is not about quality, it is not about HCAs, it is not about fees alone. It is not only about survival.

This battle started off with a united profession fighting to preserve justice for all. This battle should continue with a united profession fighting to preserve justice for all. Don't let your judgement be clouded.

Zoe Gascoyne

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