

LIFE AS A KIWI AT THE ENGLISH BAR

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In honour of Professor Smith's status as a member of the English bar, this article provides an insight into life at the English bar from the perspective of a New Zealander who has practised in England as a barrister for over 20 years. The author describes how the English bar and barristers' chambers operate, and her own path to becoming a King's Counsel, including some of her most memorable cases. The author graduated from Victoria University of Wellington in the mid-1990s with a BA and LLB(Hons), and was awarded the Chapman Tripp Sheffield Young prize for the top law graduate in her year. After completing the LLM at the University of Cambridge (and gaining the highest mark in her year), she worked for two years as a solicitor at Clifford Chance in London before transferring to the bar, where she has practised from Blackstone Chambers ever since. This article is an adaptation of a lecture given at the Victoria University of Wellington Faculty of Law in September 2022.

My life has intersected with that of Professor Tony Smith in three ways. We first met at Gonville and Caius College, Cambridge in late 1996, where Tony was a Fellow and Professor of Law, and I was starting my LLM. Caius (pronounced "Keys") is known for producing historians (including Simon Sebag Montefiore and Andrew Roberts), physicians (such as Francis Crick and Howard Florey), scientists (including Stephen Hawking and 14 Nobel Prize winners, second in number only to Trinity College, Cambridge) and some pretty good lawyers, too. Many of those lawyers have been New Zealanders, such as Sir Robin Cooke, Professor Len Sealy and of course Tony Smith himself.

Like many Kiwis drawn to Caius, Tony and I were both Tapp Scholars. (Tony's future daughter-in-law, Nicole Moreham, was also a Tapp Scholar a year after me.) Tony and I were part of the Kiwi mafia at Caius, resulting in the college sometimes being referred to, somewhat tongue in cheek, as "Gonville and Kiwis". Tony did not teach me for any of my subjects, but we enjoyed the odd glass of port together after dinner in Hall.

Ten years later, Tony became my boss at the Law Faculty of Victoria University of Wellington. In January 2007, Tony was appointed Pro-Vice Chancellor and Dean of the Law Faculty. A month or so later, I arrived at the Law Faculty on a sabbatical from the English bar, as a visiting lecturer in public law and comparative human rights law. Tony's house was just down the road from my rental

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apartment, and by then I was close friends with his son Tim and daughter-in-law Nicole. It was only right that Tony and I would become good mates, too.

The third way our lives have intersected is our membership of the English bar. Tony was called to the bar of England and Wales quite late in his career, in 1992. He is both a Bencher of Middle Temple, and an Associate Member of 5 Raymond Buildings, now known as 5RB, a chambers specialising in media and communications law. I was called to the English bar in 1999, and after completing my pupillage at Blackstone Chambers in 2000, I have been practising there ever since.

This article is intended to provide a small insight for readers into what life is like for this particular Kiwi at the English bar.

I MY JOURNEY TO THE ENGLISH BAR

But first, a few words about how I ended up at the English bar. Having completed my undergraduate degrees at Victoria, and my LLM at Cambridge, I was employed for two years as a solicitor in the London offices of Clifford Chance. It was, for the most part, a great experience. But after two years, I realised big law firm culture was not for me. And I yearned to be an advocate. As a solicitor, I had instructed some of the greats of the English bar: Gordon Pollock QC,¹ Johnny Veeder QC, David Perry QC and Christopher Greenwood QC (who went on to be appointed a judge of the International Court of Justice). I remember watching them in court, wishing I was doing what they were doing.

So in 1999, I took a leap into the unknown, requalified as a barrister and obtained a pupillage at Blackstone Chambers, which was at that time well on its way to becoming one of the top five sets of barristers' chambers in London.

A "pupillage" is the final, vocational stage of training to become a practising barrister. It is effectively an apprenticeship where a pupil gains practical knowledge and experience under the tutelage of one or more senior barristers, who used to be known as pupil masters or mistresses, and are now known as pupil supervisors. A pupillage lasts 12 months, which are split into two six-month periods, known as the "first six", where the pupil shadows their pupil supervisor and cannot practise; and the "second six", where pupils can begin to practise independently, with responsibility for their own case load.

When I was a pupil, it was not compulsory to pay pupils anything at all. This predictably meant that only those with funded pupillages or private money could afford to go to the bar. Thankfully, the Bar Council has for many years required chambers to pay pupils a minimum pupillage award of around £20,000, although in the leading commercial sets such as Blackstone, pupils are paid considerably more than that. The downside of compulsory pupillage awards is that there are very few

¹ At this time, of course, all senior counsel held the honorific "Queen's Counsel".

pupillages available in England and Wales, and competition for places is fierce, with only a tiny fraction of applicants being successful.

I don't think I have ever worked as hard as I did as a pupil. I had four supervisors for three months each, covering all the practice areas in chambers (commercial law, EU competition law, public law/human rights, and employment law). I was assessed on every piece of work I produced, and was expected to demonstrate excellence in legal research, written advocacy and oral advocacy, as well as social skills. My chambers wanted to know that I did not just have a good legal mind, but was capable of working well as part of a team, and that I was likely to inspire trust and confidence in future clients and judges.

At the end of the year, every member of chambers got a vote on whether to take me on as a permanent member of chambers. When they voted in favour of offering me membership, I recall my then pupil mistress Dinah Rose advising me to think carefully about accepting, because – she said – joining a barristers' chambers was like joining a family that you would be living with, for good or ill, for the rest of your life. She was right about that. Happily, my colleagues are brilliant, multi-talented, funny, down to earth people who I am privileged to call my English family. (I even married one of them.)

II THE ENGLISH BAR AND HOW BARRISTERS' CHAMBERS OPERATE

Unlike in New Zealand, the British legal profession is a "split" profession, meaning one can either become a solicitor or a barrister, but not both. There are currently approximately 160,000 solicitors practising in England and Wales,² whereas there are only approximately 17,000 barristers in practice.³ So barristers make up a very small percentage of practising lawyers in England and Wales.

Currently, less than 40 per cent of practising barristers in England and Wales are female.⁴ It was worse when I started at the bar in 2000; at that time, women made up only around 30 per cent of the practising bar.⁵ Approximately 14 per cent of the practising bar currently identifies as an ethnic minority, which is similar to the general population.⁶ However, although the data is lacking, my observation is that the English bar still has proportionately fewer people from lower socio-economic backgrounds.

2 Solicitors Regulation Authority "Population of solicitors in England and Wales" <www.sra.org.uk>.

3 The Bar Council "Demographics dashboard" <www.barcouncil.org.uk>.

4 The Bar Council, above n 3.

5 The Bar Council, above n 3.

6 See UK Government "Population of England and Wales" (22 December 2022) <www.ethnicity-facts-figures.service.gov.uk>.

When I started at the bar, it wasn't clear there was a future for the independent bar. Solicitors had been given the right to become "solicitor advocates", and it was thought that solicitor advocates may end up replacing barristers. But it hasn't worked out that way. Most solicitors are very keen to avoid the stresses of going to court and being an advocate, and are happy to engage barristers to do the advocacy. And so far as I can tell, clients have accepted the division of labour, and are content to have both a barrister and solicitor handling their cases.

Most barristers are self-employed and practise from a barristers' chambers. Practising in this way is a unique experience, that is utterly different from practising in a law firm. For a start, a barristers' chambers is not a legal entity: it is neither a partnership nor a company. It can best be described as a co-operative where self-employed barristers group together to share expenses but not profits. That means we each contribute to the costs of running chambers: the building rent, the staff, the stationery and so on, but otherwise, we keep what we earn (or as we say in the trade, "we eat what we kill"). I do not know what my colleagues earn (unless they wish to tell me), and vice versa.

Because barristers are self-employed, we can take cases against other members of the same chambers. While it can take lay clients and foreign lawyers some time to get their head around this, it is perfectly common for barristers to appear in court against one or more members of their own chambers. For example, in the recent case of *R (Miller) v Prime Minister*, which concerned the legality of Boris Johnson's advice to the Queen to prorogue Parliament, Lord Pannick KC and a team of barristers from Blackstone Chambers represented the claimant, Ms Gina Miller, while Sir James Eadie KC from Blackstone Chambers represented the Prime Minister, and Lord Keen of Elie KC also of Blackstone Chambers represented the Advocate General for Scotland.⁷

English barristers' chambers employ clerks to assist with case management. I cannot think of an equivalent to a barristers' clerk in any other jurisdiction. Junior clerks are responsible for carrying our files to and from court. More senior clerks are responsible for managing our work diaries, liaising with the courts to get dates fixed for hearings, and negotiating and setting our fees with solicitors. They are also responsible for allocating cases to barristers on those occasions when solicitors contact chambers without a particular barrister in mind for a job, which is very common at the junior end of the bar. So barristers' clerks have a lot of power and responsibility. The most senior clerks of the leading sets tend to earn extremely large six-figure sums.

However, barristers' clerks generally have no legal training. Most barristers' clerks don't have a university degree and many of them begin as junior clerks without having finished secondary school. For historical reasons, barristers' clerks tend to be white, male and working class. That is starting to change, but in my own chambers, out of 13 clerks, there are currently only two female clerks and no ethnic minority clerks. All of them speak with East London accents.

⁷ *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.

Despite its oddities, the clerking system generally seems to work in practice. Through experience, clerks become very experienced and knowledgeable about both the nature of barristers' practices, and the state of the legal market, in terms of pricing and placing our work. The relationship between a barrister and their clerk involves a delicate balance because, technically, we employ them, but they have the power, at least when we are junior, to make or break our career. I am very lucky that in my chambers we have excellent clerks who are hard-working, fair, professional and supportive. They always listen with apparent interest and patience to tales of woe or triumph from court, and in a dire emergency they can make a court hearing disappear from your diary faster than you can say "interlocutory injunction".

III LIFE AS A JUNIOR BARRISTER

When you start out as a junior barrister, nobody knows who you are in the vast English legal market. This means junior barristers are dependent on the reputation of their chambers to attract the work, and then on clerks to allocate the work to them. Alternatively, they depend on senior members of chambers to bring them into one of their cases.

It's hard work starting out as a barrister. I took every case that was offered to me. I worked long days and nights, and weekends. I travelled around the country, by train, to different courts or tribunals in far away places. I spent a lot of time in my early years at County Courts or Employment Tribunals in towns all over England and Wales, trying to get as much advocacy experience as I could.

I had to get my head around some bar customs or traditions that can best be described as quaint. It goes without saying that English barristers are "robed" in court, which means they are required to wear the horsehair wig, white collar bands and black gown in court. On one occasion, after the luncheon adjournment, the Judge entered the courtroom, took one look at me and started clearing his throat loudly in my direction. This demonstration was supposed to signify, without being so crass as to spell it out, that I had forgotten to put my wig back on my head. Oh, the mortification! When I started at the bar, it was not regarded as appropriate for women to wear trousers in court; that at least has happily changed over the years. English barristers still generally do not shake hands with each other when they meet in person, not because they are rude, but to the contrary, because barristers are assumed to be gentlemen and gentlewomen, and so can be trusted to come in peace and not armed. Hence, there is no need for a display of hands, which is the origin of the hand-shaking gesture.

The English bar also has its own unique language, which it is necessary to learn. Barristers work in a "chambers" not a "firm", and within those chambers, they have a "room" not an "office". In terms of seniority, barristers go from "baby junior" to "junior junior" to "senior junior"; and if they are lucky, they "take silk" at which point they are a "senior" or "leader". Barristers spend their days preparing "skellies" and "subs" and "cross", for which they earn a "brief fee" and "refreshers". Before going into court, there may be some "robing room tactics" with the "oppo". When barristers are in court, they refer to their "oppo" as "my learned friend" (if a qualified barrister) and merely "my friend" (if a solicitor) and to the judge as "my Lord/Lady" or "your Lordship/Ladyship" (if a judge of the "senior

courts"). The legal year is split into four terms: Hilary, Easter, Trinity and Michaelmas (although I still have the barest grasp of which is which). A barrister who sits on the governing body of one of the four Inns of Court is a "Master of the Bench", to be addressed as "Master" irrespective of gender, and who may rise to become "Treasurer" of the Inn, whereupon they are entitled to their very own coat of arms. I could go on.

Despite the antiquated customs and language, in my experience, barristers are generally very collegial and polite to each other both in and out of court. It is not considered appropriate or necessary for the barrister to take on the hostility or aggression of their client towards the opposing party. We will happily destroy our opponent's arguments in court, in the most measured terms, and then go back to being friends or colleagues when we are not in court.

Generally speaking, I have also found English judges to be very polite, even-handed and attentive. It is very rare, nowadays, for judges to be rude, aggressive or bullying towards counsel (although I once encountered a gratuitously rude and hectoring judge in the Scottish Employment Appeal Tribunal, where they did not, apparently, appreciate English-qualified counsel appearing before them). Despite being an Antipodean (or perhaps because of it), I have never knowingly encountered any discrimination from judges or opponents on the basis of my nationality. Being a New Zealander can be a distinct advantage: the English don't quite know where to place New Zealanders in the social hierarchy, which means they generally treat you as an equal.

The day-to-day life of a barrister depends on the nature of one's practice and how often one goes to court. Civil law practitioners such as myself tend to spend long periods of time working alone in our rooms. We spend our days researching the law, reading cases and drafting submissions for court. It can be a solitary pursuit. But it is not a purely academic pursuit, because barristers are always applying their legal knowledge to a particular set of facts, trying to advance their client's case. So barristers have to be practical and inventive as well. And then there is the drama and pressure of the courtroom where, in a public setting, it is your role to persuade the court to accept your own case over your opponent's case.

Being a barrister can be very stressful. The weight of responsibility falls on the barrister to decide the litigation strategy for a case (since lay clients and even some solicitors are unfamiliar with litigation and the court process). If the strategy goes wrong, that's a heavy burden to carry. The barrister is also in the spotlight, so there is nowhere to hide if he or she is under-prepared. Unlike a stage actor who knows what their lines will be and what their fellow actors' lines will be, the barrister has to be prepared for the unexpected: the question from the judge that hasn't been anticipated; the argument from an opponent that cannot be met; or the witness who falls apart under cross-examination.

But when it goes well, there's nothing like it. The thrill of a cross-examination that causes the other side's case to collapse. The interchange between the bench and counsel that at its best feels like a highly intellectual extended conversation, testing and probing the limits of the advocate's case. The

thrill of changing a tribunal's mind about a case through the power of your submissions. The relief and happiness of your client when you win.

IV "TAKING SILK": BECOMING A KING'S COUNSEL

It takes many years of hard work to build up a practice, and to develop expertise and excellence in a particular legal field. Once a barrister achieves that, and their cases reach a certain level of complexity, sensitivity or value, and he or she generally appears only in the higher courts (High Court, Court of Appeal or Supreme Court), then it is time to apply to become a King's Counsel or KC (known as a Queen's Counsel or QC during Queen Elizabeth's reign).

The award of KC status is intended to signify that the advocate has attained a certain level of excellence or expertise (although, unlike a quality mark, once granted, it is conferred for life). In my view, there's no particular need for this award or honorific to exist, but it does provide a way for the market to differentiate between barristers, and of course it enables barristers with that title to charge higher fees. For the last 20 years, KCs have been selected by an independent selection panel made up of legal and lay members, which makes recommendations to the Lord Chancellor, who formally approves the appointments on behalf of the sovereign. It is a system which has its problems (how is a non-legally qualified person to help determine which barrister is appropriate for appointment?) but it is almost certainly preferable to the former "tap on the shoulder".

There are currently around 1,900 KCs in practice in England and Wales, making up around 11 per cent of barristers. A very small proportion of KCs are female; there are currently around 350 female KCs in practice.⁸ The first female KC was appointed as late as 1949. I "took silk" in 2018, and I was the 424th woman ever to be appointed, and the first New Zealand female practising at the English bar to be appointed.⁹ King's or Queen's Counsel are known as "silks" because we wear a silk gown in court (in contrast to the wool or cotton gowns of junior counsel).

I remember the day of my silk appointment very well. All new silks are required to dress in full-bottomed wigs, ceremonial robes and silver-buckled shoes. We then processed via limousine towards Westminster Hall for the ceremony, with our clerks and our guests. It was snowing that day, and was consequently freezing cold in Westminster Hall, which is unheated. My teeth were chattering so badly by the time it was my turn to give my oath, I barely got the words out.

I very much enjoy practising as a silk. My practice is now more varied, more interesting and of course more complex. I now have junior counsel to assist me on many cases, and am able to delegate more of the drafting to my juniors. I don't have to work weekends as often as I used to as a junior. My seniority has opened doors for other interesting legal avenues, such as becoming a judge of the

8 Bar Standards Board "King's Counsel statistics" (2 February 2023) <www.barstandardsboard.org.uk>.

9 New Zealander Wendy Miles took silk in 2015 but at the time was practising as a solicitor in a law firm.

Commonwealth Secretariat Arbitral Tribunal, chairing the Administrative Law Bar Association and sitting on the committee which helps to run Inner Temple and its estate.

V SOME MEMORABLE CASES

I thought I would finish with some examples of cases that were memorable for me in different ways. The first case, *R (Mr and Mrs M) v Human Fertilisation and Embryology Authority*, was probably my most emotionally challenging.¹⁰ It involved a woman who wanted to give birth to her own grandchild. The woman's adult daughter had frozen her own eggs after receiving a cancer diagnosis, but tragically died before she was able to use the eggs to start a family. Her grieving parents sought permission from the United Kingdom's fertility regulator to export their daughter's frozen eggs to a clinic overseas, so that the eggs could be fertilised by a sperm donor and then implanted into the mother, so that she could give birth to her daughter's child. The fertility regulator refused permission because it was not sufficiently persuaded that the daughter had given informed consent for her eggs to be used in that way. I acted for the regulator in defending its decision, in both the High Court and the Court of Appeal (where my client's decision was ultimately quashed). It was not a legally difficult case (it ultimately turned on the nature of the evidence regarding consent) but it was the case where I felt the greatest sympathy for the party on the other side.

My most socially useful case is probably that of *R (British American Tobacco UK Ltd and others) v Secretary of State for Health*.¹¹ I was part of the team of barristers that acted for the Government in successfully defending the Government's tobacco plain packaging legislation against the forces of Big Tobacco. Every major tobacco manufacturer issued judicial review challenges to the legislation, arguing that plain packaging for cigarettes, by removing manufacturers' logos and branding from cigarette packets, would breach their intellectual property rights and their rights under the Human Rights Act 1998 (UK). I recall there being 16 barristers ranged against our Government team of six in that case. There were highly complex arguments concerning proportionality, the scope of the right to peaceful enjoyment of possessions and the role of expert evidence, but we managed to convince both the High Court and the Court of Appeal that removing trademarks and logos was a justified measure to make cigarettes less appealing to young people. As a result, if you see cigarette packets in the shops in the United Kingdom, they are now an ugly brown colour, with no logos or branding.

My most personally satisfying case is probably that of *R (CityFibre Ltd) v Advertising Standards Authority*.¹² I acted for the United Kingdom's advertising regulator in a judicial review claim brought by a full-fibre broadband company which sought to challenge my client's decision that it was not misleading for part-fibre broadband providers to advertise their services using the word "fibre". (The

10 *R (Mr and Mrs M) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611.

11 *R (British American Tobacco UK Ltd and others) v Secretary of State for Health* [2016] EWCA Civ 1182.

12 *R (CityFibre Ltd) v Advertising Standards Authority* [2019] EWHC 950 (Admin).

claimant company felt that this gave broadband providers who only used fibre optic cable in part of their services an unfair advertising advantage.) The broadband company had initially engaged a junior barrister to represent them, and at the initial stages of their case, I thought their case was quite weak and advised my client that we should win.

After permission was granted to bring the claim, the broadband company then brought in Dinah Rose KC to represent it in court. She is easily one of the best barristers at the English bar, and had been my supervisor when I was a pupil. It's fair to say I was nervous about my chances. Dinah Rose's brilliant advocacy in court managed to make the claimant's rather weak arguments sound persuasive. Having sat down at 3 pm on the first day, she left me the remainder of that afternoon and the next day to try to persuade the Court that her arguments were flawed and my client should succeed. I won the case, and although it was not the most significant of cases, it felt like the most satisfying. Afterwards, my client thoughtfully sent me flowers, accompanied by a card: "They had a Rose but that was no match for a Callaghan". It is on rare but sweet days like these that nothing beats being a barrister.

