Bullfry gets too close to the client

By Lee Aitken

'The client is God!' Bullfry rolled the offending phrase off his tongue with growing delight, incredulity and muttered thanks, pausing only to refresh himself from a crystalline tumbler. He rested his glass from time to time on the skull of the former jurist purchased from its wanton executrix; a minor tumble to the floor caused by Alice's drunken dusting, had given it a nasty parietal fissure, and markedly increased its slack-chopped appearance which added to it a benignity which its owner had never displayed judicially. 'The client is God' – in those four words lay confirmation of the continued, if benighted, existence of the independent Bar.

Bullfry had never regarded a client as God. Indeed, apart from a few concupiscent instructresses who qualified potentially as nymphs, or goddesses, no notion of the Deity had informed any part of Bullfry's practice. (This misplaced admiration had evoked a certain gene from the first Mrs Bullfry to which he had applied the sage advice of the Scotch bard: 'A man may drink, and not be drunk, a man may fight and not be slain, a man may kiss a bonny lass and still be welcome home again'). True it was that in his in his variegated career, various jurists may have considered themselves numinous when asking pointed questions from the Bench but as was so often the case, they proved ultimately to be mere idols with feet of clay. So what did this new revelation from a senior member of the cadet branch of the profession betoken? What it meant, stripped of its spiritual coda, was that the largest firms of solicitors now regarded themselves as completely in the thrall of those who instructed them. (Indeed, it was only with some difficulty that Bullfry had been able to reject, firmly but politely, an invitation to canapés and champagne put on by the litigation branch of one of the bigger operations which had as its ill-concealed aim reminding counsel precisely where the litigious power lay, and which piper was calling the tune).

Bullfry remembered the dictum of one of his masters when he first came to the NSW Bar: 'Jack, always bear this in mind – there are 10,000 solicitors in New South Wales and it takes more than one lifetime to lose the goodwill of all of them'. So it was that Bullfry had no hesitation in sending from his door clients, dishevelled and crying, aghast at the forthright and depressing advice which he had delivered. As Viscount Simon had advised long ago about dealing with solicitors, when starting into practice at the Bar, and advising those older than yourself, you must do so without pomposity or apology. Of course, there were always craven exceptions: stall-fed juniors who would do anything to maintain their standing with the largest firms in return for a large amount of debt-collecting work for registered security holders. One such had recently adjured Bullfry to go easy on a liquidator Bullfry was cross-examining on the basis that 'the firm has a lot of work which they could brief you to do!!' That suggestion revealed a sad misconception of the characters of them both.

For the largest firms things were slightly different, and it was hard not to sympathise with them while being fully alert to the constant conflict of business and ethical interest which they confronted. To begin, they had huge overhead, and enough ancillary staff to embarrass Nebuchadnezzar. (Recently, Bullfry had been in-house and had been greeted by a uniformed waiter who offered him a choice of every form of beverage known to man). Furthermore, very large operations had to maintain contacts with anchor clients at every level of the organisation. So it was that each had become sedulous in placing young and old associates on secondment in the company as in-house advisers with the express intention of maintaining those relations and ensuring that the work continued to flow. In addition, in order for the partners to maintain a colossal draw, every manjack in the building had to be pulling on an oar from dawn until well after dusk. To make the place profitable, enormous leverage had to be imposed for the services of the most credulous and least skilled and tedious, time-consuming tasks undertaken to permit a full budget to be recovered.

The same commercial sentiments meant that there was an overwhelming pressure to do as much work as possible 'in-house' and to brief the Bar rarely, if at all, as the matter matured. Since the lawyers doing the work at the early stages would never have to explain to a savage court exactly why a particular forensic course had been adopted there was every incentive to take as much marrow from the bone as could be chewed before any barrister reached it. Bullfry had noticed an increasing tendency for his own advice to be sought only at the death, when for whatever reason, the firm feared that the matter was going awry, and it needed the cold comfort of a Bullfry conference either to dampen down client expectations of a victory, or give the whole case its quietus.

Unfortunately, the market for Australian legal services was fully mature. Each client had to be guarded reverently. As clients merged and cartelised, so the demand for legal services decreased. Moreover, as matters became commoditised, the client expected to exert constant downward pressure on legal costs in the same way as it might order widgets more cheaply from Ruritania. Thus it was that, per capita, Australia had the largest law firms in the world. The only way, so it seemed to Bullfry, that a firm could expand was by poaching one two or three star performers from another firm who would bring their existing clients with them. Within the firms themselves, constant internal fighting went on over who owned what, and who was entitled to the 'client credit' thus engendered. Youth no longer owed deference to age. With the supply of legal services saturated it was vital to continue to employ the best and brightest of graduates.

But the *cursus honorum* had changed greatly. Bullfry had very briefly in his salad days (a period of alcoholic frivolity) worked at such an organisation (before being escorted to the door by armed security). Then, the average time to reach partnership was four to five years. Now, it was more like nine or ten. In Bullfry's day, a man who shaved and checked his dress before leaving was virtually assured of ascension to heaven. Now, only one out of six or seven ambitious thrusters (or more likely thrustees) in the same section was likely to be promoted. As a result, each firm had viperish in its bosom a large number of disappointed aspirants who would never have their honours thick upon them. Furthermore, there was no longer any question of resting quietly on the oars and reaping the benefits of years of careful work; to the contrary, each man (few women survived motherhood and the 'mommy track' despite the canting endeavours of the firms to convince their female cohort of junior solicitors otherwise) had to continue to labour in order to maintain the billables and avoid the knock on the door which presaged a cut in the points, and the thinly veiled invitation to take up the smallgoods store at Batemans Bay.

No wonder the client was 'God' to the law firms. The comment revealed the inherent conflict in anyone providing a fee for advice. The advice might be to settle, or discontinue the matter immediately, but to do so necessarily diminished the work available to be billed. The courts had largely encouraged this. Modern 'pleading' meant that

'The client is God.' In those four words lay the continued, if benighted existence of the independent bar.

when anything could be pleaded, anything would. The pusillanimity of most jurists meant that very few matters would be peremptorily struck out. (It always struck Bullfry as somewhat ironic that the very senior jurists who most inveighed against the 'extravagance' of discovery or the like failed completely to remedy the situation by using those powers of summary dismissal or judgment which had made courts of special pleading such worthwhile tribunals. The Common Law Procedure Act had much to answer for). The broad powers of amendment and their liberal use meant that the possibility of a demurrer cutting off a case before too much time had been wasted almost never occurred. Similarly, since there was no rule against a departure, multiple inconsistent cases could be put with the solicitor generally safe in the knowledge that all could be settled at the door of the court. So it was that there was the strongest incentive to run cases along on a Micawber basis (at least until well past full discovery). Equally, in its own defence, a firm running a largish case for a major client could argue that so stringent and bizarre had the law of professional negligence become that a big case demanded the expenditure of millions of dollars in its preparation to avoid any contention that some important aspect (or unimportant and remote possibility) for ultimate victory had been overlooked.

Fortunately, Bullfry had no leverage – indeed, it was all he could do to rise from his chaise lounge. He took no man's surplus work product; indeed, it was but seldom that he could bill for his own. He did not care what matter any of his confreres was conducting; he did not aspire to be one of those who enjoyed an etiolated Customs Act practice before some federal beak, delving for hours on end into the backside of a revenue statute, while the AGS man cowered in the corner; he did not aspire to run a bespoke commercial matter where eight or nine trolleys of irrelevant documents were deployed from the 'tender bundle', and each day brought a spiral bound volume from someone on level 78 which set out what the judge had had for lunch the day before.

The Bar is not a zero sum game (unlike a law firm). Provided that Bullfry was gainfully deployed anyone else's practice was a matter of indifference to him. A matter could as easily end up in the High Court from the District Court at Newcastle as it could from Court 21B. And Bullfry well knew that in each court filled with higher primates, and like any other troop of rebarbative Barbary apes, an unspoken fighting order existed so that every counsel of any experience knew immediately where he stood with his fellows and the tribunal. The overly frequent granting of silk had, in an inevitable application of Sir Thomas Gresham's law, risked driving out the brilliant counsel with the unsound but there were political reasons for that. It did not really matter what honorific was claimed by counsel – the Bar was still so small that anyone practising in a particular jurisdiction knew to a nicety over time the precise strengths and weaknesses of any opponent.

Alice announced the arrival of the next conference with her usual hesitancy. ('Has she already had her extra scoop?' wondered Bullfry?) The subject matter of the conference was a delicate one and the client, a rich widow from the East, was attending. The solicitors had gone wrong early on but had continued on a fateful forensic course and had run up costs on account beyond the dreams of avarice. (As was invariably the case, this made the matter almost impossible to settle). Then, too late, they had sought the advice of counsel having extracted as much potential profit cost as they decently could. With a trial looming (and failure virtually certain) she was being brought in at the last minute to obtain Bullfry's proverbial benison. He never let them down – it never for a moment crossed his mind, as it had a famous jurist of the past, to suggest, at the end of a difficult conference, commencing proceedings against those instructing him. With his usual eloquence and circumlocution he would (once again) pull their fat from the fire. He had often grappled in his darker moments with the hypocrisy this deception necessarily involved.

The door to his chambers opened and Bullfry was momentarily taken aback. He had not connected the name with his past but as the solicitor showed her in Bullfry's mind flooded back to a party at the Queen's Club in his youth, and its inevitable finale.