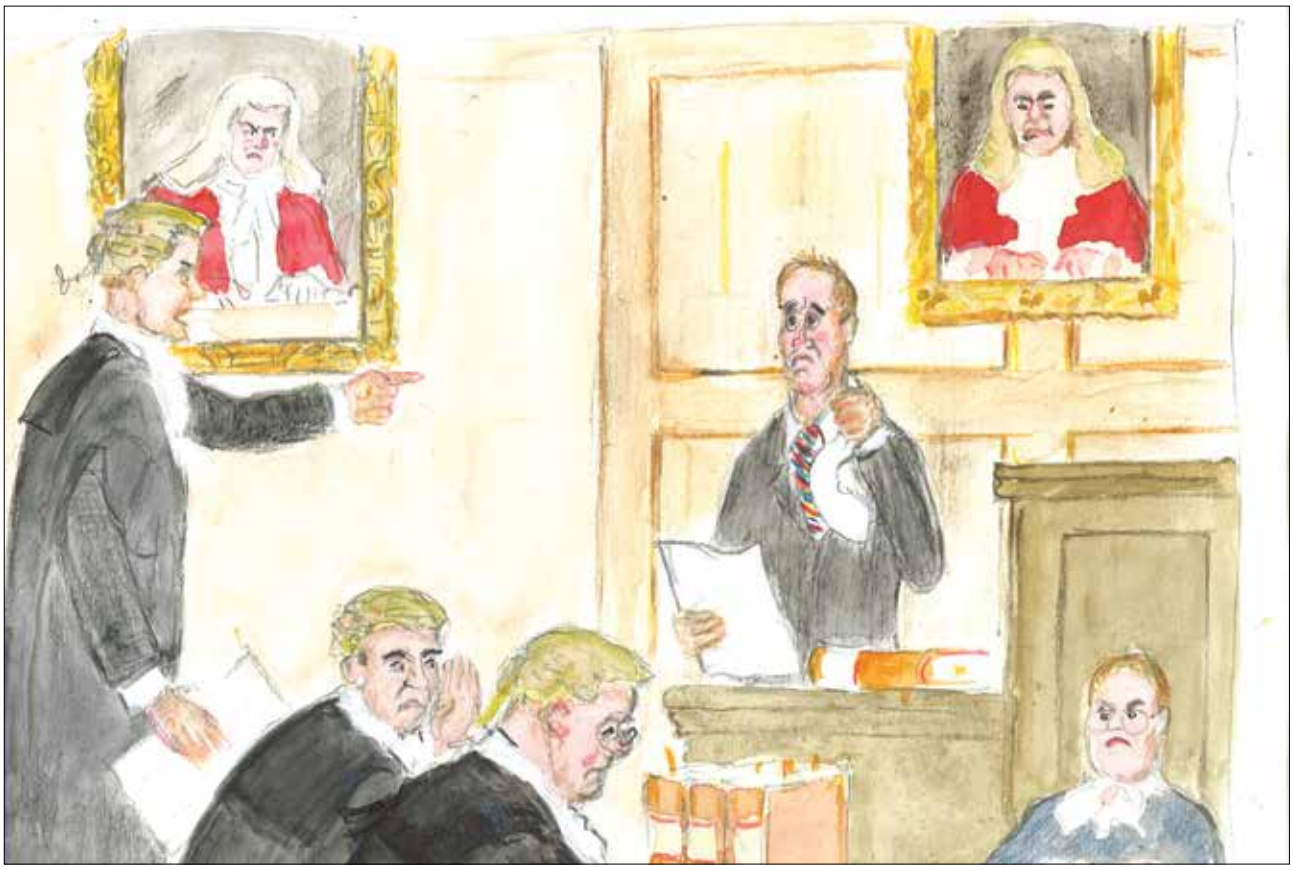
Bullfry and the billable hour

By Lee Aitken



'We are going in with all the engines on! I have just been offered a tasty injunction – settle this for what we can get'...

What a beautiful day! The sun shone down, the waves lapped the shore. Was it time for him to risk the shoulder reconstruction, and go for another quick paddle? How many such sunny days had he wasted in the past in Chambers, working steadily through files 4 and 5 of voluminous bank discovery? The central problem with any legal analysis was distilling the facts – this is why legal advice is so expensive, even though in hindsight when the facts have been lucidly set out in a judgment, the result seems obvious. A lay client could not understand how a large fee note could arise when the entire dispute was encompassed in a lucid judgment consisting of but 25 paragraphs.

And yet, because of the business model which applied to the 'cadet' branch of the profession, Bullfry himself was now reduced to charging at an 'hourly rate'. Presumably, this 'rate' represented, in his case, the capitalised 'return' on 35 years of legal practice, long hours on the Madame Recamier immersed in Balzac, and the recovery time from too happy a lunch in the city. But Bullfry did not stand at the summit of any pyramid of workers and drones – he took no-one else's 'surplus product' – he was part of no Faustian bargain in which, on what appeared to be a rapidly failing business model, callow youngsters, fresh from the Varsity, were paid a fraction of their gross earnings for working 1800 hours per annum on the basis that, after fifteen years of toiling to climb a greasy pole, 'all this will be yours, and you too may exploit the newbies'.

To the contrary, on the validity of an easement, or the existence of a caveatable interest, Bullfry could give the interrogator an opinion almost immediately. Was he then to charge some fraction of an hour for that? It did not suit him, as it suited many of those instructing him, to spend endless hours considering every aspect to the problem to their greater profit.

And how was the 'rate' to be set in any event? Timely advice given over an hour might save the client

millions of dollars – yet there was no suggestion, and nor could there be, that some percentage of the saving could be charged. When he had worked in Hong Kong, Bullfry had occasion to brief London silk in a very large liquidation – he had prepared and delivered a brief with the fee 'marked' at six hundred thousand pounds, with appropriate daily 'refreshers'. The statutory requirement of costs disclosures had done away with 'marking' any modern brief (and when, in reality, were Barristers' Rules 91 and 99(c) ever invoked?)

In addition, like every other business where the work was done first, and the fee note then delivered, timely payment was ever a problem. Had not the Supreme Tribunal, in its latest discussion on the topic, and after an impeccable analysis of the relevant statutory regime, recently decried the notion that funds received by a solicitor to deal with counsel's fees were immediately impressed with any form of trust to ensure that the money found its proper home?

At the top of the profession stood a few counsel with real market power. Once he had been called to assist in an appeal which had gone awry when he ran the case at first instance on behalf of a millionaire, exposed as mendacious in the witness box. Inevitably, he had been 'sacked', and a new team recruited for the appeal. The new leader had sought his assistance to explicate and understand certain Delphic aspects of the trial transcript . Adventitiously, it had emerged in colloquy that Bullfry's last, modest, fee note was still outstanding after three months.

The leader's face blenched. 'That is intolerable', he said. And there and then, without further ado, he picked up the telephone and dialled the recalcitrant solicitors. 'I have just been told by Bullfry that payment is still outstanding in relation to the last day of the trial; if he does not receive payment by noon today, I am returning all my papers in the matter'.

The conference meandered to a useful conclusion. Getting out of the lift, the clerk approached, clutching an envelope – 'Jack, by hand of messenger!'

It did not suit him, as it suited many of those instructing him, to spend endless hours considering every aspect to the problem to their greater profit.

Moreover, despite the most diligent preparation, once the matter was in court, any case could change in an instant.

He remembered just such a transformation from his youth. A large Australian insurer via its bibulous claims director had been persuaded over several long lunches with the vendors, smooth-tongued wizards all, Lloyds brokers, (turned out with the inevitable silk-lined, Saville Row suits) to reinsure a large amount of risk by the usual misleading blandishments – the largest law firm had prepared a six hundred page 'statement' for use in the Commercial List – the key witness entered the box, and, almost as soon as he began to testify, began to suffer complete 'Stockholm syndrome' in cross-examination at the hands of the sinuous, upright silk deployed for the defendants – after 25 minutes of constant concession, and acknowledgement that the fault, if such it be, was all the witness's own, Bullfry had leant over to his own leader and said: 'We are going in with all the engines on! I have just been offered a tasty injunction – settle this for what we can get', and promptly departed. (There are two types of junior at the Sydney Bar – those who call after the case to find out how it went, and those who don't). You can know too much about a case before it begins – the thousands of hours of preparation all went for nought.

Looking down, Bullfry could just see his wiggling toes as they peeped out beyond the convexity of an XXL 'rashie'. It had come to this – despite hours of walking around the park, his BMI (calculated on the basis of a mesomorphic body shape) still exceeded 30! (The metric on obesity which looked not to a BMI but to the actual circumference of his waist in centimetres at its greatest point was even more disturbing!)

He thought back to a famous leader, now sadly deceased, overwhelmed by the damage done through too busy a practice – Bullfry had consulted him urgently on a complex issue of set-off the night before the relevant directions hearing (at which the threat of peremptory summary judgment for a very large amount was threatening). He had reached him just after 8 pm – his interlocutor forgot his current case, and, seizing a crystalline decanter, poured a young Bullfry three fingers of neat Scotch to replicate his own drink – both of them downed it in a gulp – and turned

at once to the fresh matter in hand - 'I've been told by my doctor to do three laps of the park every morning', rasped his leader. 'I have to get my weight down – if it gets nasty, just stand it in the list and I will come up and see what can be done' – and with that Bullfry had left, into the night. Later, he used to see his old adviser (by then a senior jurist) as he puffed slowly up the hill from the ferry – but the fatal damage, sadly, had already been done.

Out on the waves he could see a fishing boat going past – it reminded him a little of the words of the famous poet, which equally applied to a fractious Court of Appeal – 'they may not look out far, they may not look in deep, but when was that ever a bar, to any watch they keep'.

His mobile jangled – not for him the artifice of an iPhone. Oh no – a trusty waterproof Nokia ($25 from the nice Vietnamese man in McLeay Street) – that was all he needed.

'Bullfry speaking'.

'Oh, Jack, we've got a bit of a problem.'

'If it wasn't serious, you wouldn't need me. The doors of the Court of Equity, like the gateways to Hell, are always open'.

He stumbled towards the shoreline, his mind already alive to the subrogation issue latent in his questioner's recitation of the facts. The beach was one thing but the smell of greasepaint was, to an ageing forensic thespian, ever and more attractive.

And of course, he would have time to prepare and robe. Never again an appearance in shorts and thongs as many years before. Solicitors had wanted consent order revisited on Christmas Eve – Palmer J presiding – 'we are holding a cheque for you as soon as the orders are made'.

'I am already there', he had said. He had slipped quickly into robes and bar jacket over his regular summer chambers attire, and headed into action. His favourite usher had remarked on his get up, but said nothing as he reached the bar table, and had the orders made. *Ou sont les neiges d'antan?*

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are 'plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect', a question that is determined by reference to 'considerations of fairness that inform the court's view about an inconsistency which may be seen between the conduct of a party and the maintenance of confidentiality'.[17]

A note on the CPA and the interests of justice

The High Court's decision was quickly delivered (one month and two days after oral argument occurred). The timing is pointed given the admonishments it includes against practitioners, parties and courts losing sight of their common duty to facilitate the just, quick and cheap resolution of proceedings with a 'tangential issue'[18] that, in the words of the court:[19]

> distracted [parties] from taking steps to a final hearing, encouraged the outlay of considerable expense and squandered the resources of the Court.

There is nothing gentle in the court's reminder to litigators about the centrality of the overriding purpose of the CPA. The court has indicated that, should parties and practitioners not heed the call, it is for courts to take a more 'robust and proactive approach'[20] to enforcing that purpose.

Endnotes

1. At [4].
2. At [57].
3. At 66].
4. At [63].
5. *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393.
6. At [20].
7. At [7].
8. At [45].
9. At [49].
10. At [49].
11. At [35].
12. At [61], [63].
13. At [30].
14. At [34].
15. At [30].
16. At [30], [35].
17. At [31], citing *Mann v Carnell* (1999) 201 CLR 1 at 13 [29].
18. At [7].
19. At [59].
20. At [57].