Bullfry and the 'overriding purpose'

By Lee Aitken

Once upon a time, thought Bullfry, a Rule was Rule. You knew where you stood – if your statement of claim was defective, you amended it and paid any consequential costs. If, in order to minimise costs by entrusting the task to unskilled neophytes, your opponent revealed confidential and privilege information to you, that there was their lookout. If you discontinued a claim you might, as advised, recommence it subject to any condition imposed on the discontinuance. Now all changed, changed utterly.

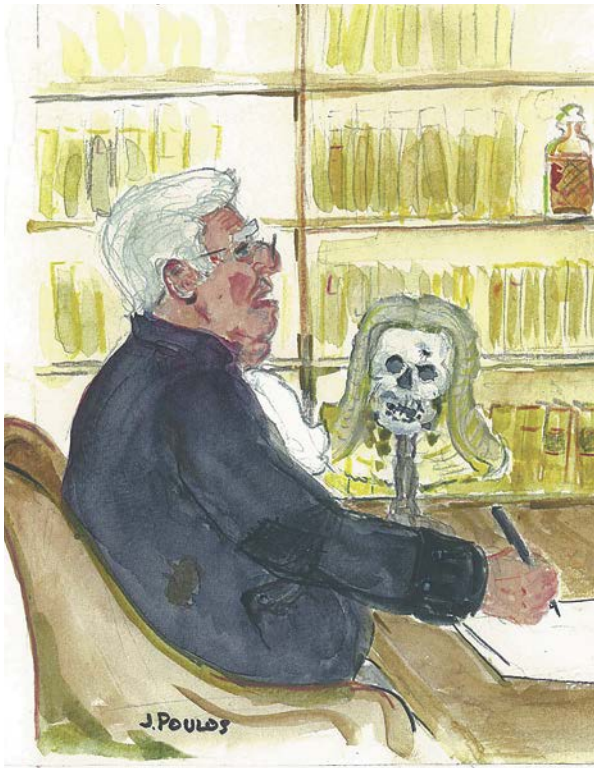
In keeping with the temper of the times, a vast procedural alteration was introduced (a dubious import from England) – the notion of an 'overriding purpose' which controlled both the *Civil Procedure Act 2005* and the Rules themselves - section 56. The 'purpose' in civil proceedings was to 'facilitate the just, quick and cheap' resolution of the 'real' issues. As BA Coles QC had said to Bullfry at the time, 'You see, Jack, even justice gets some recognition!'

No matter that there is a fundamental internal inconsistency between a result being 'just' as well as 'quick' and 'cheap'. Justice done 'too quickly' on the 'cheap' is frequently not justice at all – the old nostrum (in its positive sense) made that clear – 'Fiat iustitia, ruat coelum' – the draftsman of that 'Rule' was not concerned with something quick, nor cheap. 'It might be thought a truism that `case management principles' should not supplant the objective of doing justice between the parties according to law".

A reason that legal advice is so expensive is that, unlike in, say a Contracts I exam, the relevant legal facts have not been distilled at the start. It may take days, weeks, or months, before what is legally relevant to the dispute becomes clear. For that same reason, it may be impossible for a matter to be resolved quickly. And indeed, the whole notion of 'time-costing' provided a perverse disincentive from resolving anything quickly – the longer it took, the higher the fee.

Things had been simpler in Bullfry's youth – then, practising on the South China Sea, the 'billing guide' for the most venerable firm in the colony had, as its first criterion – 'the importance of the matter to the client'!

Bullfry had freed an airline from US arrest



for an anchor client of the firm. He carried the file to the chain-smoking senior litigation partner (now long-deceased) who had said to him:

'How much is on the clock?'

'Four hundred thousand.'

'Say two million'.

Those were the days.

Nevertheless, under the modern dispensation, the needs of the courts as a whole, and efficiency with respect to other litigants is said to be a matter which must be borne constantly in mind. Justice delayed is justice denied – public confidence in the system will be lost if a court accedes to applications without explanation, or justification, for adjournments, amendments, and the vacation of trial dates.

And yet, on the other hand, matters were not struck out summarily or on demurrer. A short TPA matter involving a hearing of one day, and a couple of witnesses, might run each side to $140K with all the costs to come out of a modest estate! As usual in the modern world, there were any number of statutes which set out pietistically what should occur, but very little follow through in practice, except for the odd bit of virtue signalling by the highest court on the *Admiral Byng* principle, when a large number of ancient authorities which predated 2005 were impliedly disregarded, or taken to be overruled by implication, because they no longer conformed to the Zeitgeist.

And, how did the 'purpose' tie in with the notion of the 'real issues' in a case? Until special pleading was abolished a whole series of technical Rules (non-traversable averments, and the like) meant that only one issue would be present for the trier of fact.

Modern civil pleadings (often generated in-house by the larger firms of solicitors to preserve a 'costs-centre') frequently bring to mind Baron Brampton's reminiscence (Chapter XI) and Codd's Puzzle, and the five defences to the presence of the duck in his client's pocket – 'he was like a conjurer who asks you to name a card, and as surely as you do so you draw it from the pack' –

'First,' says Codd, 'my client bought the duck and paid for it'

He was not a man afraid of being asked where.

'Second,' says Codd, 'my client found it; thirdly, it had been given to him; fourthly, it flew into his garden; fifthly, he was asleep,

and someone put it into his pocket.'

There are, so it would seem, no real penalties for departure, even though mutually inconsistent pleadings would seem to be in breach of the 'overriding purpose' and thus put any barrister or solicitor involved in drafting them in breach of section 56(4) of the Act.

Modern authority from the highest tribunal confirms the terrible muddle into which the court has got itself by articulating the 'overriding' purpose. The fundamental practical problem is to work out well in advance which particular homespun litigation practice (long-sanctioned by usage and binding precedent and universally applied) will fall foul of the 'overriding purpose'

Difficulties first arose with *Aon*. Prior to *Aon* it was a forensic given that upon penalty of paying the costs occasioned by it, a party might further amend a pleading on foot. 'In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. *Those times are long gone'*. Now, an amendment may only be made when 'the controversy or issue was in existence prior to the application for amendment being made'. Any unexplained delay in articulating the claim may be fatal.

Then came *Expense Reduction* and the 'discovery' imbroglio. Privileged documents are inadvertently disclosed to the other side – 'the persons who were given the task of reviewing the documents were not very experienced in the process of discovery'! The other side thinks there may have been a deliberate waiver. A powerful Court of Appeal understandably regards the question as one involving equity's jurisdiction over confidential documents. Not so. Once again the question is susceptible of 'simple' resolution by applying case management rules and seeking merely to amend the list of discovered documents.

Finally, most recently, *UBS AG v Tyne* a case where a party which had discontinued without any condition being imposed was prevented from recommencing a claim. It is a most interesting decision – the High Court splits 4\3 in favour of the 'modern view' of litigation with powerful dissents from Nettle and Edelman, and Gordon JJ.

In the Full Federal Court, interpreting the Zeitgeist, Dowsett J had dissented because a 'focus on the `right' of a litigant to discontinue and later commence fresh proceedings is out of keeping with the conduct of modern litigation, consistently with the overarching purpose'.

The 'purpose' involves 'the just resolution of disputes according to law'. Now so soon as 'justice' is expanded from some inquiry between the immediate parties to take into account 'other litigants who are left in the queue awaiting justice' very difficult tactical questions indeed are generated in terms of how, when, and where to implead a defendant.

And even the failure of the party against which the initial claim had been discontinued to seek, as appropriate, conditions on any further claim (as contemplated by the Rules) will not protect the later claim as being stigmatised as an abuse of process!

Justices Nettle and Edelman in dissent in UBS concluded that where the delay complained of was not 'inordinate or inexcusable', the party's claim had not been determined, the prosecution of the claims was not 'unjustifiably oppressive' to a huge, international Bank (!!) and there was no collateral purpose which brought the administration into disrepute, the matter should have proceeded to trial. Gordon J also dissented. Her Honour noted the great challenges of modern litigation and the 'cultural shift' which had occurred in conducting it. Her Honour noted that the Rules specifically contemplated that the original matter might be discontinued, and there was 'unchallenged sworn evidence' as to why that course was taken.

Gordon J summed up the fundamental dilemma posed by the antithetical rationales concealed in the 'overarching purpose'. As her Honour stated emphatically, all the considerations of efficiency, cost, timeliness and the like are directed fundamentally to the '*just resolution*' of the dispute.

Well, there you have it, thought Bullfry.

On the one hand resources must be conserved, costs minimised, and all litigants given their day in court – on the other hand, delicate and complex Rules of procedure which might be mastered and applied for tactical forensic advantage (and upon which the case law exegesis was immense) were available to be invoked by the skilled practitioner.

Which approach was to prevail? And how was the modern lawyer to advise? The chasm between the Cadi and his palm tree, and Mr Tidd looms ever larger!