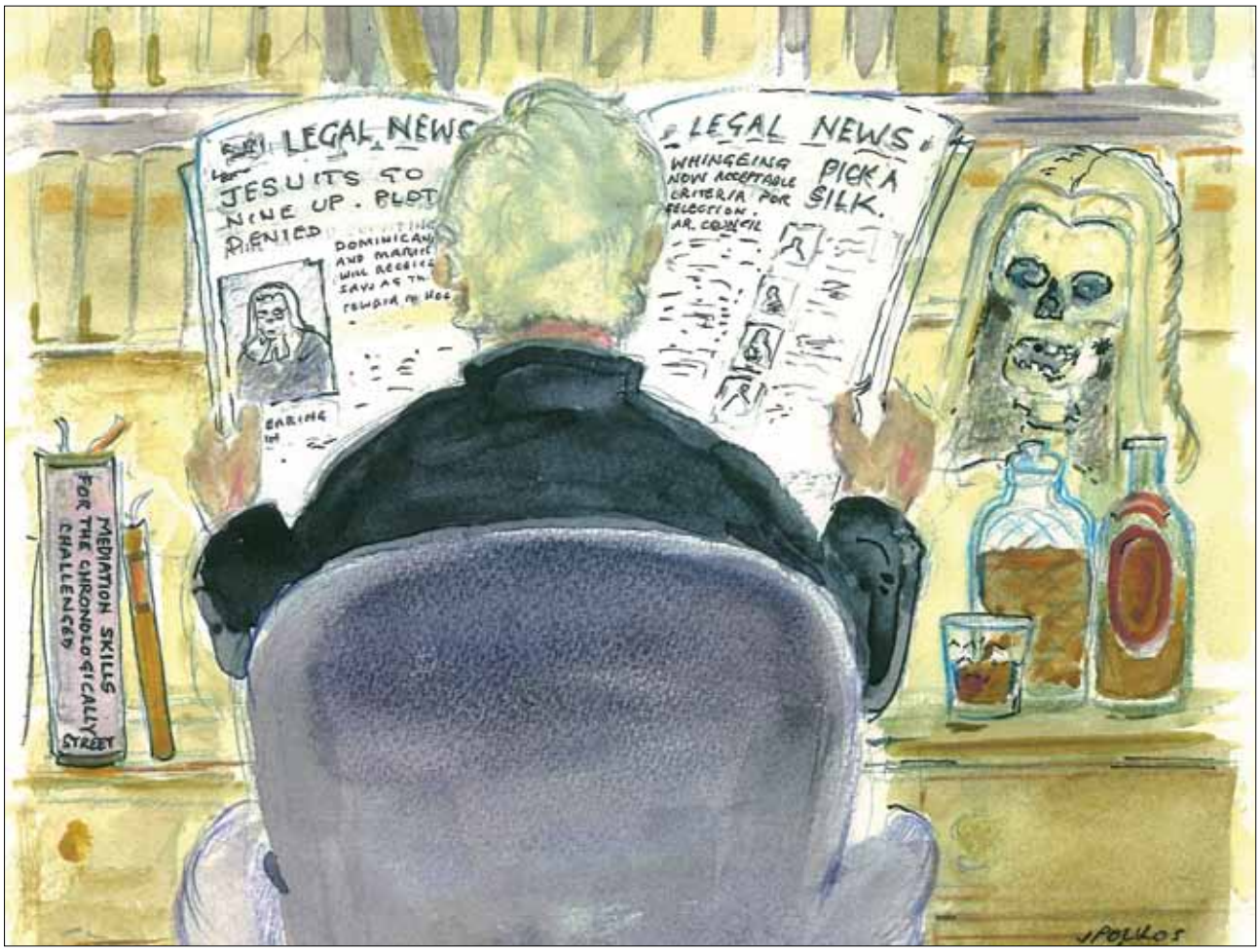
Bullfry and the 'magic list'

By Lee Aitken (illustrated by Poulos QC)



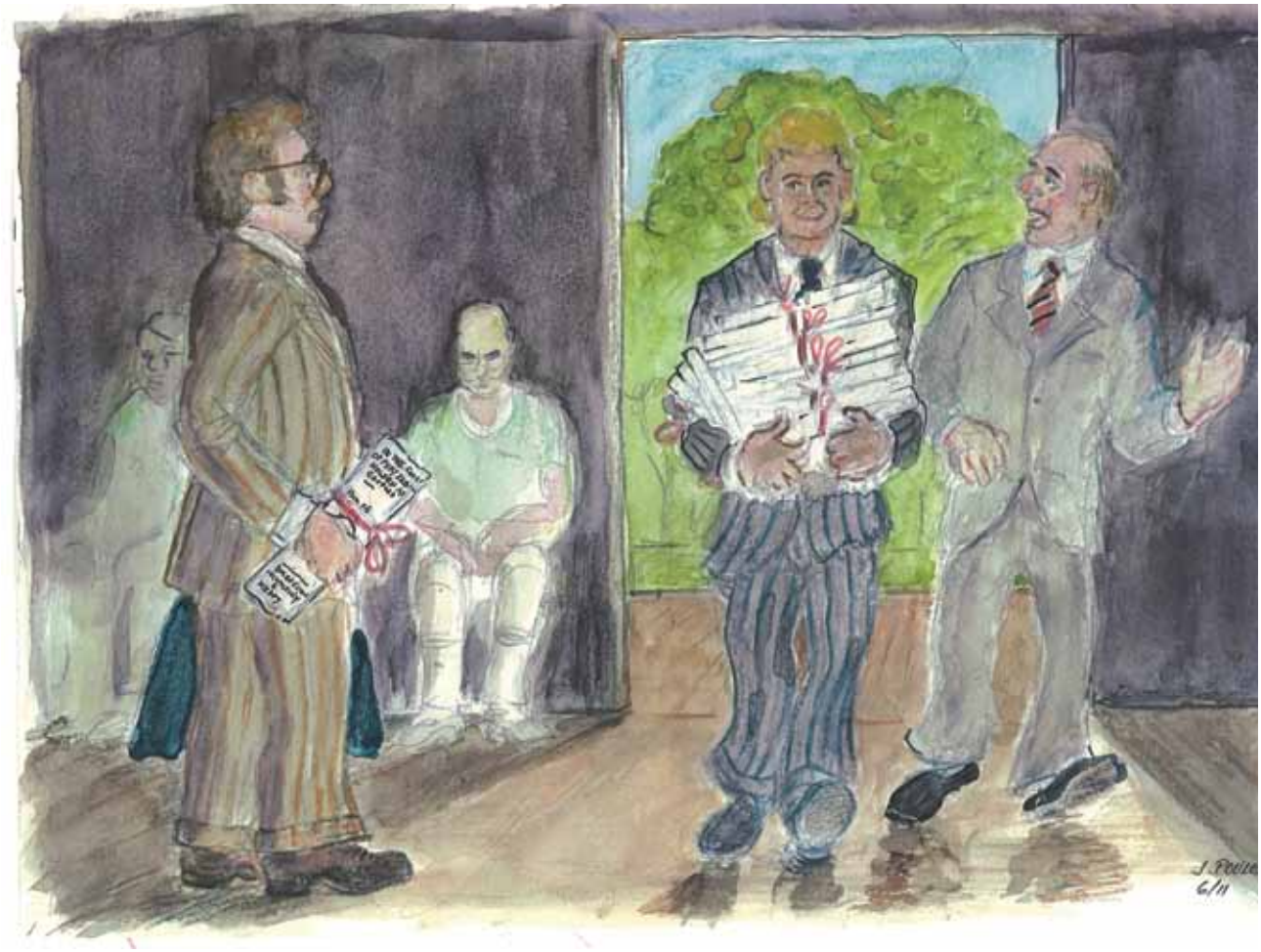
'Ah, yes! Here it is'. Bullfry was anxiously scanning the Friday Legal Pages of a leading organ. 'Eureka!'

In the third column down, at the very bottom of the List, 'J Bullfry QC'. Bullfry looked doubtfully at the category – a reference to the index brought him up sharply –'If no-one else available'!

What jackanapes had composed this List? It was claimed by the commercial mob hawking it about at great expense that it represented the 'distilled wisdom of endless interviews with practitioners across the City'. Yet, the emollient sentiments expressed about the bellwethers ('the Bet-the-Company-men' [sic]) conveyed no specific information about them at all. 'A wonderful performer', 'very popular with female instructors', 'usually attends court when briefed to appear', 'never 'jammed'', 'has often read the brief', 'always has a clean jabot' – what a load of rubbish it all was, although, to be fair, none of those comments could ever be applied to Bullfry.

But, to a perplexed laity, no doubt it provided some comfort. The fact that it contained a large number of serious factual errors (surely most of the men listed as third tier juniors were all silks, if not judicial officers, or the solicitors-general of lesser states?) raised some doubts about its credibility, or perhaps the editing? And how was it possible to pontificate upon the incommensurable? Furthermore, it was not entirely clear at whom it was aimed – barristers were, by definition, consultants – unless, like Bullfry occasionally, you were happy to take a 'direct' brief from a client over a latte. So, it was highly unlikely that any of the more reputable law firms would be hastening to confirm the standing of their counsel of choice.

No doubt, it was aimed at the *clients* of the largest firms of solicitors – the in-house counsel would have little guidance on which barrister to deploy. In fact, if the client was US-based, it would



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be very difficult indeed for the largest firm to explain precisely why, despite its vaunted expertise, the actual conduct of the most important part of the proceedings *in court* had to be entrusted to some independent operative entirely, rather than the firm's managing litigation partner. Thus, for a handsome cover price, it was useful to have some 'Legal Guide' in the firm's library, so that if Delores (the in-house counsel) inquired about the proposed barrister's standing the partner could confidently reply: 'I have looked up the latest listing and it is very comforting for us – Bloggs QC is a 'bet-the-company-man', who has 'often read the brief' and 'always has a clean jabot' – and listen to this, Dolly – 'very popular with female instructors!'

How was the quality of counsel to be measured? This was always a difficult question to answer. Among themselves, each counsel who appeared frequently in the same tribunal always knew to a nicety his respective standing. But the wholesale broadcast of the sobriquet 'senior counsel' to all and sundry had, in an example of Gresham's Law, driven lower the value of good counsel, with the bad. Many successful applicants now had very little court practice indeed – a successful application was thus a prerequisite to appointment to a minor judicial post, or the commencement of a 'mediation practice'!

The problems had really begun when the 'two counsel' rule was abolished on grounds of 'efficiency', and 'competitive practice'. In the old days, there was always a big risk attached to a successful application for silk – it meant that the barrister concerned was holding himself out as running only larger, and more important, matters which would justify two counsel being retained.

By default, if the new silk was not able to attract such a practice, he would fail. Now, SCs could be found who exulted in a practice entirely at the 'paper end' of the Equity Division, or advising on costs.

There was no doubt an element of a 'positional good' in it – you could bump up the fees substantially. However, the granting of silk in itself (despite several 'inquiries' into the process), was opaque in the extreme. The awarding of silk bestowed an approbation which could easily deceive an unsuspecting laity, and even solicitors! It was anti-competitive – no examination, or other, formal process was required – merely being perceived to be, so it appeared, as a 'jolly good fellow' by one's peers.

And wasn't one of the most competent and sought-after counsel at the bar (by general repute and the scope of his practice) still a junior after 25 years, in petulant response to an unsuccessful, though not premature, application for silk decades ago? What did that say about the system?

But there was no longer any real éclat in the title – in olden times, a silk would only appear with at least one, and frequently two, juniors. Some silk in Chancery would appear only before a particular judge.

Sir Patrick Hastings in his autobiography tells of a wonderful English system in which you needed to be briefed 'special' to go on a Circuit which was not your own, with an appropriately (much) larger fee. Desperately ill with chickenpox, he had been so briefed as junior to Montague Shearman QC at the Maidenhead Quarter Sessions to defend a businessman on a charge of indecency. He had never heard of his instructing solicitors before the brief arrived. He staggers to Maidenhead desperately ill to discover that the grand jury has thrown out the bill of indictment. He goes home to bed, pocketing the fifty guinea brief fee. And why did he get the brief? Because the solicitors had to brief a junior from the relevant Circuit; Hasting was a member of it, while Shearman was not, the solicitors' usual junior counsel was a Mr Hart, who was unavailable, and Hastings was the next junior in alphabetical order on the Bar List!! Imagine, thought Bullfry, if the entire state was divided into similar precincts so that one had to go with a 'special' junior to Bathurst, or Coffs Harbour.

Before the Civil Liability Act had destroyed a common law practice, such opportunities of that type had still existed. Bullfry in his youth recalled appearing for an insurer at a Local Court on the Central Coast where his opponent was holding 16(!) plaintiffs' briefs – he was a scion of the relevant local firms. The presiding magistrate had inquired about the state of the 'running list' in chambers at morning tea, and then said, laconically, in Bullfry's presence, to his opponent: 'You had better settle eight of them before lunch, and we can see out tomorrow'. Ah, those were the days, when success at the common law bar might support the ownership of one, and maybe, two hotels!

But how was Bullfry to improve his own 'profile'? He made a short list. First, a memo to Alice – 'Clean all jabots!' Secondly, read all briefs when delivered and make sure that they did not 'disappear' into the morass on the floor of his chambers; finally, attend court, and avoid being jammed.

Oh dear – Bullfry reached for his first Scotch of the day – it was a counsel of perfection which at his age was unattainable. *Capax imperii nisi imperavisset.*