BULLFRY

Bullfry gets to yes

By Lee Aitken

‘I must be careful’, thought Bullfry, as he slowly entered the main portal of the Megalopitan Tower at the Paris end of Castlereagh St. ‘We don’t want a repeat of last time!’

What a catastrophe that had been. It was very hard to explain later to the chief judge why the Commercial List summons should be struck out. Had anyone ever heard before of setting aside a settlement reached after a day-long colloquy because of ‘actual duress/violence manifested by the plaintiff’s counsel?’ Still, that was probably a little better than obtaining a result for his client by bursting into tears and imploring his opponents ‘to give something, anything to this broken down old man’.

These mediations had gone too far – and the mediators! Just the other day Bullfry had surprised a distinguished former federal jurist who was heaving a large trolley out of ‘HV Evatt’ – each conference room at the firm was named, adventitiously, after a famous judge to give the firm a patina of learning. When questioned, the latter had muttered something about ‘defined benefit’ and the ‘Costello surcharge’ – references which left Bullfry even more perplexed than usual.

Well, here we are – ‘AB Piddington’? – was that a good omen?

A uniformed flunky entered.

‘What can we offer you today, sir? Iced coffee, tea – pekoe, oolong, green, English Breakfast, Earl Grey – Bonox, Milo, a milkshake?’

Bullfry was about to suggest a brandy and dry, or a single malt, but thought better of it. No wonder these mega law firms were all in trouble. They had five...
hangers-on for every fee earner. There was wall-to-wall black granite over half a floor, mirrored walls and old Masters and a view of Sydney Heads and the park. But on the other side of the ‘barrier’ senior partners worked in an ‘open plan’, or in a ‘dead cat (rat)’ office, gazing forlornly at the smog settling slowly over the outer reaches of the west of the Emerald City. Where is Bossley Park? How would the London and Sydney ‘draws’ equate when the dollar went back through the floor?

In the old days a barrister would never visit a solicitor’s office. Now the bar was the firm’s to command. There, was of course, a very large danger in this for the bar. The essence of a mediation was to reach a result which pleased no one by not knowing or analysing the relevant legal rules – oh no – a lachrymose appeal to what was ‘fair’ (an acquired Bullfry specialty), or resort to emotional violence. Those were the stock in trade of the participants.

Where did that leave the years of learning, and the exquisite Equity Division points on demurrer? In a real court, at some stage of the game, the judge would say: ‘Mr Bullfry, that last submission was nonsense. What is your next one?’ Rules of evidence and procedure applied. You had to make a reasoned argument and relate it to the facts.

None of this was relevant to a mediation. It did not matter if your opponent had no idea of the underlying legal principles at all. In fact, it assisted her case since she could assert with a straight face that the whole transaction was *nudum pactum*, or that ‘tacking’ did not apply, or that an Equity Division judge would never disbelieve a thrice-convicted swindler. The process encouraged in certain more asinine opponents a Molotov approach to resolving issues: sitting at Stalin’s behest on a block of ice until Hell itself froze over. ‘Nyet! Not a cent more than $30,000’ etc, etc. What need of any legal training if you could simply make it up as you went along without ultimate sanction? An ignorance of any legal nicety meant there was no incentive against adopting a kamikaze approach to the entire process.

The reason we have courts is so that a highly trained jurist can opine objectively and with detailed reasons on centuries of jurisprudence as applied to ascertained facts. If the whole matter was reduced to ‘the vibe’ then one might as well study advanced shamanism, and acting, as waste any time on complex legal doctrines.

A mediation, as well, could destroy potentially thousands of hours of gainful court preparation and trial work to the great cost of the junior bar. Who could forget the devastation wrought by a mediation in his youth? Many younger colleagues deployed drafting witness statements and other esoterica as two large ‘telcos’ fought out some legally mundane dispute (involving tens of millions) over their respective bills *inter se* – what an absolute feast! Boys and girls taking instructions day-after-day and billing fortnightly. And then, overnight, a mediation for a few hours when the respective CFOs had resolved matters over a coffee. Oh, the wailing and gnashing of teeth.

And frequently, in smaller matters, the conduct and management of the cadet branch of the profession rendered a matter ‘unsettleable’. How could one possibly resolve a dispute over $250,000 when the solicitors had already run up $180,000 in WIP on the clock?

Enter the mediator. He was a former floor colleague of Bullfry’s: on his uppers, his practice all gone as he had outlived his instructing solicitors, now attempting to ‘reboot’ via accreditation as a ‘trained mediator and conciliator’, and a slightly mendacious website. ‘So, Jack, how long will this take? Can we settle before lunch so that I can get to Royal Sydney? And have you got my cheque?’

Bullfry wondered whether the ex *parte* communication rule applied to a mediator. Was there any Code of Conduct, or was it, like a ‘court’ in a federal statute, only a small ‘c’ code?

‘It’ll have to run past 2.00pm so that I can justify a full day’s brief fee – but we should be able to wrap it all up shortly thereafter. What time do you want to tee off?’

All professions involve a conspiracy against the laity.

Bullfry put on a magnificent act – crying, shouting, pleading, referring to Lord Tenterden’s Act and many other irrelevancies. His opponent, for the secured lender, was already on the money. What did she care? By creeping up in careful $5,000 increments and achieving a generous reduction in the ‘red ink’ on the ‘unauthorised lending rate’ honour all around was satisfied.

Bullfry got to ‘Yes’. On reflection, something he was achieving with increasing rarity domestically!

The lender avoided *A Current Affair* – known to many a mediator as ‘Bullfry’s last gambit’. Possession was to be given with a sale to follow, with enough left in the equity for the client to commence life afresh at Yamba (the mediator thinking of his Niblick). Bullfry’s effort was good for a day’s brief fee.

Was there any easier way in the whole wide world of drinking coffee and making a sum which, to any honest nursing sister, aged-care provider, or child-minder, would have seemed a king’s ransom?