Bullfry and the constructive trust

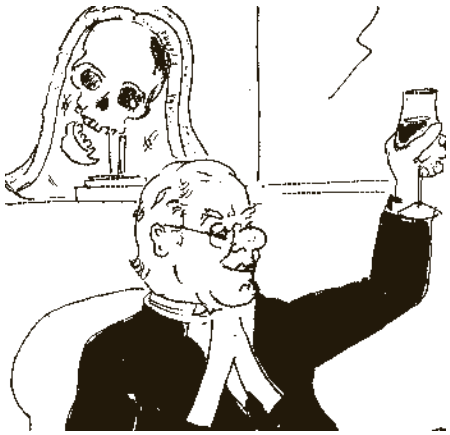
'Your Honour, I am relying on it institutionally, not remedially'.

Bullfry jerked back to consciousness, awakened by his own incipient snore, and his junior's nudge. What was all this about? How long could this bellwether continue? Even the chief judge looked bemused – she had led Bullfry frequently in her younger days but usually in matters which ran for many weeks in the Common Law Division involving allegations of peculation, fraud, and gangsters with pistols.

'Institutionally, not remedially?' Bullfry reached cautiously for *Nuggets of Equity for the Beginner* which he had artfully covered with brown paper to conceal its humble nature. All equity was rubbish really – Bullfry simply looked the client in conference straight in the eye and said: 'Well, what would your sainted mother, were she still alive, think about all this and in particular, your own conduct? If she says its all kosher, we win – if not, I had better settle it immediately.' Was it necessary to delve endlessly into judgments written by Lord Nottingham to work out the position in the year of Our Lord 2009? Bullfry usually preferred to get a quick grip of the facts, pull on his helmet and goggles and start the engine! As he always told his clients in a desperate interlocutory pass – 'You can't be any worse off being in court'. One of his leaders in his youth had said to him something that had always resonated, 'You can know too much about a case before you start it – one tale is good until another be told'.

Bullfry had frequently appeared before the masters of the craft – one, as duty judge on a quiet day, had held him up for thirty minutes on a short-service application of a mortgagor's summons by recondite questions concerning the auxiliary jurisdiction, the requirement of payment in, the 'rule' in *Harvey v McWatters*. Bullfry had staggered through, but was conscious at the end that he received barely a pass mark.

But had he acquired age with wisdom? He doubted it – and even attempting to read a judgment of the Supreme Tribunal required a wet towel and a large double scotch. Seven players, all writing to demonstrate their own cleverness, driven inexorably by the need to get a draft out before the others – then add in the two high-flying associates, each destined for a BCL and a D Phil before coming back to do discovery and make sandwiches at Blakes – then the research officers and the library staff – by Bullfry's calculation some 30 minds were devoted to each judgment. Was it any wonder that more humble counsel had the greatest difficulty in actually finding any ratio at all?



But Bullfry pined for the certitude of those Halsburyian judgments, read and reread constantly as a student, which graced the *Privy Council Reports* at the start of the last century – they didn't make them like Hardinge Giffard any more: 'A factor in Bangalore assigns a warehouse note to a syndic in Madras for value received who then executes a quasi-aval on it before transferring it to the bank etc etc' A modern reader needed a whiteboard and a dictionary just to understand the facts. Then – no CAV – ex tempore with the lapidary opening word: 'The matter is too clear for argument …' followed by four – just four!! – seamless pages – with no footnotes at all – presumably first written in long hand beside an oil lamp – in which the controlling rule with respect to the duties of a factor, the rights of the syndic, the law of quasi-avals, and the liability of the bank – are all laid out in words of one syllable for immediate application and to stand as the controlling precedent until Kingdom come!! Where had it all gone wrong?

But did academic pretensions matter at all in the long run at the Sydney Bar? Many came with their academic honours thick upon them only to sink into the oblivion of the Sutherland Local Court. Or else they were trapped permanently arguing nasty section 424 points before a federal beak. Many year before Bullfry had worked as an associate to a judge who though small in stature had, like Horace Avory, a personality which was infinitely forbidding. Bullfry had innocently suggested writing a short tome on some aspect of company practice to help garner a practice at the junior bar – the judge had looked at him coldly for a moment and said: 'Yes – by all means do that – and they will send you nothing but cases on the Dog Act'. Most counsel staggered into a practice as they staggered into matrimony – they simply awoke one morning to find themselves appearing, forensically and domestically, before a 'deputy registrar' seeking 'first access' and usually with the same success.

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'Mr Bullfry, what do you say about this difficult point?'

What did he say? What did he care? He looked sideways at Ms Maxine Blatly, his junior *de jour* who was a whiz on these things – the usual CV – 'starred' first at Cambridge after being dux at NSGHS and a scholarship from Sydney. She prepared brilliant submissions which he had 'settled' with some difficulty, so subtle were the points she had made. He leant over circumspectly towards her, ready to be put 'on remote' when he got to his feet. '*Baumgartner* and *Guimelli* - Deane' she whispered.

He rose slowly to his feet and without a hint of portentousness said: 'Your Honour, we say simply that the whole question is covered by the judgment of Sir William Deane in *Baumgartner v Giumelli* in a passage which my learned junior will hand up.'

The chief judge looked at him steadily – was she going to call his bluff?

He felt a sharp nudge in his left buttock – it reminded him of the mule-like kicks over snoring he sometimes attracted from the second Mrs Bullfry when he could persuade her to spend a full night with him. He glanced down – Blatly was shaking her head furiously.

'I think it may be more appropriate if I ask my learned junior, Ms Blatly, to address your Honour on this point'.

He resumed his seat. He could now continue his nap while watching Blatly in action – he had not recommended her to his instructing solicitors solely because of her knowledge of *Hopkinson v Rolt*.