



I have heard of an old ‘custom’ (mentioned in a Bench and Bar speech a number of years ago) of practitioners challenging each other to incorporate the name of a piece of fruit or some other suitably silly word into oral submissions, legitimately so as to go un-commented upon. Is this to be encouraged?

Could it be true that practitioners of old were so unchallenged by the usual rigours of court advocacy that they had to introduce new ones? Surely you are mistaken! Is it not enough that one must carefully craft and calibrate one’s oral submissions to match law, facts and judicial temperament so as to convey a sound and cohesive argument that meets both the needs of justice and that of one’s client in a succinct and effective manner? Or if that is not truly the aim of the advocate, why stop at just one word? Surely the wordsmiths of yore could have risen to the challenge of not one, but perhaps three incongruent fruit related or other words to weave into oral submissions?

No! I think it far more likely that the reason that there appears to be a proliferation of oranges, apples, pomegranates and mangosteens in some counsels’ oral submissions is a covert challenge, albeit one that is belated and possibly too subtle, co-ordinated by the Illuminati in vengeful remembrance of the day Sir Owen Dixon and his colleagues held¹ that it was a relevant consideration of the commission controlling water irrigation licences to deny transfers of water rights to Italian fruit growers on the basis that all Italians were ‘bad farmers of irrigation methods’² and that it was ‘undesirable’ to promote a considerable aggregation of Italians in the area.

There! ‘Mangosteen’, ‘Sir Owen Dixon’ and ‘Illuminati’ all in the one sentence and not at all ridiculous, contrived, contorted or off-point. If that is your aim, consider the challenge now set.

I have read a number of transcripts where counsel is making an application for a judge/ magistrate to recuse themselves on the ground of apprehended bias. In almost every matter, the judicial officer took the application as a personal affront. Is there a form of words that a counsel can use to reduce the chance that a judicial officer will view the application in this way?

The well-known test for recusal for apprehended bias is ‘whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide’. Who exactly constitutes the ‘fair-minded lay observer’ is not exactly clear, although one suspects that during the time of Sir Owen Dixon, such an observer would have looked just like Sir Owen. But still, as imperfect as it is, dispensing justice has, at its core, the fundamental premise that the person doing the dispensing is impartial. This fundamental premise is, perhaps, best expressed by the well-worn aphorism that justice must not only be blind, but must be seen to be blind. This of course presents the ocularly challenged dispenser of justice with an impossible conundrum akin to that of asking Schrodinger also to place himself in the box with his infamous cat. It is no wonder then, that judges perceive such applications as needlessly annoying disruptions to their otherwise faultless dispensation of justice. With this in mind, the correct answer to your question is ‘no’. Nevertheless, I suggest that the application be made sensitively, dispassionately, promptly (so as not to constitute waiver) and be based on objectively determinable factors or behaviours supported by authority as grounds for disqualification. And if you can also successfully work the word ‘Illuminati’ into your oral submissions, do let us know. Recusal applications get bonus points.

END NOTES

- ¹ *Water Conservation and Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492
- ² We assume the Commission had only a passing familiarity with Roman aqueducts and other Roman inspired methods for controlling water flows since antiquity.

If you have a question you want the Bar’s agony aunts to answer send it to: ingmar.taylor@greenway.com.au