

30,1980

IN THE PRIVY COUNCIL

No. 5 of 1980

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION IN PROCEEDINGS NO. 1682 OF 1977

CADBURY SCHWEPPE'S PTY. LIMITED

TARAX DRINKS HOLDINGS LIMITED

TARAX DRINKS PTY. LIMITED

TARAX PTY. LIMITED

Appellants (Plaintiffs)

THE PUB SQUASH CO. PTY. LIMITED

Respondent (Defendant)

TRANSCRIPT RECORD OF PROCEEDINGS

PART 1

Volume II

SOLICITORS FOR THE APPELLANTS

Sly & Russell,
68 Pitt Street,
SYDNEY.

By their Agents:

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IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) No. 1682 of 1977
)
EQUITY DIVISION)

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PTY. LIMITED

v.

THE PUB SQUASH COMPANY PTY. LIMITED

TENTH DAY: MONDAY, 6TH FEBRUARY, 1978.

(Corrections to transcript:

- *Page 182 - sixth last question (that is question reading "You say trade registration is the Pub name"). All parties agreed that was probably incorrect and that the question was probably: "You showed the trade registration of the Pub name?" or some such similar question. 10
- *Page 182 - last question second line word "in" deleted and word "you" where firstly appearing in third line deleted.
- *Page 186 - second question last line word "not" to be interpolated between words "would" and "have".
- *Page 191 - fifth last question add at the end of the first line the word "not". 20
- **Page 200 - first question third line the word "stations" instead of "station".
- **Page 207 - third last question second line delete the words "A question with".
- **Page 212 - first line of eighth last question substitute word "development" for word "advertisement".
- ***Page 213 - answer to seventh last question interpolate the word "not" after "I had" and before "registered".
- ***Page 188 - third last question second last line substituted word "dealt" for word "felt". 30
- ***Page 174 - third question ninth line substitute word "segment" for word "settlement".
- * See now pages 207, 211, and 219 respectively.
** See now pages 230, 240, and 245 respectively.
*** See now pages 246, 214 and 197 respectively.

* Page 149 - exhibits described as "Bl-4" should be "Vl-4".)

PETER ROBERT BROOKS
On former oath:

MR. PRIESTLEY: Q. The last thing you were being asked about on Friday was some envelopes with notations on the outside of them about the date of order of various things, those envelopes, apparently, being envelopes of the advertising agency. Do you recall the questions? A. Yes.

Q. Have you been able to think any further about the suggestions I was putting to you on Friday, namely that it was not until the dates shown on those envelopes that orders were made for the design of the labels and for other things necessary to be done before the completed version of the various containers for Pub Squash could be obtained? A. No, that is not correct. 10

Q. You have thought further about it, have you, over the week-end? A. No, but the earlier work was carried out in December/January for the initial art work and they were only follow-on packages.

Q. First of all, let me ask what your recollection is of what was done in December, 1974, and January 1975 concerning the art work design label and so forth of the containers in which Pub Squash was subsequently sold? A. The first piece of art work prepared was for the can design and that was discussed in late December, prepared in January and orders placed on the can company early in February. The envelopes you showed me were for label designs and we had to delay those because the glass company was not in a position to produce any plates or print for us until well into April. 20

Q. Do you have now the documentary version of what was done in December of 1974? A. Only what is available to you there, what we have discovered. 30

(Discovery documents 92 and 97 called for: produced.)

Q. I show you a copy of discovery document 92. It seems to be an account or an invoice addressed to Passionate Marketers, presumably by Mr. Harris's firm, dated 26th March, 1975. You agree with that? A. Yes.

Q. The heading is "Production Pub Squash P.M. 032/034". Do you understand the reference P.M. 032? A. No.

Q. The envelope discovery document 111A has a P.M. 032 in the top right hand corner and would you agree that that, no 40

* Not reproduced in this evidence.

doubt, means Passiona Marketers Account Number or invoice No. 032? A. I really wouldn't know.

Q. I suggest to you that there is no documentation earlier than what appears in this envelope 111A and the invoice number 92 relating to any work on design for can designs or art work in regard to Pub Squash containers? A. I wouldn't know.

Q. Looking at the one dated 26th March, 1975, discovery document No. 92, you see it has a note "reproduction rights for country pub photograph not charged by the Film Library of Australia. If this design can is used eventually a fee of \$60 is due to the library." Do you recall that now that you see it again? A. No, I wouldn't have seen it. It would go through our accounts section. 10

Q. Would you agree on seeing that that as at 26th March, 1975, there had not been a final decision as to which design was going to be used on the Pub Squash can? A. No, I wouldn't. The can design was already in the hands of the can company at that date.

Q. Would you agree, looking at the document, that it was only very shortly before the 26th March, 1975, at the best, that any final decision was made about the design to be used on the can? A. No, it was January. You see, they only charge these at the end of a project. They don't charge weekly or monthly, so if there is a three months delay we might get one interim payment. The chances are, on the usual way we work, we get one payment for one invoice after three months. 20

Q. Then you got another invoice, which is discovery No. 97 dated 30th April, 1975, for some further work regarding Pub Squash after, is that correct? A. For display material. I haven't seen the invoice before, but that is what it is. 30

Q. Looking at it now, wouldn't you agree that Mr. Harris's firm was sending invoices monthly? A. That is a separate area of the company than that - that is the promotion area where they work on promotional material and this section here is the design section, that was a project I was working on with Mr. Harris.

Q. Returning to discovery document 92, do you see that there is \$122 charged on it for design "Two alternate can designs"? A. Correct.

Q. Doesn't that indicate that at some stage of the process, at any rate, you and Mr. Harris had reached the stage where there were two alternate can designs under consideration, one of which was to be the design? A. There was one can that he wanted to put up and there was a can that I wanted and I decided I wanted the can that I had told him and his can was discarded. 40

Q. I suggest to you, again, that would have been certainly in March, of 1975, wouldn't it? A. No, it was in January.

Q. I think you have told us that Mr. Harris's firm had only commenced quite recently before the discussions that took place between you and him in the latter part of 1974? A. Commenced in August, I think that was the date.

Q. And it began in a small way, do you recall? A. Yes.

Q. Are you in a position to say whether Mr. Harris was supervising the sending out of the invoices personally at this early stage of his firm's activities? A. No, I am not. 10

Q. You would agree that whoever prepared this invoice did not know as at 26th March, 1975, that a choice had been made between the alternative can designs? A. I think the note says "Reproduction rights for country pub photograph not charged ..." it doesn't necessarily mean that we might use it for Pub Squash, it means that we might use it at any time for any product; that is what they are referring to there.

Q. Notwithstanding the concluding part of the sentence? A. "Eventually" it says. 20

Q. Reading that, together with the alternate can designs in the first part of the invoice, wouldn't you say that that invoice is making it clear that at that stage there had been no choice between the alternate can designs and if one was used you were going to have to pay \$60 fee to the Film Library? A. The can order had already been placed with the can company in February, so that invoice was irrelevant.

Q. Do you have a copy of that can order amongst the documents in your company's possession? A. No, but the can company would have the information. 30

Q. What is it that enables you to recall that it was February that the order was placed with the can company? A. Because the electricity strike started at the time and they said there would be a delay in supplying any cans to us at all and I know it was about the time that we had that long period of power strikes in 1975.

Q. How does it happen that you do not have copies of the orders placed for the cans with the can company? A. We placed the art work with them. We didn't place any standing orders for any of our cans with Pacific Can when it first commenced operations. 40

Q. Was there a document that went from your company to Pacific Cans ordering the manufacture of a certain number of cans

relating to Pub Squash? A. No, it was verbal and, like most of our can orders were verbal week to week.

Q. A moment ago you told me the order would be found in the records of the can company? A. Well, they record the orders and they would have a note of that, yes.

Q. You think they made a note of your verbal order? A. Well, they always do.

(Discovery documents 92, 97, 111 (together with contents) and 111A (together with contents) tendered: envelopes 111 and 111A objected to: admitted and marked Exhibit W1, 2, 3 and 4 respectively.) 10

Q. Your recollection is that the order for the cans that were actually used when Pub Squash was first launched was placed sometime in February of 1975, is it? A. The art work would have been given to the can company in February, 1975, but I don't place the orders so I wouldn't be sure just when the order was placed.

Q. You don't know when the order was placed for the cans, is that right, personally? A. I personally don't know. 20

Q. And you believe that somebody in your company placed it orally? A. At that time that was the procedure.

Q. There would be no written record at all in the company though, would there, showing the date on which the order for the cans was placed? A. No.

Q. Is there any record of when the art work went to the canning company? A. The canning company would have a record.

Q. Does your company have any record of when that happened? A. Not on any art work.

Q. Do you have any recollection of who it was that gave the art work to the canning company? A. No. 30

Q. It was not yourself? A. No.

Q. Is this the position, that your earlier statement that the order was placed in February of 1975 was based on your recollection of what the practice of the company would have been at that stage? A. That's correct.

Q. You have not any direct recollection, one way or the other, yourself personally? A. Not about the exact order, no.

Q. Who, according to the practice, as you recall it at the

time, would have been the person to hand over the art work to the canning company? A. I couldn't remember now, that was four years ago.

Q. Who would have been the person to place the order for the cans to be produced? A. Someone in the manufacturing area at the time.

Q. Your staff had not got very large at that stage, had it?
A. No, not really.

Q. You should not have any difficulty in recollecting whose task it was at that time to place such an order, should you? 10
A. Well, many people ordered it because it was a mixed function and I just couldn't say who it was.

Q. You say "many people", did you have many people in the organisation at that time in your company? A. I had several in production, yes.

Q. Who were the staff in production? A. We had a production manager.

Q. His name was? A. At the time it would have been Kevin Jones. We had two production superintendents. 20

Q. Were you at the time placing some hope upon the new product Pub Squash being a success in the market? A. Very much so.

Q. Were you not concerned with every detail of the preparation for its launch upon the market? A. Yes.

Q. Can you really not recall now who it was that did any ordering that had to be done with the can company concerning the manufacture of the cans and the type of art work that was to be put on the cans? A. No.

Q. I approach again with the documents that are contained within Exhibit W3. Do you recall whether you discussed those documents with Mr. Harris or anybody from the advertising agency - and I show you the eight pieces of shiny paper with printing on on one account and another which comes from Exhibit W3, retaining one for the moment in my hand which has got only printing on it and nothing else? A. No, I didn't see those (objected to). 30

Q. You see eight pieces of paper before you at the moment?
A. Correct.

Q. Have you seen any of them before? A. Not until we started the court case. 40

Q. Are you prepared to say that you never discussed any one of these pieces of paper with Mr. Harris? A. That's correct, I haven't.

Q. Or before the commencement of this court case with anybody from his agency? A. No, I haven't. The only one I might have seen (but I don't recall it) would be the photograph of the hotel, but I don't think that is the one I saw.

Q. Do you say that you never discussed any of those eight pieces of paper with anybody employed by Passiona Marketers before the commencement of this court case? A. No, I don't recall discussing them - I don't recall seeing them. 10

Q. The ninth piece of paper that I show you coming from the same envelope has some writing on it. Do you recall having seen that writing before at any time? A. No.

Q. Not even in the preparation of the case? A. I only see finished art or mock up, I don't see all those.

Q. Have you seen this particular piece of paper since this case commenced prior to today? A. I don't recall seeing it, no. 20

Q. Would you not agree that looking at the nine pieces of paper together it indicates quite clearly that as late as 12th March, 1975, the final decision as to the design of the label for the can had not been made? A. No.

Q. If I may just draw your attention again to Exhibit W4, do you see amongst the notations on the outside of that envelope ditto signs under the word "order" and then the words "photographic ... (read) ... 7th March, 1975"? A. Yes.

Q. Then, showing you a copy of what was discovery document 92 and referring you again to the reference to the design on the alternate can designs and then the reference to the reproduction rights to the photograph at the foot of that copy (Exhibit W1). Would you not agree that you had not seen the country pub photographs before 7th March, 1975? A. No, I don't agree with that at all. 30

Q. Do you know whose writing this is on the outside of W4? A. No, I don't.

Q. Are you familiar with Mr. Harris's writing? A. Not really, no.

Q. It is possible it is Mr. Harris's writing? A. No, I wouldn't say so. 40

Q. In the course of earlier questions you had mentioned having regular, although perhaps informal discussions with Mr. Harris towards the end of 1974? A. No, I said there was a meeting at our plant around once a week, not necessarily with me. I didn't see Mr. Harris a lot at all.

Q. That wasn't always with you, that particular meeting, is that so? A. No, it wasn't always with me, it was with the company and the personnel.

Q. (Witness shown transcript) About three-quarters of the way down p. 194, where my name appears there at the start of a question: "Q. So what was the business purpose of your discussion with Mr. Harris in October, 1974?" and you said "We met weekly and I could not remember at that time what the discussion was". Would you not agree that when you said "we" you were referring to Mr. Harris and yourself? A. Well, there is not the situation, anyway. Mr. Harris used to talk to our people on a weekly basis, but I could go for a month or six weeks and not see him because he was mainly concerned with point of sale material, cleaning up, advertising and trade things like that.

Q. Just look at that answer I asked you about and answer my question, if you would. When you gave that answer on Friday "We met weekly", were you not referring to Mr. Harris and yourself? A. I was referring to we, the company.

Q. We, the company met weekly, did you mean? A. Yes.

Q. The question related to your discussion with Mr. Harris in October 1974? A. That's correct, yes.

Q. And you understood that question, did you not, to be referring to a discussion between you yourself and Mr. Harris in October, 1974? A. Yes, I did.

Q. And you answered "We met weekly". Will you not agree that that can only mean that you and Mr. Harris met weekly? A. It might read that way, but I didn't meet with Mr. Harris weekly.

Q. But on Friday you said that you and Mr. Harris met weekly, didn't you? A. Well, I didn't mean to say it.

Q. Wouldn't you agree, when you read the whole sequence of questions and answers starting with the question I have already asked you about down to the bottom of p. 194 that those questions and answers are dealing with meetings between you yourself and Mr. Harris? A. I think it just means as I said he came out there weekly and sometimes I saw him, sometimes I didn't.

*See now page 223

I didn't place that much emphasis on the fact that it had to be me personally as much as people in the company.

*Q. Would you turn over to the first question on p. 195: "He was coming to see you regularly concerning what sort of advertising or advertising campaign or other business that his firm would be putting in hand on your account? A. "Yes, that's correct"? A. I was speaking on behalf of the company when I made that statement.

Q. Do you say the same thing about the next question and answer? A. Well, that relates to the earlier discussion in October, yes. 10

Q. You do say the same thing about - A. No, I said that that relates to the first question back here where I said "Yes, I did discuss the account and he did come to the company and he spent" - you know, there was just no way I could see him every week and the people that were handling the business affairs there he would see on his weekly trip. I might see him there and say "How are things going" and things like that, but there were certainly no meetings every week, there were no planned meetings with me personally. 20

*Q. The second question on p. 195 "Was this in about October, 1974, you discussed with him, you said a moment ago, the Solo cans? A. On or about October, 1974, yes, I would have discussed it, yes. I couldn't be specific as to the date." I suggest to you that that question and all the questions preceding it back to the one when I asked you what was the business purpose of your discussion with Mr. Harris in October, 1974 all related to discussions between you yourself and Mr. Harris? A. Well, all I can say is I didn't discuss it with him weekly. I did see him when he came round from time to time. 30

Q. It would be right, wouldn't it, that you saw him on any occasion when he came out to the office premises of your company? A. No, that's not correct.

Q. Had Mr. Harris done any advertising work or any art work for your company before the work that he did in relation to Pub Squash? A. Yes, he did.

Q. What was that? A. Labels for C-Time, labels for 7-Time, designs for stickers and window displays and so forth.

*Q. Still on p. 195 "You mentioned that you discussed the Solo can with him", that is the third question and you might remember I did ask you a series of questions about why you showed him the can. Do you recall that part of the cross-examination? A. Yes. 40

*See now page 224

Q. In those discussions you yourself had, however many they were, with Mr. Harris in which the Solo can was discussed, did he at any stage mention that he had heard the Solo advertising?

A. I don't recall him mentioning it, no.

Q. Do you recall whether he said he had seen the Solo television advertising? A. No, I don't recall that.

Q. Wouldn't that have been something very much in his province? A. Yes.

Q. You have said that you yourself at that time were so taken up with the various problems of production and the like that you did not have time to watch television or keep up with the marketing side of things, that's correct, isn't it? A. That's correct.

10

Q. But Mr. Harris would be the very man, would he not, who would be able to tell you what was happening so far as the advertising of the rival product was concerned? A. He would know, I imagine.

Q. Can you not recall discussing with him that advertising? A. No, not until some time in December I discussed it with him, I remember, as we started to come out of our production problems becoming more interested in marketing.

20

Q. Don't you recall that there was an article in "The Australian" in September, 1974, relating to the national launch of Solo? A. No, I don't. I think I did read some clippings later on, but I don't specifically remember reading it at that date. We don't get the Australian, anyway.

Q. You say you did not see anything in the Australian and you did not see anything on the television and you did not discuss with Mr. Harris the advertising on the television for the opposition product? A. I don't think the launch was that spectacular, it just didn't interest me at the time.

30

Q. What you say is you did not see those things or discuss those things with Mr. Harris before the end of 1974? A. I don't recall discussing them with him, no.

Q. Do you recall whether you even asked Mr. Harris whether he thought the Solo advertising was successful or unsuccessful or not? A. No, I don't recall that.

Q. You have given some evidence about people within your own organisation saying they thought it was unfortunate that the Solo lemon drink had been launched at the time when it had been? A. Yes.

40

Q. Those remarks were made, were they, in round about the same time as you were occasionally meeting Mr. Harris?

A. They were made December, January, I imagine.

Q. In December and January you were occasionally meeting Mr. Harris? A. Yes.

Q. And the advertising and art work that he was engaged on in connection with Pub Squash was more extensive than anything else he had done for your company, wasn't it? A. No, I think it was just another project he was doing so far as he was concerned. 10

Q. Yes, but more of his time was taken up with the Pub Squash aspect of his dealings with your company than either of the other two drinks that you had mentioned, C-Time and 7-Time? A. Not initially.

Q. As time passed? A. At a later date, certainly.

Q. When was it that there was first any discussion that Pub Squash would put out a television commercial? A. It would have been around January, definitely December/January.

Q. That discussion would have been between yourself and Mr. Harris, would it not? A. That's correct. 20

Q. Because that would be an item quite costly for the company in its then financial position? A. That's correct, yes.

Q. And you would want to make certain that that money was spent in accordance with your understanding of what the advertising should be? A. Yes.

Q. And you will have discussed with Mr. Harris in December or January of 1974 or 1975, as the case may be, the possible lines that commercial might take in some detail? A. No, we didn't, not at that time. 30

Q. You began to discuss it in either December or January of 1974 or 1975? A. The advertisement was put in the hands of his creative people and they come up with their recommendations. I certainly don't recommend what they should do so far as advertising is concerned.

Q. You exercise a veto power if you think it necessary to do so? A. When we see the copy, yes.

Q. Wouldn't you have any ideas of your own in the first place of the kind of line you would like them, at least, to take? A. No, not at all. 40

Q. Didn't Mr. Harris suggest some lines of possible creation when the matter was first raised with you? A. No, I think that at a subsequent discussion his partner mentioned the lines, or his associate.

Q. Is this what you say, that on the first occasion when you discussed with Mr. Harris the production by his firm of a television commercial for your company nothing more was said about it than that his creative people would think of some ideas and get back to you? A. That's correct.

10

Q. Not even the faintest commencement of a suggestion by either of you of what the commercial should deal with? A. No, never.

Q. Any discussion of how long it would be? A. Yes, it would be a 30-second commercial.

Q. That would have been necessary to have been discussed right at the outset, wouldn't it? A. Yes.

Q. In those days was it automatic that a commercial would be made in colour at the end of 1974? A. Pretty well so, yes.

Q. So it would have been specified that it would have been 30-seconds and in colour? A. Taken for granted, I'd say.

20

Q. You say there was no discussion at all on that occasion of the commercial then currently appearing in regard to Solo? A. Around about December, January there is no doubt Mr. Harris did mention the Solo advertising as being something to do with the dribbling and I remember that quite clearly.

Q. It was apparent to you, was it, at the time of that discussion with Mr. Harris that he had seen and considered in some little detail the Solo commercial? A. He told me he had seen the commercial, yes.

30

Q. Did you discuss with him whether the commercial that he would put in hand would bear a general resemblance to the Solo commercial? A. No.

Q. Did you discuss with him whether it should be completely different? A. It didn't even enter the question. We knew that the prime audience we were going for, the middle class group, and it was up to the creative people to come up with the answer to what we wanted, it was that simple.

Q. Do you recall whether Mr. Harris asked you at the time of this initial conversation "Well, would you like us to produce something in the same general area as the Solo commercial"? A. No, it was not. I don't recall any discussion like that.

40

Q. You would agree, wouldn't you, that the commercial that was produced bore a distinct resemblance in style to the Solo commercial? A. No, definitely not.

Q. You would deny any resemblance at all between the two? A. Totally, ours was a spoof, we didn't have a macho type image.

Q. Wouldn't you agree that the commercial produced by you was a satirical version of the macho type advertisement that the Solo people had produced? A. No, it was straight off the "6 Million Dollar Man" and it was a spoof on that, he was jumping up mountains, definitely for a younger audience.

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Q. Did you discuss that aspect of the matter with Mr. Harris at any stage, namely, that what was to be produced was a spoof of the "6 Million Dollar Man"? A. No, the creative fellow at the time said that that was the best way to go and I said O.K.

Q. When you say at the time, what time are you referring to? A. It would have been in March, I imagine.

Q. Going back to the time when you first became aware that there was a launch of Solo going forward in Sydney and Brisbane, did you then give any instructions to any member of your staff to keep an eye on the progress of the sales of that product? A. No, I didn't.

20

Q. Do you recall that around about December and January 1974/75 Mr. Baxter had an office in a building called Fund of Australia House in Alfred Street, North Sydney? A. 1974/75.

Q. Yes. A. I think he was still there at the time, I am not sure, he moved around about that time to another company.

Q. Do you recall being in his office on occasions in that building, Fund of Australia House? A. Very seldom, I can't recall that particular date, no.

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Q. Let's forget about the date. Do you recall from time to time being in Mr. Baxter's office in the building known as Fund of Australia House? A. In early, 1974, yes. I don't recall being there in late 1974 or 1975.

Q. Do you recall, whenever it was, that you were there speaking to Mr. Baxter from time to time about your intentions in a general way concerning the marketing of products by your company, Passiona Marketers? A. He was the managing director of Pepsi and prior to setting up the company yes, I did spend quite some time in his office.

40

Q. After setting up the company from time to time you were

there also, were you not? A. I can't really recall being there while he was still the manager.

Q. Have you any accurate recollection of when it was that Mr. Baxter moved from his office in that building? A. No, I don't recall.

Q. Do you recall an occasion when you mentioned to Mr. Baxter that you were going to register the name "Uncola"? A. No, I don't remember discussing it with him.

Q. Did you, in fact, at some stage register the name "Uncola" through Passiona Marketers? A. Yes, I did. 10

Q. Do you remember mentioning to Mr. Baxter that you would use the same kind of marketing campaign in regard to "Uncola" as had been used in the United States by the producers of the drink "7-Up"? A. No, I don't remember that discussion.

Q. Did you, in fact, use a marketing campaign in relation to "Uncola" similar to that used in the United States in connection with "7-Up"? A. Yes.

Q. Do you say you have no recollection of mentioning these things to Mr. Baxter? A. I don't remember mentioning them to Mr. Baxter at all. 20

Q. I suggest to you that you did mention them to Mr. Baxter and in the presence of a Mr. Spackman? A. I would never discuss anything in the presence of Mr. Spackman, I can assure you.

Q. Do you have any recollection of telling Mr. Baxter that you were intending to launch a lemon product in the name "Pub Squash"? Q. No, I don't recall telling Mr. Baxter that until just prior to the launch. I would have told him sometime, I imagine about the time we were launching it. He was not part of our business. 30

Q. You do recall then, do you, telling him shortly before the launch that you were going to make the launch under the name Pub Squash? A. No, I don't recall.

Q. You think it probably happened? A. It probably happened.

Q. Again, I suggest to you that it did happen and that Mr. Baxter then asked you how it was you were using the name Pub Squash? A. I don't recall the conversation.

Q. I suggest also you made a reply along the lines that the words came from the Schweppes Advertisement? A. That is not correct. 40

Q. Have you been in touch with Mr. Baxter recently? A. He works for us, he works for the Pub Squash Company.

Q. Have you been in touch with Mr. Spackman recently? A. I saw Mr. Spackman here somewhere, but I didn't speak to him.

Q. Had you been in touch with him shortly before you saw him here? A. No, I had not.

Q. You remember the questions you were being asked on Friday concerning the conversation at which the joke was made as you recall it about "Why don't we use the name Pub Squash"? 10

A. Yes.

Q. Are you able to recall whether some similar reference to using Pub Squash had been made at an earlier meeting between various employees of your company at which you were present?

A. No, there had been no conversation about using the name prior to that.

Q. I want to be accurate about that. Do you say that prior to a meeting which you put as being about a fortnight before the launch there had not been any discussion at a meeting of employees of the defendant company at which you were present concerning using the name Pub Squash which you heard? A. That is what I'd say, yes. 20

(Short adjournment.)

ON RESUMPTION

Q. Incidentally, have you seen Mr. Mojsza recently? A. Mr. Mojsza?

Q. Yes. A. I saw Mr. Mojsza on Friday night.

Q. He is in Sydney at the moment, so far as you know?

A. Yes he is.

Q. Would you look at Exhibit 19A. Is that Exhibit 19A the actual one you got when you were in the United States doing the seminar you have told us about in 1970 or 1971? A. I could not say, no. 30

Q. Do you have the actual one that you obtained when you were in the United States for that seminar? A. There are so many of them floating around now, I could not say which is the exact one.

Q. Do you know whether you have in your records or Passionate Marketers records the actual documents that you have given evidence that you obtained in the United States when you 40

were there in connection with the seminar? A. No, I could not say. They are all photostat copies.

Q. Would you look at Exhibit 20. There is pencilled handwriting on the front and the back of that particular exhibit. Do you recall that? A. Yes.

Q. Can you recall whether the two lots of pencilled handwriting were placed on that document at the same time or at different times? A. At the same time.

Q. This time you have given evidence of, is it about May 1973? A. Sometime around May, June it would have been; I cannot be specific on the date, but it is around that period. 10

Q. If we forget about the actual date, can you recall the occasion that that was done as being an occasion almost immediately after you had first met Mr. Mojsza? A. Within a month or six weeks, yes.

Q. The main body of the document, actual sales and sales forecasts of drinks sold by the Passiona Bottling Company, is that correct? A. No, that is the plan for 1974, it is not the actual sales. That is the sales forecast. It was prepared by the Cottees Operation. 20

Q. It is only a sales forecast? A. Yes, taken off the original sales of the prior year.

Q. It had been prepared, you say, by the Cottees organisation? A. By Mr. Mojsza for the Cottees organisation.

Q. At the time when he was working for the Cottees organisation? A. I am not sure, but I believe so.

Q. He appears to have done it while working for an opposing organisation, did he? A. Well, I would say he prepared it while he was working for Cottees, yes. 30

HIS HONOUR: Q. When did he cease to work for Cottees so far as you are aware? A. I cannot say, I think it was 1972. I would say it was 1972, when he ceased working for Cottees. It might be 1973, I just cannot remember. I do not really recall. It was late in 1972 or some such time.

Q. As you understood, this was the document that he had prepared for Cottees? A. That is correct.

Q. In his capacity as an employee of Cottees? A. Yes. But he was in transition between two companies which only he can explain to you, because I cannot. He was working for Pepsi and Cottees. He was working for Cottees at that time and had a 40

franchise for Pepsi. I would have to let him explain how it all worked out.

Q. He had discussions with you, you had no communication with Cottees or Pepsi. The document was prepared by him in his capacity as an employee of Cottees or Pepsi? A. With the agreement of the General Foods management.

MR. PRIESTLEY: Q. This agreement you have just mentioned, was with the General Foods people, was it? A. That is correct.

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Q. Do you recall who it was who gave you that agreement? A. A Director, Mr. Gerry Wollert.

Q. Did he give you permission at the time when you were first raising the possibility of buying the Cottees assets from the General Foods Group? A. I had access to all documentation relating to the soft drink division as from early 1973, on his instruction.

Q. When you say "On his instruction" did he say to you yourself, "You are to be at liberty to look at all these documents." A. No, he said, "Whatever document you require, you may have."

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Q. Again, is there anything in writing about that? A. No, but I would have no trouble bringing a witness from General Foods here.

Q. From what you have said, is it right that Mr. Mojsza in all probability prepared the details in that document while he was still employed by the Cottees organisation? A. Yes, I would say he did.

Q. Your recollection is that was either 1972 or early 1973 that he was still working for them? A. You would have to ask him.

30

Q. Can you tell us why it is that this forecast of sales commences as from April 1974? A. General Foods closes their accounting year off in March, and they start their new accounting year in April.

Q. With Mr. Mojsza being last employed by General Foods either in 1972 or early 1973, would he not have then been preparing the sales forecast for the year commencing April 1973? A. No, they put the plan through for a year ahead. As I say, I could not give the date he left the company, you would have to ask him.

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Q. Is it really possible in the soft drink business to make

a sales forecast of that kind, over twelve months ahead?

A. I did it for five years at Coca-Cola, projected five years ahead. It is a requirement in the American companies that they project up to two and three years ahead.

Q. Do the projections bear much relationship to what actually happens in your experience? A. Usually the first year or two stay fairly well within a pattern.

Q. Do you recall whether the projections that Mr. Mojsza showed you went further than 1974/1975? A. No, I do not.

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Q. Do you recall whether that document was amongst those you were authorised to see by Mr. Wollert whom you have mentioned? A. There is no reason why it would not have been.

Q. Do you recall whether it was? A. I had access to any document that I required, and that was a document we required.

Q. To whom did you make that requirement known? A. To General Foods, I imagine. I cannot remember. It is five years, and we were dealing with many people.

Q. Do you recall whether Mr. Mojsza produced that document from amongst his own papers or not when you first saw it?

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A. He could have, but I do not recall.

Q. You recall the other day you were asked by Mr. Bannon whether you had had a discussion with Mr. Mojsza in April or May *1973 (p. 154), was that document which is now before you produced at that discussion and you said that was one of many documents? A. Correct.

Q. By that, do you mean Mr. Mojsza produced it to you from documents in his possession on the first occasion that you saw it? A. I had documents at the time, but I cannot recall whether that was in the documents I had or he had it, but he might have had it.

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**Q. Would you turn to page 204 of the transcript and in the middle of that page where there was a question and answer as follows: "You knew some months before your company's product went onto the market that it was a foreseeable possibility that at the time your product went onto the market some members of the public would associate the slogan 'a squash like the pubs used to make' with "solo" and then you answered, "yes". Do you see that? A. Yes.

***Q. I want to draw your attention to that, and on page 207,

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* See now page 170.

** See now page 235.

***See now page 240.

fourth last question and answer, "It had to be so, in March 1975 that there were some people who associated the product Solo with the slogan 'squash like the pubs used to make'?

A. Yes."? A. Yes.

Q. Then, the other answer I want to draw your attention to *is on page 208, third last question: "I suggest to you that it must have been completely obvious to all the executives of the company and yourself at that meeting that there would inevitably be confusion between your new product called Pub Squash and the Solo product when your product came onto the market shortly afterwards?" I want to ask you how you reconcile your agreement that there were members of the public who associated the slogan "squash like the pubs used to make" with Solo, with your statement that it was not obvious to you that there would inevitably be confusion between your product called Pub Squash and the Solo product already on the market?

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A. I believe that the statement was a descriptive statement stating the type of soft drink Solo was and that is the only association I put with the people involved in it. When I state there must be an association it would be as to the description of the type of drink, that is, when we talk about the drink Solo and Pub Squash. I do not think there is any confusion at all as to the two names.

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Q. Do you say you did not even consider it was a possibility that because some people associated the slogan "squash like the pubs used to make" with Solo, that, when a drink called Pub Squash came onto the market, those people would associate that drink with Solo? A. No, I did not, it was purely a descriptive phrase stating the type of drink it was.

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Q. I just want to put some things to you directly so we can have your answers on them. I suggest to you that the name "Pub" in the name of "Pub Squash" was not of any great concern to you as at May 1974? A. That is not correct.

Q. I suggest they were names which were mere possibilities at the most in your mind for possible future products? A. It was a major part of setting up the business, expanding the lemon segment with Pub Squash.

Q. I suggest to you that until you became aware of the Solo advertising campaign and the use of the slogan "Squash like the pubs used to make" in association with that product that you had not seriously considered marketing any product under the name "Pub Squash"? A. That is not correct.

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Q. I further suggest at the time when you put your product called "Pub Squash" onto the market you did so believing that your product would gain an advantage by being so called, because of the reputation Solo had built up in the public's

*See now page 241.

association with Solo, with the slogan "squash like the pubs used to make"? A. That is incorrect.

Q. Is it correct that you did not show the copy of the U.S. mark that you had brought back from the United States with you to anyone in the Coca-Cola organisation before you had completed your employment with that organisation? A. No, that is not correct.

Q. So you say, do you, that you had actually shown the photostat that you had brought back from the United States to some people within the Coca-Cola organisation? A. Yes, I do. 10

Q. Who were those people? A. The Marketing Services Manager at the time was a Miss Marilyn Johnson.

Q. Anybody else? A. I cannot remember who was in the room at the time, but there were other people present.

Q. Do you say at that time you mentioned the name "pub squash" as distinct from "pub"? A. No, I cannot recall the conversation exactly.

Q. Would you agree that nobody was particularly interested in that name at that time? A. No, I would not. 20

Q. Nobody was particularly interested at the time when Coca-Cola was actually selling its lemon squash drink through pubs and clubs in the name "Pub Squash"? A. It was not offered to anyone of the management people or discussed with any of the management people at Coca-Cola.

HIS HONOUR: Q. This is a document that you had obtained when you were in America in the course of your employment? A. In my free time at Coca-Cola I undertook these investigations of trade marks and so forth.

Q. In the course of and for the purposes of your employment, Mr. Brooks? A. I think it was a general fact finding mission of things that interested the company or myself. It was not specifically to find trade marks for the Coca-Cola company or to investigate anything for the Coca-Cola company. 30

Q. I understood you attended that symposium in Coca-Cola's time at Coca-Cola's expense and you were paid by them? A. That is correct.

Q. That is hardly free time, is it? A. We have free time when we are away to investigate whatever segment of the market we wish to. I should also point out that Coca-Cola have a list of names that are assigned to drinks and they all emanate from the United States, not from locally. 40

MR. PRIESTLEY: Q. The other thing is that, if I remember correctly, you said that you saw this name in a book or a bundle of trade marks on the premises of another company in the Coca-Cola organisation in the United States? A. That is correct.

Q. You have said that you did mention or show that document to people in the Coca-Cola organisation in Sydney? A. Yes, I did.

Q. The only one you can remember at the moment showing the actual document to being the lady you mentioned a few minutes ago? A. That is correct. 10

Q. You say she was not at senior executive level in the company? A. She was the Marketing Services Manager, and responsible to me. It was a fairly senior position.

Q. She was subordinate to you in the organisation?
A. Correct.

Q. Did you show it to anybody senior to you in the organisation? A. No, I do not recall showing it to anyone.

Q. Those two names you mentioned the other day, Litchfield and Tollis? A. Yes. 20

Q. Were they senior to you? A. No, working in the marketing services section at the time. I think they were in the marketing services section at the time.

Q. It was mentioned by you to both of them in the course of the same conversation? A. I think it was at the same time as it was mentioned to Miss Johnson.

Q. Is it not correct at that stage there was no particular value or reason for using the name in connection with the Coca-Cola product? A. No, there was no value. 30

Q. And that the value in the name emerged after the Solo Advertising campaign had been on foot for some time? A. That is not correct.

*Q. Would you turn to page 192 of the transcript before you, the third question, that is the part where I have been asking you about whether you would not have realised it would be necessary to move into other States. I had been asking you about price cutting and whether you would not have realised it would be desirable to move into other States, and you said, "I did not consider it until we looked at our financial situation as we moved into 1975"? A. That is correct. 40

*See now page 219.

Q. Is it not correct from the time you commenced operations in May 1974 in Passiona Marketers that you were paying the closest attention on a daily basis to the financial situation of your company? A. On a monthly basis.

Q. Would it not have been more frequent than that in view of the commencement of the company and its dependence on borrowed money to get its programme under way? A. Programme regarding what, I am sorry.

Q. You were working on a tight budget, were you not, in 1974? A. Yes. 10

Q. You were concerned both about revenue from sales and outgoings during the whole of 1974? A. Yes, that is correct.

Q. You were keeping a constant watch on the financial situation of the company? A. That is correct.

*Q. Looking at that third answer on page 192, did you mean by that that you did not know the precise financial situation of the company until you moved into 1975? A. What I meant by that was the price cutting became so severe in 1975 that we had production capacity but selling in the Sydney market was then not profitable so it was easier for us in mid 1975 to open up a warehousing operation and using our production to capacity, all that we had available, to trans-ship into another market where it was more profitable. 20

Q. What I was putting to you the other day was that that was something that you were able to assess during 1974 just as much as in the beginning of 1975? A. The price cutting was severe in 1975; all major manufacturers were price cutting in 1975.

Q. At the top of the page you had agreed that the price cutting war was under way: "Q. Was not the price cutting war under way well and truly at the end of 1974? A. Well, it was under way, but we certainly were in no position machinery-wise to manufacture a product for shipment into other States until mid 1975."? A. That is correct. 30

Q. Then, I will ask you again the question I asked on that occasion. I asked you to address yourself directly to the question: Would not the desirability of expanding into other States, if you could manage it, present itself to you as soon as you had realised the position arising under the price cutting circumstances? A. No. 40

**Q. Would you turn to page 207, fifth question and answer: "Q. You would agree that you could foresee certainly in March 1975 that people would associate the slogan 'Squash like the

* See now page 219

**See now page 239

pubs used to make' with the product Solo? A. Not directly I didn't.". What did you mean by that answer? A. I believe, that once again, it is a descriptive phrase, describing the type of soft drink that Solo is, and I do not believe that they associate it with a line of direct advertising. It is a descriptive phrase describing the soft drink.

Q. The mere fact that it is descriptive would not prevent people associating the slogan with the product, would it?

A. It is just describing the product, the type of product. 10

Q. You would not suggest that it did not describe the product Solo at the time the advertisements were being shown? A. It did not describe the product Solo, it described the type of drink Solo was.

Q. It was on that basis, was it, that you came to your conclusion there would be no confusion if you marketed your drink under the name Pub Squash? A. That is correct.

HIS HONOUR: Q. In relation to Exhibit 19, the American registration of "Pub", you said it was not offered to Coca-Cola. What do you mean by that? A. I received it from Coca-Cola and they had access in the home office to the registration and, had they wished to use it, obviously they could have used it themselves. I came back with, I think, three carton loads of information I had picked up in the United States. Most of what I saw over there I had to discuss and report on when I arrived back. When I came back I had to make a presentation on the particular segments of the market that I went over there to see, nothing else. What other information I picked up relating to the United States market was purely for my own information. 20 30

Q. Were you intending to convey by that answer that you had no obligation to draw Coca-Cola's attention to the information?

A. My comment was that they had the registration. I received it from them, so they had access to it.

Q. They did not have it in Australia apparently? A. Oh, all trade marks from Coca-Cola emanate from United States, not here.

Q. Perhaps so, but I am still puzzled by the phrase, "It was not offered to Coca-Cola." I do not understand what you intended to convey by that? A. The whole thing was it was not presented to them at all. It was never discussed with Coca-Cola management; it was not relevant at the time. 40

Q. It was a piece of information that you were free to use for yourself for your own purposes? A. Yes, with such of the other information I returned with.

Q. You were free, if you so desired, to take, when you left Coca-Cola, any physical manifestation in which there appeared information which you had gained? A. If I had gained it in my time or during the course of my visit, certainly.

MR. PRIESTLEY: Q. I did ask you whether you still have the document that you stated in evidence you brought back with you to Australia, being the copy that you obtained in the United States at that time, and you said that you did not know? A. I do not know if I have that or who has it.

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(Mr. Priestley informed his Honour he wished to have access to that original copy if it was in Mr. Brook's possession or the possession of the defendant and he asked whether Mr. Brooks could make a search so that he could inform the court whether or not that document was still in his possession or the possession of the company.)

RE-EXAMINATION

MR. BANNON: Q. Is there anything you are aware of to distinguish the original photographic copy of the trade mark registration which you brought back from the United States from the document which has become the exhibit which was shown to you by Mr. Priestley this morning? A. No.

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Q. Any mark on it or any identification? A. No.

Q. Is there any way that you know of by which you could positively identify any particular photographic copy of the United States registration as being the original? A. No, I do not.

*Q. You were asked (page 211) about the market, about television advertising and I think the fifth question is, "Some of the confusion created in relation to this, would you not agree, was that associated with the slogan in the television advertisement - the slogan "like the pubs used to make" - with Pub Squash?" You said, "Yes". You were asked, "You would agree, would you not, that that must have happened?" and you said, "Yes". What did you mean by saying that? A. I think the slogan, once again, was descriptive of the type of drink pub squash was. The same as was descriptive of the drink Solo was.

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Q. Have you at any stage considered that the slogan "Squash like the pubs used to make" had become solely identified with this Cadbury-Schweppes product Solo? A. No. (objected to: allowed)

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Q. You were asked by my friend concerning the product with

*See now page 243.

which your company commenced to manufacture called "Cottees Lemon Drink"? A. Cottees Lemon Flavour.

Q. First of all, I ask you was that a lemon squash? A. No, it was a lemon flavour; it had no juice content at all.

Q. No lemon juice content? A. No lemon juice.

Q. You told my friend this morning that a major part of setting up your business was having a lemon segment using the mark "Pub Squash"? A. That is correct.

Q. If, when you set up your business and gave up your position with the Coca-Cola company, you had envisaged that you would not be able to market the lemon segment, the lemon squash, bearing the trade mark "Pub Squash", would you have set up this company? A. Not on the same scale. 10

Q. Had you any particular reason for wishing to call the lemon squash that you envisaged marketing the name "Pub Squash"? A. I think it actually goes to the root of the lemon segment. It always was a very large segment back in the days of Shelleys. Shelleys were the third biggest sellers at the time and the only reason no one was selling in the market was because Coca-Cola dominated the market and no one had bothered to develop a lemon segment. 20

Q. I do not think you are listening carefully to my question. The question was, did you have any particular reason for wishing to call it Pub Squash? A. I believe it was the best name to call it.

Q. What was your reason for thinking that? A. I believe that lemon squash was well known by most of the community and I wanted to capitalise on it.

Q. What was your reason for wanting to call it "Pub Squash"; the word "pub" what was the significance of that? A. I saw the trade mark and believed it was the right name to call it. 30

Q. When you say "the right name", what made you think "Pub" was the right name to call a lemon squash in N.S.W.? A. Because most of the squashes, lemon squashes, being sold at that time were sold in hotels. I wanted to expand the segment into the on-premises consumption.

Q. Within your experience in marketing with Coca-Cola, did you believe that that name would have any marketing significance? A. I certainly did. 40

Q. Did you think that at the time you set up the company? A. Yes, I did.

Q. You were asked questions about whether you had had any great expenditure in regard to Pub Squash during the year 1974. During that year did your company employ Mr. Newall? A. Yes, I did - the company did.

Q. He was a technologist, was he? A. The Chief Chemist, yes.

Q. Mr. Alman? A. Yes, Technical Manager.

Q. These gentlemen, did they spend part of their time in working on Pub Squash? A. They did.

Q. Were they being paid wages for that work? A. They were. 10

Q. Mr. Mojsza, was he employed by the company? A. Yes, he was.

Q. What was his position during that year? A. Financial Manager.

Q. Was he engaged in preparing estimates in relation to the sale of Pub Squash? A. Yes, he was.

Q. Was he also being paid wages for his work? A. Yes, he was.

(Interrogatories administered by the plaintiff Cadbury-Schweppes to the defendant numbered 17, 18 and 36, and the answers to interrogatories 17 and 18 and so much of the answer to interrogatory 36 as comprehends paragraphs (a) and (b) up to and including the words, "actual launch of Pub Squash" are tendered and marked Exhibit 26) 20

Q. You mentioned that at Coca-Cola you had what was called a barometer and also Nielson reports to assist in market surveying and to watch other producers? A. That is correct.

Q. Did the Pub Squash Company during 1974 have either of those aids available to it? A. No.

Q. Does it today have a barometer and the Nielson research to assist it? A. No. 30

Q. It still has not? (not answered)

Q. Regarding this Cottees Lemon flavour which you carried on for some time, was there any reason for producing that in the first stages of the company? A. We had an agreement with General Foods which required that we make or manufacture Cottees Lemon flavour for supply to their other franchise operators in country areas throughout N.S.W.

Q. How long did the manufacture of Cottees Lemon continue?

A. For the twelve months of the contract. It terminated, the agreement, in May 1975. I think that was the period.

Q. You were asked questions as to whether or not Solo had any apparent success on the market. What did you mean by telling my friend that there appeared to be some apparent success?

A. I think that - (objected to; not pressed)

Q. How did you become aware of this success that you were *speaking about (page 190)? A. The general talk in February - people were talking about the chap dribbling and the message had been communicated I think. I think that is just general - or something controversial at the time. 10

**Q. At page 192 of the transcript you were asked about the product C-Time about the middle of the page. You said that in May 1974 you regarded it as the most important product. What was the reason for regarding C-Time as most important in May 1974? A. Three major segments in the market: Coca-Cola, which is the largest, Lemonade which is the second, and Orange which is the third. The product Tango marketed by Cottees, they had problems with it over the period of the past prior twelve months and the product had fermented in the trade and no one would buy Tango, so it was essential that we move into the orange segment quickly. So, to establish ourselves in that particular segment we sold to food stores. 20

Q. You sold it under the name C-Time? A. That is correct.

HIS HONOUR: Q. When was that trouble with Tango first apparent? A. It was apparent when General Foods had the company. In fact, they reimbursed us an amount of \$20,000 for collecting the fermented product out of the trade. 30

Q. At what point of time did General Foods become aware?

A. General Foods was aware of it when I was negotiating with them.

MR. BANNON: Q. Has your company kept a scrapbook of advertisements of various products? A. All supermarket advertisements that appear in the evening papers on Wednesdays and Tuesdays we keep a copy of them.

Q. Did you actually keep this yourself or did some employee?

A. No, kept by our Food Manager at the time or his employees.

Q. Did you see this from time to time? A. Yes, I did. 40

Q. Is this the document (shown)? A. Yes, that is the document.

*See now page 217

**See now page 220

(Above book tendered)

(Luncheon adjournment)

ON RESUMPTION:

(Tender of above book objected to: m.f.i. 14)

(noted that m.f.i. 9 firstly marked is to retain that number and the second document m.f.i. 9 which subsequently became Exhibit 14 is to be m.f.i. 9b)

(Witness retired)

DAVID GLANVILLE
Sworn and examined

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MR. PRIESTLEY: Q. Is your name David Glanville? A. Yes, sir.

Q. Do you live at 36a Carlotta Avenue, Double Bay. A. Yes, sir.

Q. And you work for Mercantile Mutual Insurance Company Limited? A. Yes, sir.

Q. And are you an accounts clerk with that company? A. Yes, sir.

Q. Are you acquainted with a soft drink known as Solo?
A. Yes, sir.

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Q. Can you tell us about how long it is since you first became aware of the availability of that drink? A. About three years, sir.

Q. Are you able to say whether you remember anything about television advertising in regard to that particular product?
A. Yes, sir.

Q. Can you tell us whether your recollection of advertising dates from before or after you first became aware of Solo yourself as a drink? A. Before.

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Q. What is your recollection of the advertising that you first saw on television? A. Well in a way, they said it was a Pub soda squash sort of thing. It was the next best thing to a squash that you get at a local pub.

Q. Do you remember anything else about the advertising? What was shown on the first advertisement you saw on television?
A. The first one I can remember is a man paddling a canoe up a creek.

Q. Do you remember any of the advertising lines or phrases that were used in that particular advertisement? A. Yes.

Q. It doesn't matter if you have said them already, but just tell us what you remember that came from the advertisement?

A. "A great squash that you get at your local pub".

Q. Can you tell us whether you saw that particular ad just once or a number of times? A. A number of times.

Q. And can you remember whether or not that particular line that you have just mentioned was used with that ad every time or not every time? A. Every time.

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Q. When was it, in relation to your first seeing that advertisement on television, that you first actually bought some Solo for yourself, if you can remember? A. I would say a minimum of a month.

Q. And at the time when you first bought Solo did you associate the advertising phrase that you have mentioned with any particular product? A. Yes, Solo.

Q. Have you also become acquainted with a drink called Pub Squash or Pub Soda Squash? A. Yes.

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Q. Can you say when it was approximately, in relation to the first time that you bought Solo, that you became aware of the existence of a drink called Pub Squash or Pub Soda Squash?

A. About a year later.

Q. And do you remember seeing Pub Squash or Pub Soda Squash on sale? A. Yes.

Q. And when you first saw it did you have any thoughts about it in relation to any other product? A. Yes.

Q. What were they? (Objected to: rejected)

Q. Do you recall the actual time when you first bought any Pub Squash or Pub Soda Squash? A. Not specifically, no. But I would say approximately two years ago.

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Q. On the occasion when you bought it, what drink did you set out to buy? A. Solo.

Q. And how did it come about that you bought Pub Squash and not Solo? A. Because it was handed to me across the counter.

Q. What did you ask for on that occasion? A. Solo.

Q. And when you got Pub Squash in response to a request for Solo, what did you think you got? A. Solo.

Q. Had you paid any particular attention before this occasion to the actual get-up to the can of Solo or cans of Solo you had previously bought? A. No, not really. Except for who made it.

Q. And when you were handed a can of Pub Squash, how did it appear to you as far as get-up was concerned compared to what you noticed about the Solo can? (Objected to)

Q. I asked you whether you paid any particular attention to the Solo cans and their get-up before this occasion when you got the Pub Squash, and you said you had not except for the name of the manufacture, I think you said. Did you have any idea at all of the appearance of a Solo can before you bought this first Pub Squash can? A. Yes. 10

Q. Well, can you tell us now the sort of things that you were aware about the Solo can before you first bought a Pub Squash can? A. It was yellow and it had gold - silver writing on it. It was a yellow coloured can with a silver background on it, or printing on it.

Q. How did that genral appearance compare in your understanding with the Pub Squash can that you got when you first got one? A. A similar colour. 20

Q. On that occasion did you have any belief as to the identity of the manufacture of the Pub Squash that you were handed? A. I didn't know who made it but I believed it was made by the same people making the Solo.

Q. Are you able to tell us now what was it that lead you to that belief when you were handed the Pub Squash can? A. Advertisings on telly.

Q. And can you remember any particular features of the advertisements on television which led you to this belief when you were handed this can? A. A similar slogan. 30

Q. Pardon me if I appear to be making you go over ground, can you tell us which slogan it was that you had in mind at that time? A. The one that said "A great squash from a pub."

Q. On subsequent occasions did you again wish to buy a lemon squash drink, after this occasion when you got the Pub Squash? A. Yes.

Q. And on subsequent occasions did you intend to buy any particular brand of lemon squash drink? A. Yes. 40

Q. What brand were you seeking to buy? A. Solo.

Q. And were there any later occasions when Pub Squash was handed to you? A. Yes.

Q. As Solo? A. Yes.

Q. And are you able to tell us how long you remained of the belief that they were the same drink from the same manufacturer?

A. Approximately six months.

Q. And what happened then to make you think differently?

A. I looked at the can of Pub Soda Squash for the manufacturer.

Q. What did you see there when you looked? A. I think it was made by a company called The Pub Soda Squash Limited. 10

Q. Can you give us any idea of the number of occasions during the six months that you told us about during which you thought the two products were the same, from the same manufacturer, that you actually went to buy lemon squash or Solo? About how often? A. About three.

Q. Three times? A. Yes.

CROSS-EXAMINATION

MR. BANNON: Q. Mr. Glanville, do you ever go into an hotel for a drink? A. Yes, sir. 20

Q. And have you had a lemon squash in the hotel? A. Yes, sir.

Q. And did you do that before you had heard of Solo? A. Yes, sir.

Q. How often had you done that before, Mr. Glanville?

A. More than a dozen.

Q. And have you ever paid any attention there to how the lemon squash was prepared for you? A. Yes.

Q. How was it done? A. They used lemon cordial and a form of lemonade or soda water. 30

Q. Which hotels had you been in where this was done? A. The Royal Oak at Double Bay, The Golden Sheaf at Double Bay; Watson's Bay.

Q. Mr. Glanville, when you saw these advertisements for Solo that you told my friend about, what was said was it was a Pub Soda Squash, next best thing to a squash at the pub, and when you tried it did you find it was a similar thing to a squash at a hotel? A. Yes.

Q. Same sort of thing? A. Yes.

Q. And did you find the same sort of thing applied to a Pub Squash? A. Yes.

Q. You felt that was a fair description of both products did you? A. Yes.

Q. And when you saw these advertisements for Solo did they say anything about who made it? A. No.

Q. And did you have any idea at the time as to who made it?
A. No.

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Q. You say you drank this Pub Soda Squash and you started to drink Solo about three years ago, is that right? A. Yes.

Q. And a year ago, a year from today, did you know who made Solo? A. Yes.

Q. A year ago, you had found out? A. More than a year ago.

Q. When did you find out who made Solo? A. Within six to eight weeks of learning Solo.

Q. How did you find that out? A. At the time I worked in a supermarket which was supplied by the Schweppes-Cadbury company and Solo came in boxes which had Schweppes-Cadbury written on the outside.

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Q. What side of the business in the supermarket were you working in? A. Groceries.

Q. And were you handling the sale of soft drinks? A. Yes.

Q. Did you see the name of Cadbury-Schweppes written on the can of Solo? A. Not that I recall.

Q. But after you saw the name on the boxes did you have a look to see if the name appeared on the can? A. Yes.

Q. This supermarket you were working at, where was it?
A. Double Bay.

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Q. What company? A. G.J. Coles.

Q. And did they carry other brands of soft drinks apart from Cadbury-Schweppes? A. Yes, sir.

Q. Other lemon drinks? A. Yes, sir.

Q. They come in yellow cans also? A. Yes.

- Q. And they carried Coca-Cola, I take it? A. Yes.
- Q. And Export Cola? A. Yes.
- Q. Which is the Cadbury-Schweppes one isn't it? A. Yes.
- Q. And which is practically identical in appearance with Coca-Cola? A. A different shade of colour but nearly.
- Q. Both in red cans, the Coca-Cola? A. Yes.
- Q. And both of them have got, I think, black lettering on them? (Objected to).
- Q. They both have red cans and black lettering is that right? 10
A. No.
- Q. What is the lettering on Coke? A. They have silver lettering on them.
- Q. And what is the lettering on the Export Cola? A. Black.
- Q. And they have orange drinks, too? A. Yes.
- Q. And they all came in orange cans, I take it? A. Yes, sir.
- Q. And there is a general colour code in the trade, orange cans for orange drinks? A. Yes.
- Q. Red cans for cola? A. Yes. 20
- Q. Yellow cans for lemon squash? A. Yes.
- Q. And that has been the position as far back as you knew the trade? A. Yes.
- Q. And how long were you in that trade at Coles? A. Three years.
- Q. When did you leave Coles, Mr. Glanville? A. The end of 1976.
- Q. You have seen other advertisements for Solo, have you not? Apart from the one referring to a squash at an hotel? A. Yes.
- Q. I think the current ad for it is the thirst crusher? 30
That is the one that you see very often now? A. Yes.
- Q. It shows the actor, Michael Ace, with some lemon squash dribbling down his face and he crushes a can in his hand?
A. Yes.

- Q. And that is the one appearing now? A. Yes.
- Q. It appears quite frequently? A. Yes, I saw it last night.
- Q. And there is another advertisement which calls it a man's drink? A. Yes.
- Q. Have you ever gone into a shop and asked for a man's drink? A. No, sir.
- Q. Have you ever gone into a shop and asked for the next best thing to a drink at a pub? A. No.
- Q. Have you ever gone into a shop and asked for a lemon squash like the pubs used to make? A. No, sir. 10
- Q. You have regarded these as just copy, advertising?
A. Yes.
- Q. You knew when you saw these advertisements that Solo was claiming to be a squash of the same type as the hotels made?
A. Yes.
- Q. But you always knew it, that the brand name was Solo, didn't you? A. Yes.
- Q. And you never regarded the phrase about the hotels or the squash like the pubs used to make as being put forward as the trade name, did you? A. No. 20
- Q. You told my friend that you went into a shop and asked for Solo and a shopkeeper gave you Pub Squash the first time. You said it happened three times, is that right? A. Yes.
- Q. Which shop is that at the first time, Mr. Glanville?
A. As far as I can remember it was a corner shop of Sydney Technical College just near Gazelle House.
- Q. And the second time, where was that? A. At Bondi Junction, a milk bar at Bondi Junction.
- Q. And the third time? A. That one I can't remember. 30
- Q. In each case you asked for Solo and each time the shopkeeper gave you Pub Squash, is that right? A. Yes.
- Q. Now, when the first shopkeeper gave you Pub Squash, I take it you looked at the can, did you? A. Yes.
- Q. And you saw it had a different name to it from Solo?
A. Yes.

Q. And you know, don't you, that from your experience in working for Coles how to differentiate between different products in the same range? A. Yes.

Q. And you realised at once he had not given you the product you asked for didn't you? A. Not immediately, no.

Q. Well, as soon as you looked at the can you realised that it was not Solo, didn't you? A. Yes, outside the shop.

Q. Did you go back to the shopkeeper and complain? A. No, because I was in a hurry.

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Q. So you didn't bother? A. No.

Q. The next time it happened did you ask for Solo again?
A. Yes.

Q. And this time the shopkeeper produced a can of Pub Squash?
A. Yes.

Q. You saw it was not Solo as soon as he produced the can?
A. Yes.

Q. What happened then? A. He said, "I have run out of Solo".

Q. And you took the Pub Squash? A. Yes, as a substitute.

Q. And the third time did you ask for Solo again? A. Yes.

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Q. And again the shopkeeper produced Pub Squash? A. Yes.

Q. And did you immediately tell him that wasn't Solo?
A. No.

Q. You knew it was not Solo? A. Yes.

Q. But you took it all the same? A. Yes.

Q. (Witness shown Exhibit A and C) You recognise Exhibit A as a Solo can, do you? A. Yes, sir.

Q. And Exhibit C as a Pub Squash can? A. Yes, sir.

Q. And the design of the label on each? A. Yes, there's labels on both of them.

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Q. The labels are quite different, are they not? A. In what way?

Q. One of them has got a pair of bar doors on them and one has not? A. That's right.

Q. One has the word "pub" on and one has not? A. That is correct.

Q. And one has the word "Solo" on it and the other has not?
A. That is correct.

Q. And any person who can read English can see they are different? A. Yes, in their words, but they are the same colour.

Q. The same colour, the can? A. Yes.

Q. The lettering in the Pub Squash can is red, is it not? A. Yes.

Q. And the lettering on the Solo can is largely in black, is it not? A. Yes. 10

Q. And with your experience in G.J. Coles Limited you are very experienced in differentiating between different products in the soft drink field, are you not? A. Yes.

Q. And you would never mistake a can of one product for another can yourself? Would you, because of your experience?
A. No.

Q. When you said that you knew who made Solo within six months, the name appearing then was Tarax, wasn't it, within the first six months? A. Yes. 20

Q. And that was the name you saw on the boxes? A. Yes.

Q. You didn't see the name Cadbury-Schweppes at all at that stage, did you? A. No. But that was before I was in the supermarket business. That was approximately three years ago.

Q. And how long were you in the supermarket again? A. Three years.

Q. And when you left the supermarket where did you go to work after that? A. I went to Sydney Technical College.

Q. Sydney Tech.? A. Yes, I was a student.

Q. Where did you go after Sydney Tech? A. To Mercantile Mutual Insurance Company. 30

Q. And had you worked anywhere before you worked at the supermarket? A. No, sir.

Q. How long before you went to work at the supermarket was it that you became aware that Solo was a Tarax drink? A. I couldn't answer that.

Q. But you had bought it before then and you knew it as a Tarax drink before you went to work at the supermarket?
A. Yes.

Q. At a stage when you had not seen any boxes or crates?

A. No.

Q. So you had read the name on the can, had you? A. Yes.

Q. That is the only way you could have seen it? A. Yes.

Q. Or seen it on an advertisement? A. Yes.

Q. Could it have been from an advertisement that you saw the name Tarax? A. No.

HIS HONOUR: Q. One thing Mr. Glanville: when you worked in the supermarket were you working full time or as a weekend casual? A. I was working full time for approximately eighteen months and then I was a casual.

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RE-EXAMINATION

MR. PRIESTLEY: Q. Mr. Glanville, when you bought Solo at the time before you were working at the supermarket and you noticed the Tarax name on it, whereabouts did you buy it, can you remember? A. At a milk bar.

Q. You have mentioned it, I think, that your first job was at the supermarket? A. Yes.

Q. The first one after you left school? A. Yes.

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Q. What was your last year of school? A. 1973.

Q. And how long after you left school did you start work at the supermarket? A. Approximately two months.

Q. And how long after you began to work at the supermarket was it that you noticed that Solo was, after received by the supermarket in the cartons, bearing the Cadbury-Schweppes name? A. Approximately six months.

Q. And before you noticed that in the supermarket, that is the Cadbury-Schweppes carton of Solo coming in, did that supermarket stock Solo? A. Not that I can remember because it was only six months after working there that I was put into the drink section of this store.

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Q. That is when you first started to take notice of the drink side of things? A. Yes.

Q. You mentioned the first occasion when you were given Pub Squash instead of Solo was at the - I have forgotten the precise words you used - a little shop right next to the Sydney Technical College? A. Yes.

D. Glanville, re-x

Q. And who frequented that shop? A. Technical students.

Q. And who did they consist of? What age group, what sex, mainly? A. Fifty per cent sex wise - (objected to).

Q. Do you recall the occasion when you asked for Solo at this little shop next to the Sydney Technical College?

A. Recall when?

Q. Do you recall the actual occasion? Were you going to Tech, coming from Tech, was it in between classes? A. Lunch time.

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Q. And who else was there when you asked for Solo and got Pub Squash? (Objected to as irrelevant: rejected).

Q. You were asked some questions also about what was said to be the colour code, I think. In relation to the Schweppes Cola that you were asked questions about and Coca-Cola, were the shades of colour on those two types of can identical?

A. No.

Q. Would you say they were nearly identical? A. No.

Q. Did you find any difficulty in distinguishing between the two colours? A. No.

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Q. And in regard to the various orange drinks sold in cans, can you recall if there were two or three or more brands of those at this time when you were at the supermarket? A. About three brands.

Q. And can you tell me whether the orange colours on those brands were identical? A. Yes.

Q. Which ones were they? A. There were the G.J. Coles colour, they had their own brand, and there was also a brand called Tarino and there was also Fanta.

Q. And in regard to the Solo can and the Pub Squash can, are you able to see any difference between the yellows used on those cans? A. No.

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(Witness retired and excused,)

(Case for plaintiff concluded)

CASE FOR DEFENDANT RESUMED

MARALYN JOHNSON
Sworn and examined:

MR. BANNON: Q. Miss Johnson, is your name Maralyn Johnson?
A. Yes.

Q. You live at Unit 24, number 170 Spit Road, Mosman?
A. Yes.

Q. And you are a market researcher, are you? A. Yes, I am.

Q. With the La porte group? A. Yes.

Q. And they are the manufacturers of industrial chemicals? 10
A. That's right.

Q. And, Miss Johnson, between 1968 and 1973 were you employed at Coca-Cola Bottlers, Sydney, and also Coca-Cola Export Corporation? A. Yes.

Q. And I think you were born in the United States of America?
A. Yes.

Q. And came to Australia? A. Yes.

Q. At Coca-Cola did you hold the position of Market Research Officer? A. That's right.

Q. And did your duties involve statistical analysis regarding market segmentation? A. Yes. 20

Q. Of soft drinks? A. That's right, yes.

Q. By flavour? A. Yes.

Q. Package? A. Yes.

Q. Type? A. Yes.

Q. And outlets? A. Yes.

Q. And did these duties include analyses, not only of products of Coca-Cola, but also of other producers as well?
A. Yes, the total market.

Q. And did you leave the Coca-Cola Corporation in 1973? 30
A. Yes.

Q. To join the La porte Group? A. Yes.

Q. Where your current position is that of market research and advertising officer? A. That's right.

Q. And whilst you were at Coca-Cola did you receive information regarding sales data of various soft drink companies?
A. That's right, yes.

Q. From what sources did you receive that information?

A. Well from the Commonwealth Statistician we received production figures and from Spry-Walker we received package and flavour data.

Q. That is a Chartered Accountants? A. A Chartered Accountants, yes. And from Neilson we received the Small Traders and Food Index.

Q. And from this information did you compile schedules setting out the amount of soft drink consumed and the proportion of market shares enjoyed by each of the flavours? A. Yes.

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Q. And were the major flavour categories that of Cola, Lemonade, Orange and mixers? A. Yes.

Q. When you speak of mixers are you speaking of drinks such as tonic water, dry ginger ale, bitter lemon and soda water? A. That's right, yes.

Q. Was there one other segment which showed considerable growth? A. Yes.

Q. What segment was that? A. Lemon segment.

Q. And in that field did Coca-Cola have a lemon squash product? A. As an untrademark one, yes.

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Q. An untrademark one? A. Yes.

Q. And was that sold as a post mix product? A. Yes.

Q. And you know Mr. Peter Brooks, do you? A. Yes.

Q. Was he then working in the Coca-Cola company? A. Yes.

Q. And did he ask you to furnish statistics regarding the lemon segment? A. Yes.

Q. Can you tell me when that was? A. It would have been about 1970.

Q. Do you know if he left Australia and went to the United States? A. Yes.

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Q. Do you know when that was? A. That would have been about 1970 also.

Q. When he came back from the United States did he have any conversation with you? A. Yes.

Q. And was there any reference to - (objected to).

- Q. I suppose you had a lot of conversations with him, did you, when he came back? A. Yes.
- Q. About various matters? A. Yes.
- Q. You remember any particular conversation in which he discussed anything he saw or heard or found in the United States? A. Yes, we were going to launch a new product.
- Q. Who was going to? A. The bottler at this stage.
- Q. Coca-Cola Bottlers? A. Yes.
- Q. What did he say? I want you to say it, not me. Can you just put it in as close as you can to his words? A. Well, because of the increase of the lemon market we were thinking of doing a lemon squash type product. Instead of just having it in post-mix, we were going to put it in bottles and cans. 10
- Q. And what did he say? A. He wanted to brand name the products. He wanted to call this one "Pub".
- Q. Did he say anything to you about this term "pub"? A. Yes he found it in the States.
- Q. Did you say anything when he said this or was anything else said or done about it? A. No, not really. It just went on the books as another research programme. 20
- Q. He wanted to put out a brand product? A. Yes.
- Q. A lemon squash which he was going to call "pub"? A. Yes.
- Q. What happened about that, can you tell us? A. I left then. I went to the Export Corporation. You know, we became involved in a Leed launching. I wasn't involved in the Bottlers anymore.
- Q. Did you know a Mr. Stewart Lichfield at the Coca-Cola Bottlers? A. Yes.
- Q. A Mr. Steve Tolus? A. Yes. 30
- Q. Can you recall now whether either of those gentlemen might have been present when this conversation took place? A. Yes, and so was Ian.
- Q. You are saying they were present and so was Ian? A. Yes.
- Q. Who was Ian? A. Ian Robertson.
- Q. Was he employed at Coca-Cola Bottlers too? A. That's right, yes.

M. Johnson, x

Q. At that time was the Coca-Cola Bottling company very much involved in launching another product? A. Yes; Leed.

Q. Is that a lemonade? A. Yes.

Q. And what happened to the idea of producing a canned or bottled lemon drink? A. No, we didn't go ahead with it.

Q. And have you any idea of the reasons for that? A. We were too involved in the lemonade launch.

Q. You left the Coca-Cola group in 1973? A. That's right, yes.

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Q. And you have had nothing to do with them since? A. No.

Q. You know Mr. Brooks' company, the Pub Squash Company?
A. Yes.

Q. Had anything to do with them? A. No.

CROSS-EXAMINATION

MR. PRIESTLEY: Q. Miss Johnson, when was it you went to the Export Corporation? A. In 1971.

Q. 1971? A. Yes.

Q. Mr. Brooks' trip to the United States that you recall -
A. Yes.

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Q. - took place before you went to the Export Corporation, did it? A. That's right, yes.

Q. And in regard to the reference to the product that he wanted to call "pub" is there anything in particular that enables you to recollect that conversation and who was there on the occasion when it took place? A. Yes, because it was going to be the first new product the bottler had launched by itself.

Q. What was Mr. Brooks' position in the bottling company at the time when this conversation took place? A. He was marketing manager.

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Q. Were yourself and the three other people that you have mentioned, Mr. Robertson, Mr. Lichfield and Mr. Tolus all persons subordinated to Mr. Brooks in the hierarchy of the Bottler company? A. Yes.

Q. Can you recall approximately when this conversation was in relation to Mr. Brooks' return from the United States?

A. It was the latter part of 1970, because I can remember the project only lasted about three or four months and then I left.

Q. Had the project come to an end before you left to go to the Export Corporation? A. Well then, Ian left after it. Ian Robertson left the Research marketing side of things after I left.

Q. You mean as far as you were concerned? A. Yes.

Q. Did you have any contact with either of the four men after you went across to the Export Corporation? A. Oh, I would see Ian at the Neilson meetings.

Q. At the Neilson meetings? A. Yes. They were once a month. 10

Q. Was it ever mentioned to you by him the idea of marketing lemon squash in a brand name had been discarded? A. Well, they didn't carry on with it. It only lasted a couple of months after I left and we all got involved in the Leed launch because the Export Corporation nominated the Sydney Bottlers the first one to go with the Leed.

Q. You are able to say, or are you, simply nothing ever happened about that particular project within the Coca-Cola organisation after some preliminary research? A. Yes, that's right. 20

Q. When was it that you were first asked to try and recall this conversation which took place in 1970? A. About April or May of last year.

Q. Who was it then who spoke to you about it first?
A. Mr. Duffield.

Q. Before speaking to Mr. Duffield about it, did you speak to any of the others who were present that you can recall such as Mr. Robertson or Mr. Brooks or Mr. Lichfield or Mr. Tolus?
A. No.

Q. Do you recall whereabouts it was that the conversation took place, which room? A. Yes, it was my office at the Bottler. 30

Q. Was it at any sort of regular meeting? A. No. All of us used to get together in my office for lunch. It was just after lunch.

Q. What would you say about your memory as a general rule? A fairly good memory? A. Yes.

Q. Did you have any difficulty in recalling the details of the conversation when you were first asked about it? A. Not a lot, you know, because the reason it sticks in my mind it was the first new product launch that I had ever worked on. That is why it was important to me. 40

M. Johnson, xx

Q. Did it get a file or any official documentary type of status in the bottling corporation? A. Yes, it became new product.

Q. If you were to look for it now or if some one in the organisation was to look for it, how would you go about finding it? A. Probably under Spry-Walker information.

Q. And from your recollection of the system would that file still be or should that file still be there at the Coca-Cola Bottlers? A. I should imagine so, yes.

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Q. Were the particular records that were kept of that particular project records under your control? A. Yes.

Q. And were you able to look at them again before you made your statement to Mr. Duffield? A. No.

Q. Have you had an opportunity of looking at them since? A. No.

Q. And would you agree that the name "pub" was a provisional name? A. Oh, yes.

Q. And the whole project was at a very tentative stage when you last saw it? A. That's right, yes.

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Q. I think you said - correct me if I am wrong that you left the Bottler Corporation in early 1971, is that right? A. Yes.

Q. Before you went to see Mr. Duffield? A. Yes.

Q. And did you go to see him in his office? A. No, I went to Mr. Bannon's office.

Q. And you saw Mr. Duffield in Mr. Bannons' office for the first time? A. Yes.

Q. Who was it who arranged for you to go to Mr. Bannon's room? A. Mr. Duffield's secretary.

Q. And before you heard from her had you heard from anybody else about the possibility of giving evidence or giving a statement in the case? A. No.

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(Witness retired and
excused)

LAZSLO MOJSZA
Sworn and examined:

MR. BANNON: Q. Is your name Lazslo Mojsza? A. That's correct.

Q. Do you live at No. 32 Coorabin Road, Northbridge?
A. That's correct.

Q. Presently you are the Finance Director of the Pub Squash Company Limited? A. That's correct.

Q. That you joined in May, 1974, and I think you hold a degree in economics from the University of Budapest?

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A. That's correct.

Q. Which you obtained in 1954? A. That's correct.

Q. You hold a Master's degree? A. Yes.

Q. For some years were you employed as a regional controller with the Pepsi Cola Company? A. Company of Australia, yes.

Q. Did that company enter into a franchise agreement with a company called Passiona Bottling Company (Sydney) Limited?

A. Yes.

Q. Were you then asked to work at the offices of the Passiona Bottling Company (Sydney) Limited? A. Yes.

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Q. Were you with that company between approximately March, 1971 and late 1972? A. That's correct.

Q. Did you then go to work for General Foods Corporation?

A. That's correct.

Q. Did that company take over the activities of the Passiona Bottling Company in the production of drinks? A. 1974, May.

Q. Did you have at the office of General Foods Corporation some cost projections relating to the Passiona Bottling Company (Sydney) Limited? A. Yes, I have.

Q. When you were working for General Foods Corporation did you meet a Mr. Peter Brooks, the present managing director of the Pub Squash Company? A. No, I didn't.

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Q. When did you first meet him? A. When I was working at Pepsi Cola Company of Australia Limited.

Q. Who introduced you to him there? A. The name by Mr. John Baxter.

Q. Was he the managing director of Pepsi Cola? A. He was the managing director of Pepsi Cola Company of Australia.

Q. Can you tell us when approximately it was that you met Mr. Brooks? A. About April, 1973.

Q. Were you told where Mr. Brooks had worked prior to that time? A. After introduction by Mr. Baxter to me Mr. Peter Brooks, then I learned he was work prior to Coca-Cola Corporation.

Q. How often did you see Mr. Brooks from then on? A. In the first, weekly, fortnightly, once a while always he come up in our office - weekly, I'd say, once a week regular he come up in our office.

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Q. Did he tell you anything about what he intended to do? A. Yes.

Q. How long after you first met him was there any discussion about what he intended to do? A. The first was on the social introduction and generally or regularly talk about the soft drink industry in general. Then I learned his intention that he left Coca-Cola Company and he wants to buy another soft drink company and do it his own manufacturing and distributing soft drink his own.

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Q. Can you tell us approximately when that was? A. In the same month, April.

Q. April, 1973? A. 1973.

Q. What else did he say to you at that time, can you remember anything else he said to you? A. The first visit nothing else, no.

Q. Then did you see him again after that? A. Say another week or so passed by and Mr. Baxter brought Mr. Brooks in my office and Mr. Baxter said "Mr. Brooks has some question to ask you if you can help him". Then I asked "What about?" and then Mr. Brooks outlined his future plan to take over the Passiona Bottling Company, which was a subsidiary for the Cottee's General Food and he said to me "I learned you worked with Cottee's the time before you work at Pepsi and I am wondering if you can help me to work out certain details regarding volume size for the future and from that volume size and cash flow forecast? which he had to hand over to Cottee's at certain time or due course to prove how he try to change operation from that level of operation at the time.

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Q. What did you say to that? A. "By all means, of course I help you".

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Q. Was there any discussion at that stage about some documents? A. What documents, I don't know.

Q. Did you at any stage show some documents to Mr. Brooks?

A. Then the conversation went further and we made another appointment for next time. Then we said "All right, this time we sit down and I want to hear what is in your mind and what you want I put on paper for you to help you". Then the next occasion we sit down and he was very interested what was the Cottee's size at present and I had a file from Cottee's in my possession regarding the 1973/74 fiscal year budget which I prepared fully, which one part was the content - was the volume size. Then when Mr. Brooks approach me to help him to prepare a budget finished with the cash flow I then use that file for reference. Now, then, when we estimate what the present size -

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Q. What did you say? A. The next was when we had a look - when I pull the file out and we were estimate what the present size by flavour and size Cottee's intend to do for the 1973/1974 fiscal year. Then Mr. Brooks step by step outlined his plan for the future, which consists certain new project in the market by new flavour, new size and when we talk I make a few notes for myself, being the budget calculation, so I make certain notes not to forget what he talk about.

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Q. What did you make those notes on? A. On original paper, original working paper - back of original work paper which was the Cottee's 1973/1974 fiscal production and sales budget.

Q. (Exhibit 20 shown to witness) Is that the document on which you made the notes? A. That is part of a big working file, a large working file, one page out of this, yes, I recognise it.

Q. Are they the pencilled notes on the reverse of the document? A. Is my handwriting.

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Q. And there are some pencil notes on the front in the left-hand margin - ? A. But not only on that page, but many other page too.

Q. But on the front in the lefthand margin I am talking about now, you see some pencilled notes? A. Yes, everytime is not Pub Squash.

Q. Whose handwriting? A. Mine.

Q. When were those pencil notes on the front of the document made? A. I say the same month, April sometime.

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Q. What about the notes on the reverse side? A. The same day.

Q. The same time? A. Same time, same day.

Q. You see on the note on the reverse side of the document there are bracketed together Nos. 5 Pub Squash, 6 C-Time with juice content, No. 7 7-Time? A. Hint of lime.

Q. No. 8 Strike Cola balancing Pepsi, No. 9 - what's that one? Q. Rate.

Q. No. 10 Citra? A. Yes.

Q. And they are bracketed together as being in the low calory range? A. That's correct.

Q. Then 11 mixer range "Ambassador Royal? at least four flavours, is it? A. That's correct. 10

Q. Nos. 5 to 11 are bracketed together and what it says outside the bracket is "All new flavour disclose for Cottee's only C-Time 7-Time". What does that mean? A. Mr. Brooks said to me he does not want to tell everything Cottee's what he try to do because that is his own secret, but he was wishing to bring everything what he said to me in a volume budget and we agreed that when we had the budget we will disclose Cottee's just new flavour and the rest he wants to keep it for himself for the time being. 20

Q. Disclose it to whom? A. Yes.

Q. When you say you disclosed -? A. Not to disclose to Cottee's that budget details.

Q. When you say to Cottee's, I think Cottee's then, in fact, belonged to General Foods? A. Cottees' General Food, that was official name for the company.

Q. That is an American Corporation? A. Yes.

Q. Then on the front of the document where you have written in accounts Passiona, Lemonade and Tango you have written in the words "Add C-Time, 7-Time, Pub Squash"? A. Volume budget represents many different sizes in the flavour by size repeated there and that was Mr. Peter Brooks' wish. He want producing that new flavour in a 7-ounce, 10-ounce size, but in the 10-ounce one where possible size - and you might find in the further budget reference to each size wherever he wants to introduce that new flavour, that is retail, for a help when I prepare the budget for him not to forget those flavours. 30

Q. Against each of these products on the front of the document under each month there is a figure written, is there not? A. The first column represents falling sales curve, which experiment figure we know over year the sales, there are so many sales in the market and we come to the conclusion certain 40

months for a total budget of the percentage you can sell for certain months. The soft drink is a very seasonal product on the market, so you can't budget a full year budget, say the total amount divided by only twelve. You apply certain percentage summer time is higher percent, winter time is lower percent.

Q. Under each month you have a different figure, is that right? A. Yes, but in the first column you have the total first represent 1,000 cases, 251 and from there represents 100%, from there onwards you find in the first line a certain number, this represents percentages per sales curve there for 250,000 cases 7.6 for sale April, that is why certain number was written there by calculation. 10

Q. These are in thousands of cases, is that right?
A. That's correct.

Q. And the percentage for each month is the projected percentage of sales in each month? A. Of the total, yes.

Q. Did Mr. Brooks at this time or before or after it say anything to you about joining this company? A. When the first - finally, when I made the volume products sales we met again and Mr. Brooks asked me how I felt with Pepsi Cola. I say "fine", but he said this company is winding-up or scaling down operation and he said "What will happen with you" I said "Well, I am working for Pepsi Cola and Pepsi Cola will look after me, but one thing I don't like leave Australia because in the Pepsi Cola Company they could not provide me a proper job here so they had to transfer me some other countries and I don't want to wish to leave the country." I expressed my opinion to Mr. Brooks and he said "How about I give you a job?" I said that would be very great. 20 30

Q. So from then on did you see more of Mr. Brooks? A. Yes, we were - when I step by step reach a certain stage in his projection task he give it to me. I always meet him and discuss with him the details until the end, the document was completed.

Q. Later on did you prepare a further budget estimate?
A. Yes, I did.

Q. (Exhibit 25 shown to witness) Is the document in front of you part of that further estimate? A. Yes, this is only one page of that estimate, yes. 40

Q. Could you tell me when it was that you prepared that?
A. I say during June, 1973.

Q. This page, what does it deal with? A. That deal Mr. Brooks sales estimate of bottled product.

Q. The other pages of the estimate which you don't have in front of you, what do they deal with? A. That is one flavour for another size, another type of package, say one-way package, then the canned product and Post-Mix product and all this estimate turn into income supplement and the cost of sales and we went through all the letter to prove to the Cottee's General Food the profitability of Mr. Peter Brooks' idea.

Q. Of the proposed company? A. Yes.

Q. When you talk about one-way packages, does that refer to things such as no deposit bottles? A. That's right. 10

Q. No return bottles? A. Yes.

Q. When did you last see the whole document together, the whole budget headed X.Y.Z. Company Limited? A. When I come to the conclusion that the - we call them bottom line of income statement I met Mr. Brooks in my office and handed them to him, the whole things for checking or typing, that was his problem.

Q. Can you remember when that was? A. The same month, in June - round end of June or very early July. 20

Q. This sheet of the document, when did you see this sheet again (Exhibit 25)? A. That document, I pulled out that document because when I made sales estimate for Mr. Brooks and I work out through his expenses, income and expense budget, I come to the interesting conclusion that knowing Cottee's General Food or Passiona Bottling Company what type of glass stock they had it was no possibility Mr. Brooks to introduce this new product line on the market without buying a proper returnable bottle for that product and when I come to the conclusion I say this to Mr. Brooks, he said "What's happening then?" I said "Well, that cost at least 100,000 bottle, new containers you have to buy" and he said "Can you take a document round and try to get the money from Pepsi Cola?" I said "By all means" so that is why the document was lifted out. 30

Q. When you say that document was lifted out -? A. That part.

Q. That page? A. That page, a sheet of paper.

Q. From the total document? A. Yes, and I kept that one to make another submission to Pepsi Cola to provide the necessary money for buying the new type of containers what Mr. Brooks needed for his new product. 40

Q. Did Pepsi Cola provide that money, to your knowledge?
A. Yes.

Q. I think your company granted them a debenture? A. That's right.

Q. You handled the details of that? A. Which the company just this month we paid the last instalment.

Q. Do you know what happened to the rest of the budget apart from the sheet in front of you? A. Yes, I handed it back to Mr. Brooks.

Q. Have you seen it since then? A. No.

Q. I now want to bring you to another document, Exhibit 24A and B. (Shown) Have you seen that document before, firstly, the letter and, secondly, Exhibit 24B? A. Yes, I seen all the pages before. 10

Q. When did you first see them? A. No. 1 page I seen after the research grant being granted and we had the notification.

Q. That is 24A? And the other three pages did you have anything to do with those pages? A. Yes.

Q. What did you have to do with those pages? A. When we find out that such law existed -

Q. Which law are you speaking about? A. The Research Developments Grants. 20

Q. Grants from the Commonwealth Government? A. From the Commonwealth Government - then we apply from them to claim such grant because we were under impression the development of new drinks on the market come under the favourable decision by the Government, that they grant such money for us, what we spend, and all documentation for that submission was prepared or collected by me when the gentleman from Canberra come here and bring back our submission to check every item, the correctness of every item what we claim. 30

Q. Exhibit 24B is referred to in the discovery document, item 130, as being various extracts from the file relating to the grant by the Australian Industrial Research and Development Grants Board. Can you remember whether there were any other sheets incorporated -? A. In this one?

Q. In the submission to the Australian Industrial Research and Development Grants Board? A. That was a complete format, about eight or ten ...

Q. There were more pages? A. More pages, yes.

Q. And you say this was submitted to this Commonwealth Board? A. That's right. 40

L. Mojsza, x

Q. Do you know when you prepared that submission for the Board? A. I say early winter, 1975, April or May, I don't know. Maybe was a little bit later.

Q. You see that on the last sheet of Exhibit 24B there is a reference "Product Development Runs 14/2/75 Pub Squash". Do you see that? A. Yes, I had to document that for the gentleman -

Q. That is what I want to ask you. Was that supported by documentation? A. It was, yes.

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Q. To the gentleman from Canberra? A. It was.

Q. Was that documentation produced to the Canberra man? A. Yes.

Q. Did it show in the missing pages of the extracts when money had been spent on wages? A. Yes (Objected to: withdrawn).

Q. Are the missing pages of that document now in your possession, the other eight pages or five pages? Do you know where they are? A. Must be in old file. Original in Canberra and the copy is somewhere in our file.

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Q. You have not got it here in court? A. I am not sure, I don't know.

Q. You say this man from Canberra came and inspected those? A. Yes, he spent three days in our plant and checked everything thoroughly, all the relevant work paper, diary, log book, wages paid, group certificate, everything he been check.

Q. (Approached) This material I now show you, is that the whole of the submission to the Commonwealth Grants Board? A. That is only working papers for it.

Q. This document is the whole of it? A. Yes.

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Q. And the other pages which -? A. Is missing from here is giving further details.

Q. And the other materials was produced to this Government Inspector in support of the application, this other material here? A. Yes, he was asking before he even have a look at it, yes.

Q. Does this further material, the working papers, relate to other products apart from Pub Squash? A. Yes.

Q. Does it contain confidential information of your company relating to other products apart from Pub Squash? A. It is.

(Submission to Commonwealth Grants Board tendered.)

Q. Does that also contain some information about other products other than Pub Squash? A. Yes.

(Working papers referred to by witness tendered on the basis that inspection reserved to counsel and instructing solicitors: tender deferred.)

Q. Did you occasionally attend informal discussions after work in 1974? A. Formal or informal? 10

Q. Informal? A. Yes.

Q. Do you recall any discussion about advertising of Solo Lemon Squash? A. No.

Q. During 1974? A. No, not at that time, no. This time I was working about seventy eighty hours per week to organise and form the company.

Q. When did you first hear of the product Solo? A. Some-time once on television I see a man drinking Solo and all dribbling down his face. 20

Q. Can you remember when that was? A. No, I am very much against advertising on the television any products.

Q. Can you remember whether it was in 1974 or 1975? A. No, I can't put date on it, no.

Q. Did you ever mention it to anybody at these informal discussions yourself? A. Quite possible, a joke, you know, what I saw on the television, the soft drink dribbling down the face of the man, that's all.

Q. Have you got any qualifications yourself in advertising or on the marketing side of the company? A. No, I have not. 30

Q. Have you ever had anything to do with advertising or marketing of products? A. Never.

Q. After the company operations were set up in about May, 1974, - do you know Mr. Newell, Mr. John Newell? A. Yes.

Q. Do you know whether or not he was given any instructions regarding the preparation of a lemon type drink? A. At that time when we took over the Cottee's operation the first thing we learned from the market that the Cottee's soft drink on the market is rejected by the public because of low quality

controls or something was always wrong with that drink and I remember Mr. Brooks tried give instructions to Mr. John Newell to have a look at the quality of the existing drinks and researching new drinks for presentation for the near future.

Q. In your side, on the accounting side of the company, were wages paid to Mr. Newell and Mr. Allman regarding their work on the production or do you know from your records they were paid wages? A. That's right.

Q. Do you know when the product Pub Squash was intended to be launched on the market originally? A. No, that stage we don't because that stage 1974 was only a research stage so we don't know. 10

Q. Do you know of anything that delayed its launching on the market? A. I remember one stage we were ready to launch the market but we have to stop launching because we couldn't get enough lemon juice and that was some electricity strike for month electricity strike, which resulted we couldn't get can from the cans supplier, we couldn't get many other things which we need, cartons or all sorts of things which have to be ready before can launch a product. 20

Q. Have you ever heard of any complaints of there being confusion between the products of the Pub Squash Company and the lemon drink Solo? (Objected to - not pressed).

Q. In April of 1976 did you become a director of the Pub Squash Company? A. That's correct, but before that the company name was not Pub Squash Company, company names was Passiona Marketers.

(Supplementary list of documents handed up by Mr. Priestley.) 30

(Witness stood down.)

(Further hearing adjourned till 10 a.m. Tuesday, 7th February, 1978.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) No. 1682 of 1977.
)
EQUITY DIVISION)

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

THE PUB SQUASH COMPANY PTY. LIMITED

ELEVENTH DAY: TUESDAY, 7TH FEBRUARY, 1978

(Corrections to transcript:

*Page 217 - third last line substitute word "delay" 10
for word "demand".

*Page 218 - fifth last question, second last line,
interpolate the word "might" between "we" and "use".

*Page 231 - third question substitute the word "with"
for word "to".

Sixth last question third line substitute word
"in" for word "under".

Last question third line substitute word "in"
for word "than".

**Page 248A - Answer to eighth question substitute 20
"Leed" instead of "lead".

Answer to thirteenth question substitute "my
office" for "may officer".

**Page 251 - eleventh question, second line, substitute
word "for" for the word "with".

**Page 253 - third question, sixth line substitute word
"Stock" for word "stop".

***Page 255 - sixth question, answer, substitute for the
words "seven, eight" the words, "seventy, eighty".

***Page 240 - answer to tenth last question change 30
"believe" to "believed.)

* See now pages 252, 253, and 269 respectively.

** See now pages 292, 297, and 299 respectively.

*** See now pages 302 and 279 respectively.

* (Photostat of the complete submission to the Commonwealth Grants Board identified by Mr. Mojsza on p. 255, admitted without objection and added to Exhibit 24 as Exhibit 24C. Working papers identified by Mr. Mojsza likewise on p. 255 also admitted without objection as Exhibit 24D.)

HIS HONOUR: I will direct that in relation Exhibits 24C and D disclosure be restricted to counsel and instructing solicitors on each side subject to any application that might be made at a later date.

LAZSLO MOJSZA
On former oath:

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MR. BANNON: Q. If I could just bring you back to what you said when you commenced to give evidence, you were asked the **question on p. 249 regarding working at the office of Passiona Bottling Company (Sydney) Limited and you said, "Yes."

Q. Were you with that company between approximately March 1971 and late 1972? A. That's correct.

Q. Did you then go to work for General Foods Corporation? A. That's correct.

Q. Did General Foods Corporation conduct a company called Passiona Bottling Company or a division? A. As a soft drink division, yes.

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Q. And they produced the Cottees range of drinks? A. Yes.

Q. Then the next question there is "Did that company take over the activities of the Passiona Bottling Company in the production of drinks?" Your answer is "1974, May." Did you mean by that answer to say that the company which is now called the Pub Squash Company -? A. Then called Passiona Marketers Pty. Limited.

Q. Took over the activities of the -? A. Cottees General Foods, Passiona Bottling Company.

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Q. Division of General Foods in May 1974? A. That's right.

HIS HONOUR: As I read the question a little earlier, Mr. Mojsza went from Passiona Bottlers to General Foods at the end of '72 and it does not seem to fit with the rest of the evidence. I have the impression that perhaps he went to Pepsi.

MR. BANNON: Q. Is that right? A. From Pepsi Cola Metropolitan Bottling Company went to Cottees General Foods, Passiona Bottling Company and from there I left back to Pepsi Cola Company of Australia.

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* See now page 302

** See now page 294.

HIS HONOUR: Q. You were at Pepsi when Mr. Baxter introduced you to Mr. Brooks in April 1973? A. April 1973.

CROSS-EXAMINATION

MR. PRIESTLEY: Q. If I may just get a bit more detail about some of the things you were just being asked about, when was it that you went to work for Pepsi Cola Company? A. March 1968, that was Pepsi Cola Metropolitan Bottling Company.

Q. Are you able to say that that company was a subsidiary of -? A. Of Pepsi Cola Company of Australia Limited. 10

Q. Where did you work before then? A. Before then I worked - just before that I worked with a chemical company.

Q. Then did you work continuously with the Pepsi Cola Bottling Company? A. Metropolitan Bottling Company.

Q. The Pepsi Cola Metropolitan Bottling Company until you went off to General Foods, Cottees? A. The Pepsi Cola Metropolitan Bottling operation was ceased in 1971, October when the whole operation was taken over by Cottees General Foods Limited and my contract, with the franchise contract I was transferred to General Foods Limited to look after the Pepsi Cola Production. 20

Q. When you say the Pepsi Cola Metropolitan Bottling company -? A. Operation was ceased.

Q. Do you mean that the General Foods Group bought all the shares in that company? A. It wasn't shares because that company was formed in the United States, - was registered holding company in Australia, wasn't any shares, only the franchise right was bought out by General Foods.

Q. Upon that right being bought out the Pepsi Cola Metropolitan Bottling Company ceased operation? A. '71, October, about. 30

Q. When you say you went over on a contract to the General Foods Company, was that the contract that you entered into with the General Foods Company? A. No, I agreed - the franchise agreement when was drawn up between the two companies I agreed to transfer.

Q. Upon your being transferred you became an employee of the General Foods Company? A. That is correct.

Q. And you had at that stage no connection by way of employment with any Pepsi Cola Company? A. Not during that time, but the agreement said whenever Pepsi Cola Australia need my work they at any time can pull me back. 40

Q. So that the General Foods people had agreed to release you back to the Pepsi Cola Organisation if they wanted?

A. On Pepsi request, yes.

Q. And that happened, did it? A. That happened about fourteen, 15 months later.

Q. Can you recall the month when you began to work again for the Pepsi Cola organisation? A. About November 1972.

Q. When you went back to the Pepsi Cola organisation you went back to the company called Pepsi Cola of Australia?

A. Pepsi Cola Company of Australia Limited.

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Q. At that point did you take up full employment with that company? A. That is correct. Was agreement between General Food then managing director and the then managing director of Pepsi Cola Co. Ltd. Australia when I leaving from Cottees, because nobody fill my job in Cottees, the Passiona Bottling Company and they got the name, that was soft drink branch for the General Foods operation, whenever they need my help back for management accounting I have to give them some help, help them out in certain aspect of accounting function.

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Q. Did that happen at all? A. Yes.

Q. You said you went to Pepsi Cola Company of Australia in November 1972, did you? A. '72, November.

Q. When did you leave that company in preparation for taking up an employment with Mr. Brooks' company? A. I left the company 13th May, 1974.

Q. '74? A. '74.

Q. Between November of 1972 and May of 1974 did you do any accounting work for General Foods? A. No, just only advisory capacity.

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Q. On how many occasions were you asked to do any advisory work? A. I can't give count like that. A telephone call come, they ask me some questions, then they call me out when I have free time to show some certain things. A phone call come and I give advice. Phone call come some time they call me out in my spare time to help them. You know, every day work and the base that I left there because they were wishing to continue that type of system I introduced.

Q. When you first spoke to Mr. Brooks in about April of 1973 you then had in your possession certain documents that you had compiled while you were working for General Foods, did you?

A. The whole 1973/74 fiscal budget was in my hand in working paper forms.

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Q. Had that been taken away from General Foods premises with their permission? A. More or less nobody had to ask any permission. That was my work, that was my responsibility work and the company was organised that we had no general manager, every department was connected directly to head office operation and that was open knowledge when they asked me to help them, that I have to take certain information with me to be able to help them from time to time.

Q. Would it be fair to say that you did not ask anybody's permission but you assumed that you had the right to take it away? A. I don't have to ask because I was management accountant and the agreement between the two company was formed such - I had to help them anyway, so without information I was not able to help so I took that document for that very reason. 10

Q. Is this it, that you had the document in your possession with a view to giving assistance to General Foods as and when they might ask for it? A. That is correct.

Q. And you said this was the budget for fiscal 73/74? A. That is correct. 20

Q. What was the fiscal year for General Foods Cottees? A. 1st April to 30th March.

Q. 1st April in which year would be the first -? A. Every year.

Q. Just a moment. 1st April in which year is the April commencing General Foods Cottees fiscal year 73/74? A. 1st April, 1973.

Q. You are quite clear, are you, that the budget forecast that you had in your possession from General Foods was the 73/74 fiscal year and not the 74/75 fiscal year? A. No. 30

Q. You are quite clear about that? A. Quite clear.

Q. You had prepared these papers some time before November 1972, had you not? A. Yes, had to because the head office have to approve before the fiscal year start.

Q. Had you in the course of your duties with General Foods in making budget forecasts ever gone more than one year ahead in the kind of forecast that was included in this particular set of documents? A. No.

Q. Just look at Exhibit 20 again? (Shown) I think you said yesterday (and correct me if I am wrong) that that was the top sheet of a bundle of documents which altogether comprised the budget forecast? A. Yes, I am very sure of that because 40

start the lower size of product so that must be the first page.

Q. Is that your handwriting at the top, "Plan 1974"?
A. Yes.

Q. What is your understanding of where the rest of that document, of which that is the first sheet, now is? A. Please, I couldn't catch you, what you ask?

Q. That sheet you have is the first of a number of sheets which at one time were all together? A. That is the first page of the budget, yes. 10

Q. Where is the rest of that budget now? A. It is here in the court.

(Abovementioned budget called for: not produced.)

(Short adjournment, in order that abovementioned documents could be produced.)

(Budget produced.)

Q. (Exhibit 20 shown to witness.) In the top of the middle of that document before the figures "1974", there is a mark which I think represents an F, is that correct? A. Correct. 20

Q. Does the F stand for fiscal? A. Fiscal.

Q. So the document is talking about fiscal 1974? A. Fiscal 1974.

Q. In the General Foods practice to which months of which years did fiscal 1974 apply? A. From April 1973 to March 1974, that is a taxation year for them.

Q. Although only three of the months were actually in the calendar year 1974, the 12 months commencing with April 1973 were referred to as fiscal 1974, is that correct? A. Correct.

Q. (Approached) Would you just look at that bundle. Are you able to say that the documents now in front of you, which commence with a document numbered at the top righthand side 2, and run through to a document numbered on the top righthand side 5 and thereafter a series of documents which appear to be unnumbered, comprise the whole bundle of the sales volume forecasts that you have referred to earlier? A. That is correct. 30

Q. The whole bundle that you have with you in your office or in your possession at some stage when you first showed them to Mr. Brooks? A. That is correct.

(Bundle recently identified by Mr. Mojsza m.f.i. 15.) 40

Q. When you first produced that bundle in Mr. Brooks' presence and discussed various things with him, what was the primary purpose of getting out that particular bundle of documents and getting certain information out of it? A. When Mr. Brooks disclosed to me what requests he get from Cottees General Foods, the name of the gentleman was the managing director Mr. Lazzley to produce to him an income statement where he can prove that the loss situation what occurred presently at Cottees he can turn that into a positive figure. 10

Q. Was he aware that you had this bundle of documents at your disposal at that stage? A. No, I want to bring that document to have a look at it to Mr. Brooks.

Q. Did he take it away to look at it? A. No, this happened in my office all the time.

Q. When you first showed him this document did he then immediately tell you in any detail of his plans for what he would do if he organised a company to take over the Cottees company? A. Not in the first day, no - that was after following conversation with him when we decided I help him to make a full budget for him for that purpose, forecast for him. 20

Q. Did you, in fact, afterwards make a full budget for him? A. I did.

Q. Was that a full budget forecast in something the same form as the document that has just been marked for identification? A. Similar - not exactly the same working paper, but the principle involved was identical.

Q. When did you prepare that for him, do you recall? A. Say we start middle or end of May and finish at about June.

Q. I suppose that document is still available, is it? A. One page out of it, which was shown me yesterday, drawn my attention here, the rest was hand over to Mr. Brooks for his own purpose. 30

Q. (Witness shown Exhibit 25) That is one sheet out of the full budget that you prepared for Mr. Brooks? A. Yes.

Q. Was that to show to Cottees, that full budget? A. Not by me.

Q. But was your understanding that it would be shown to Cottees as part of Mr. Brooks' negotiation? A. The typed version out of it. 40

Q. So the first version was a completely handwritten version? A. Handwritten draft.

Q. Are you able to fix the date when that draft was prepared by reference to any information in the budget itself?

A. I can't understand the question.

Q. How is it that you are able to recall that it was complete around about June of 1973? A. May and finished June.

Q. You said a moment ago you did it in May and completed it in June? A. That is right.

Q. How is it that you recall you completed it in June?

A. That was a time when one day Mr. Brooks called me over to Cottees General Foods because our meeting he recalled certain things that Cottees General Foods by the name Mr. Lazzley allowed him to see certain confidential documents from Cottees General Foods regarding the soft drink division and he called me over at the time to refer certain information what I put in that document and that time was Mr. Lazzley in front of me, he said - and hand over further what is Cottees document to Mr. Brooks, if necessary, for reference for future work by him. That was about June, that is why I remember.

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Q. Are you able to say whether the draft budget itself would show indications on it of when it was completed? Did it have a date, for example? A. I can't recollect, no.

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Q. Your recollection of the last occasion you saw the handwritten budget, apart from the sheet that is before you, is an occasion when it was in Mr. Brooks' hands? A. That was the last time I see it, yes.

Q. When was that? A. About the same time, in June 1973.

Q. Had it been typed at that stage? A. When I hand over to him, no.

Q. When you handed it over to him you handed over the whole of it, including the sheet that is now Exhibit 25, did you?

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A. No, that was lifted off and, from my recollection, he made a photo copy to replace that front page for him because we would need this document later on for his own purpose.

Q. What was that? A. The purpose which was to find him a financial possibility to buy certain returnable containers.

Q. You yourself, when you began to work for Passiona Marketers, were the financial man, the financial executive in the company, weren't you? A. When I was working with Pepsi Cola Company of Australia I was regional controller, that was my title.

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Q. When you started with Passiona Marketers in May of 1974?

A. Yes, my title was a company controller.

Q. What were your particular duties as company controller?

A. Admin and finance organisation.

Q. And then and leading up to then did you take any part in Mr. Brooks' negotiations for finance from various sources?

A. Yes.

Q. Did you see the typed schedule of which Exhibit 25 is a page from the handwritten version at any time up to and including May of 1974? A. That typed version is not corresponding with the financial part of it, that was hand over to the Cottees General Food Limited then, it is not corresponding to information together.

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Q. You said that the sheet which is Exhibit 25 was one which Mr. Brooks needed a copy of for the purpose of seeking money in regard to bottling plant, I think you said? A. That is not quite correct because I was needed - I was suggested to Mr. Brooks that what he had said in that forecast, I already told him then he will need financial help to fulfil his future plan to introduce this new product on the market. Then the question ultimately arrived how we get the money for that and working for Pepsi Cola Company of Australia as regional controller it was suggested to turn request to Pepsi Cola Company of Australia and make a submission for loan from Pepsi Cola Company of Australia and he was agreed.

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Q. It was for that purpose that either the original or a copy of this sheet, Exhibit 25, was thought to be helpful by Mr. Brooks? A. That is right and that is why the document was keep safe, with the file, the rest of the file.

Q. Pepsi Cola Company of Australia did, in fact, lend money to Passiona Marketers? A. After the company was formed, Passiona Marketers Company was formed, the loan took place, yes.

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Q. Are you able to say when it took place? A. Around between Christmas and New Year 1974.

Q. Did you see any security documents in relation to it?

A. I can't get you, what that means, security documents.

Q. You are aware, are you not, that money lent between companies is often made the subject of written agreements?

A. Correct.

Q. Was there any written agreement relating to this loan from Pepsi Cola of Australia to Passiona Marketers? A. When the principal decision and agreement come from Pepsi Cola International New York, later a document was drawn up between the two companies related to this transaction.

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HIS HONOUR: Q. I think you told Mr. Bannon yesterday there was an equitable mortgage? A. That is right, by way of guarantee Pepsi Cola International guaranteed by letter of guarantee and the transaction took place here in Australia.

MR. PRIESTLEY: Q. Just in case there is any ambiguity about 1974 in that context, your recollection is that the money was lent some time in December 1974? A. The principal decision come to lend the money for Passiona Marketers Pty. Limited.

Q. The company had commenced operations in May of 1974?

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A. That is correct.

Q. So it was some seven or eight months after commencement of the operations that the agreement in principle was made by Pepsi Cola Company of Australia to lend the money, is that so?

A. Yes.

Q. What documents were shown to that company in aid of the application for a loan so far as you know in addition to the sheet before, which is Exhibit 25? A. I believe certain sales forecast was needed by Pepsi Cola to support the company request.

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Q. The sales forecast is a document that you would have had a hand in preparing, wouldn't you? A. No, that document when I left Pepsi Cola Company of Australia all the documentation left at Pepsi office.

Q. You left it behind? A. Yes. Now when I joined Passiona Marketers Pty. Limited that request is done in conjunction with Pepsi Cola to go to obtain the loan from them and that document was entirely different again using only the original document details to do.

Q. Prior to the time that you left Pepsi Cola in May of 1974 you were aware of what documents had to that stage been presented to Pepsi Cola by Mr. Brooks in support of his negotiations for a loan, is that correct? A. No, while the company wasn't officially formed, was not official request to Pepsi Cola to obtain any loan from them because the company was not existed. We are talking about forecast and budgeting for the future and the next step always take the course of life and when the next step come we do that in the proper manner.

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Q. I just want to be clear about this Exhibit 25 that is before you. Your understanding is that that came into existence about the end of June 1973? A. Three.

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Q. And that Mr. Brooks was proposing to use it in support of an application he intended to make to Pepsi Cola Company of Australia for a loan? A. That is correct.

Q. And the loan was to be made to the new company which he was hoping to form? A. That is correct.

Q. That was the idea at that stage? A. That is correct.

Q. You know, of course, that the company did not actually come into operation until May of the following year? A. From 1973 April, May, June, always every month was hope that new company take - start operation, say next week, next week, next week and negotiation was - the deal was just one long - long though in final decision and the decision was quickly made in May 1974, early, that Cottees General Food agreed to the changeover, the operation. 10

Q. But so far as approaching Pepsi Cola for a loan was concerned, can you recall whether Mr. Brooks made any approaches prior to the commencement in business of the company Passionate Marketers in May 1974? A. Not officially, no.

Q. Or unofficially? A. Unofficially just we talk about it, we will need the loan as soon as the company start operation.

Q. Unofficially you and he were talking about it? A. Yes.

Q. But are you aware of his having approached any executive in Pepsi Cola, apart from yourself, before May of 1974? A. I have no recollection. 20

Q. In this connection you said yesterday in answer to a question from Mr. Bannon that Mr. Brooks said to you at some stage, "Can you take a document round and try to get the money from Pepsi Cola. I said by all means, so that is why the document was lifted out." A. That is correct.

Q. That was Exhibit 25? A. That is still correct.

Q. Did you yourself make any approach to Pepsi Cola on behalf of Mr. Brooks? A. I was going to at the moment the company formed, but at that stage the company didn't form so I had to wait until the company formed so waiting every day the news, the new company formed and straight away put in process whatever the principally agreed. 30

Q. So that document Exhibit 25 was in your hands for quite a long time? A. Yes.

Q. And you were expecting -? A. Until such time it come to the court then was in my hand even today.

Q. In 1973, after the documents had come into existence you were waiting for the right time to come when you could use the document and approach Pepsi Cola for a loan to Mr. Brooks' new company? A. I don't know what you mean by the right time. 40

Q. You say you were waiting day to day and month to month for the new company to commence? A. Yes.

Q. You were waiting until either it did commence or you were certain it was going to commence before approaching the Pepsi Cola people in connection with the loan, is that correct?
A. That is right.

Q. And you had the document there awaiting the time when you would make the approach to Pepsi Cola? A. That is correct.

Q. Were you eventually the person who first spoke to Pepsi Cola on behalf of Mr. Brooks' company concerning the loan? 10
A. No, Mr. Brooks, he was.

Q. Do you know when it was he first raised the matter with Pepsi Cola? A. Very soon after we start operation as Passiona Marketers.

Q. So it would be soon after May of 1974? A. Yes.

Q. And through that period 1973 up to then in 1974, you had the document Exhibit 25 in your papers? A. my file, yes.

Q. And during that period you had frequent discussions with Mr. Brooks, didn't you? A. What period? 20

Q. From the time in 1973 when he first asked you whether you would become the financial manager for his new company? Until the time when you actually took up employment with Passiona Marketers? A. We have occasional meeting and discussion, yes.

Q. From June of 1973 through to May of 1974 you did quite a lot of preparatory work in connection with the establishment of the new company didn't you? A. Yes, I helped, yes.

Q. You were looking forward to going to this new job with the new company? A. Not at this stage, no. 30

Q. When I say looking forward, you were anticipating, you knew that if the company did come into existence you would probably go and work for it? A. But that was in question, always if the company, if.

Q. But the alternatives for you were, in all probability, either having to go to some other country to keep working for Pepsi Cola or secure this employment with Mr. Brooks' new company? A. That is correct.

Q. And you were hoping that it would be the latter, you wanted to stay in Australia if you could? A. Latter was more attractive to me, to stay in Australia. 40

Q. So you were doing whatever you could to assist Mr. Brooks to get his new company started? A. Yes.

Q. All I am suggesting to you is that from June of 1973 through to May 1974 you were frequently in touch with Mr. Brooks and frequently discussing with him matters relevant to the commencement of the new company? A. Can you qualify what is actually meant, frequently.

Q. I was going to ask you whether you could remember how often you were seeing him and talking to him during that period from the end of June 1973 to May 1974? A. Once or twice a month, once the next month, twice another month. 10

Q. Mr. Brooks generally would call into your office, would that be right? A. That is right.

Q. Then when he was there you would discuss whatever was currently concerning him, concerning the commencement of the new company? A. No, I wouldn't do it this way, the concern was rather because working for Pepsi Cola I been regional controller for Pepsi Cola, Pepsi Cola aim was that whether Cottees General Food, who was holding franchise - he was franchiser for Pepsi Cola - or the new company we form, we not suffering at all, this had not reaching any disadvantage because of their company structure change. Our aim it was to provide every possible help, whether for Passiona Bottling Company or Mr. Brooks to continue operation to be able to sell Pepsi Cola in Australia, that was our aim then, not the job, not what Mr. Brooks proposed to me or whatever, but that only because we looked at it from the Pepsi Cola point of view what take place at the company where our product was the franchise product. 20 30

Q. Switching back to Exhibit 20 and the fiscal '74 budget forecast for Cottees that we have been looking at? A. Yes.

Q. Are you aware whether Mr. Brooks made any use of that in his negotiations with General Foods Cottees or Cottees General Foods during 1973? A. That information we take out of that documentation, it was helpful to him to get better offer to Cottees for the deal to take over, yes, that was the whole purpose.

Q. The purpose was to give him a clear idea of what was naturally happening in the Cottees company? A. Yes. 40

Q. To enable him to assess what would be prudent negotiation to make with Cottees to acquire whatever assets he was going to acquire? A. That is right.

Q. If I follow you, is it correct that you say that General

Foods Cottees were aware that Mr. Brooks had access to this document? A. Yes.

Q. The budget forecast? A. Yes. Can I make a remark here? At that time Cottees General Foods was very anxious to get rid of the soft drink section and, therefore, all the management Cottees General Foods, higher management, was ready to give every information to Mr. Brooks to find out what is going in that company to realistically assess what is going on there, to be able to make a proposition which is acceptable by New York General Food so that mutual help was everywhere, Mr. Brook get. He had every help from everywhere from General Food, from Pepsi, whoever he went to get the right information to make the correct decision to take over or not to take over the Passiona Bottling Company.

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Q. The fiscal '74 forecast that was in your possession was a copy of the original in Cottees General Foods' possession, was it not? A. Correct.

Q. Are you aware whether Mr. Brooks ever obtained the original budget from Cottees General Foods? A. I don't know.

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Q. When you first showed to him the copy that you had, had you contacted anybody in Cottees General Foods to get permission to show it to him? A. I from the first stage not when Mr. Brooks disclose to me his information and permission to gain any information whatever we can provide and that joint meeting between Mr. Brooks, Mr. Lazzley and me took place, Mr. Lazzley approved that by word to me.

Q. Was it made known then to Mr. Lazzley that Mr. Brooks had seen the General Foods Cottees forecast for fiscal '74?

A. Not only that, on the same time in my presence he gave him the Passiona Bottling Company, all balance sheets and all confidential information regarding the Passiona Bottling Company of Sydney.

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Q. By June, of course, there were two months of Cottees fiscal 1974 already passed? A. Yes.

Q. Did Mr. Brooks inquire how the actual sales were matching up with the forecast sales? A. Quite possibly, but he couldn't get from me because at the time I was working at Pepsi.

Q. But when he was with Mr. Lazzley and you were there too, do you recall him enquiring about how the reality was matching up with the forecast? A. I have no recollection.

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Q. Do you know whether the documentation that General Foods had showing how actual sales were going was made available to Mr. Brooks? A. Various document was handed over to Mr. Brooks. Quite possibly was part of it.

Q. Looking at Exhibit 25, which is before you, you see under the top lefthand heading, which I cannot read in my photostat - volume? A. Volume budget for 12 months.

Q. There are listed seven ounce Cottees, Pepsi and then new products with a cross and a circle next to the new product?
A. Asterisk, yes.

Q. Then down in the body of the document the cross and circle or the asterisk is repeated and the new products are listed. You have been asked about what that says there by Mr. Bannon -? 10
A. C-Time -

Q. I am not going to ask you again. What I want to ask you is have you any recollection at all of when it was that the asterisks which appear in various places were put on the document and the script detailing the new products was put on the document? A. The consecutive meeting after it was prepared with Mr. Brooks and, you know, when we wrote the document and we put in new product was a question as what type of new product and time was that prepared that remark was on it.

Q. Who asked the question about what the new products were? 20
A. I did.

Q. You had originally written in on this document new products in the three places under the three separate headings on the left? A. Yes.

Q. Without the asterisk and without knowing what the new products were, is that right? A. Please repeat, because I don't know, because the new product - please point out.

Q. (Approached) Under the heading "returnables" which is what I called "volume" wrongly a little while ago when I couldn't read the photostat, there are three things listed and then the words "new products"? A. Yes. 30

Q. Then there is a heading "ten ounces" and two products listed and then the words "new products"? A. Correct.

Q. Then there is a heading "32 ounces", two products listed and the heading "new products"? A. Yes.

Q. Is this what you were saying a moment ago that when you first prepared this schedule you had written in the words "new products" in the three places I have pointed out to you but at that stage you did not have the asterisk placed against the new products? A. That is correct. 40

Q. And that subsequently you asked Mr. Brooks what the new products were to be? A. That is right.

Q. And he then told you? A. That is right.

Q. You put in the three asterisks? A. No, he didn't tell me, I put them -

Q. You misheard me. You put in the three asterisks against the words "new products" already appearing on the sheet?

A. Yes.

Q. And you put in a fourth asterisk and then the new products and so on that appears beside it? A. Yes. It is self-explanatory because when the budget was made and Mr. Brooks disclosed his wish he wants to present in the market new product I put every segment, every size new product and where it, and wherever it been applicable we fill the column, fill the line. You see several things we didn't put in new product. But wherever the ten ounce returnable was some information was disclosed there because some new product was planned by Mr. Brooks to present on the market so the whole form of document went, the same, Cottees product, Pepsi product and new product, which represent then Mr. Brooks' product. Wherever that new product was applicable we filled the line, where weren't applicable we didn't fill the line. More or less, this is a formula document, worksheet.

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Q. Was the form of this sheet as originally prepared by you before you added the asterisk done that way on Mr. Brooks' instructions? A. No, he didn't instruct me to do it like that. I am professional and I do it my own way. Principally we agreed what he wants and the rest was my work.

Q. Was it discussed in a general way that you would prepare this volume budget for twelve months showing under the various sizes of returnables Cottees, Pepsi and New Products as the main headings? A. That is right.

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MR. PRIESTLEY: Q. And was it your understanding initially that there were not to be any products in the seven-ounce range? A. That is correct.

Q. Then this document has written underneath, "Volume, budget for twelve months" the words: "If start from July 1974"? A. Yes.

Q. Now at the stage when you prepared this document was the position that you did not expect there would be a commencement of production by Mr. Brooks' company during 1973? A. Quite possibly it was.

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Q. When Mr. Brooks asked for Cottees General Food, if Cottees General Food prepared a forecast, sales forecast and income statement, from time to time when the negotiation was elapsed

in time, have to prepare another proposition as the time of going on to the relevant new date when they were hoping the negotiation was completed.

Q. So from time to time it was necessary to prepare updated volume budget for twelve months' sheets, is that right?

A. I don't know whether it was necessary or not, but we did.

Q. So this volume budget for twelve months' sheet is one of a number prepared on the same format but with a different starting date taken for the projections? A. Quite, and that was most realistic.

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Q. The most realistic of the series? A. Regarding the comments in it.

Q. I think you told us that in June 1973 the possible starting date for Mr. Brooks' company was changing from month to month. I forget your exact words, but do you remember what you said a little while ago? A. Yes.

Q. That you did not know say in June 1973 when Mr. Brooks' company was going to start? A. No, I did not. Even Mr. Brooks did not.

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Q. But in June 1973 there was at least some prospect that it would start before the end of 1973. Would you agree with that? A. We were hoping that it would start as soon as possible. But no date was ever, was given.

Q. And things just dragged on? A. Just dragged on, the negotiations.

Q. But when he first spoke to you in April or May 1973 about the company, is it not correct that he was then saying that he was hoping to get the company started and operating before the end of 1973? A. I can't recollect. Quite possibly he said so. I cannot recollect exactly.

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Q. But you can recollect the date when first approached by him, the possible date of commencement was not nearly as far away as May 1974. Would you agree with that? A. No.

Q. Would you agree with this: that you regarded it as possibly open when he first told you, when he first spoke to you about the fact that the company would start up operations before the end of 1973? A. He was hoping that he can get started as soon as possible, as soon as practicable.

Q. Well you would have been interested to know just when he thought that was, would not you? A. Well, I was a little bit better, knowing what Cottees Food, General Food negotiations

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took place because we had similar negotiations with Cottees Food: because we found out they had similarly decided it would take too long, the time to make the decisions because the decision came from New York.

Q. You have mentioned Exhibit 25 as one of a number of similar documents prepared from time to time in the same format, but with different projected starting dates? A. Yes.

Q. Are the documents which are similar to that in the same format still in your files? A. No - when we complete we always hand the work to Mr. Brooks. 10

Q. Was any of them shown to Cottees General Foods, do you know? A. No.

Q. You do not know? A. No.

Q. Did Mr. Brooks say to you at any stage that he had shown any of them to Cottees General Foods? A. Not worded like that, that document or other document was shown. But generally he said: "I have other negotiations with General Foods."

Q. Are you able to tell us whether that document is the first or last or somewhere in between in the series of documents in the same form that you have told us about? A. Maybe was a later document; I cannot be 100 per cent sure. But if it was a later document the information in it, unsure. 20

Q. So you think that is the latest of the series? A. Or the best of the series was that.

Q. And there would have been no other in the series with a projected commencement date of July 1974? A. No.

Q. There would have been some in the series with projected commencement dates earlier than July 1974? A. Yes, it was. 30

Q. Now would you agree that any document in that form which you prepared in June 1973 must have been an earlier one in the series that you have told us about than that document before you, Exhibit 25? A. No. Please ask again the question because it is too long.

Q. Would you agree that the document before you was made later than June 1973? A. No.

Q. You have told us that there were documents in the same form made previously to that document? A. Yes, we did, yes.

Q. And you have told us that there were a number of them? A. Yes. 40

Q. And I suggest to you that it would have been on the first series that was made in June 1973? A. You are suggesting that?

Q. Yes. I am asking you to say what you want to say about it? A. It was not on the first series document.

Q. That was not a first series document? A. No -

Q. And the first in the series was made, was it not, no earlier than June 1973? A. The other document we prepared earlier. We did prepare earlier document, yes.

Q. I am asking you about the documents in that form that you have told us about? A. That form? (Indicating.) 10

Q. Yes. What I want to know is your recollection of the date when you prepared the first one in that form for Mr. Brooks? A. From April onwards we always prepared the same document for Mr. Brooks; I always prepared them.

Q. If I have followed you correctly what you have said is when the first document in that form was prepared it was for use by Mr. Brooks in negotiations with General Foods? A. Yes.

Q. That negotiations with General Foods stretched out from time to time, so that the first document that was prepared in that form became outdated as --? A. I did not say that. 20

Q. All right. Well, would you agree that after Mr. Brooks had been in possession of the first document in the series for a time, he asked you to prepare another one with a later projected commencing date in it? A. I don't know what you tried to get out of it because I explained to you from time to time --

Q. Would you just answer the questions, please? A. I don't know -

Q. Don't worry about why. I am asking it. Think about what I ask and answer the question. A. I cannot give answer Yes or No because again I have to explain, myself. From time to time was April to the end of June, say, I prepare document for Mr. Brooks. Now what title you try to put on it, earlier commencement or later commencement or more later commencement I just can't recollect. I was not there. He asked me a favour to do more work, more document for him, but it was not specified you may start or later start or another. He was meaning another document for his further negotiation. 30

Q. Let me approach it another way. The first document in the series that I have been asking you about had an earlier projected commencement date, had it not? A. No. Just the normal twelve column projection size projection. It was not 40

at an earlier or later date. Just the time it was given. If he prepare April he start from April, twelve months. If he start from May, twelve months. If he start from June it start from June twelve months. But the company will start April or May or December, that was always full for projection, revert to one year cycle.

What will be the result if Mr. Peter Brooks took over Cottees General operation. That -

Q. You have told us that Exhibit 20 was prepared some time in May? A. In April. I have said in April. 10

Q. Sorry. I might have misled you there. A. That is all right.

Q. Is it correct that you have told us that you first showed Mr. Brooks the documents in Exhibit 20, it was a part some time in May 1973? A. No. I said always in April.

Q. Is it correct that the first of the documents of which Exhibit 25 is one was prepared some time after you had shown Mr. Brooks Exhibit 20? A. That is correct.

Q. So that there are only the months of May and June in 1973 prior to the production of this document during which earlier versions of this document could have been prepared? A. That is correct. 20

Q. And you have said you did a number of those? A. Yes, maybe four, maybe five, maybe three.

Q. And you also say that each one was done with a projected commencing date of twelve months after the date when you were preparing the document. A. Maybe true to say -. If he gave two in April, the two document was started from April, twelve months' run. 30

Q. Do you recall giving two in April 1972? A. Not practically, no.

Q. It would have been a waste of time, wouldn't it, to prepare two separate ones for a projected commencing date in April 1974? A. When you want to buy a business there is nothing, waste of time -- in the document to take a business --

Q. Would not you agree that the document Exhibit 25 must have been prepared considerably after June 1973? A. No. I definitely disagree.

Q. The projected commencing date, being July 1974, was the date, was it not, which you roughly estimated would be the actual commencing date for Mr. Brooks in your company at the 40

time when you prepared the document Exhibit 25? A. The date on the top of the document, irrelevant again, again I repeat, again it is irrelevant for the starting of the company. My purpose was to name the date for the starting of the company and work on the twelve months projected sales.

HIS HONOUR: Q. As I understand you, you seem to be saying that in relation to each of these documents of the type of Exhibit 25 you prepared you did two things. First of all you adopted what might be called a lead time of twelve months in relation to everything? A. That is correct, but the date -- 10

Q. But that you did? A. Yes.

Q. And secondly you projected twelve months beyond a commencement? A. That is right.

Q. I think what Mr. Priestley is saying is that if you prepared a document in April you would work your lead time from the beginning of May? A. It might be April or May. It would depend. That is a fictitious figure, your Honour, because you have to work a full cycle to arrive at the correct income cycle at the end of the year. 20

Q. I know, but I understood you to have said in relation to each date at the beginning of document 25 you have adopted a minimum lead time of twelve months? A. Twelve months.

HIS HONOUR: I am more confused, Mr. Priestley.

MR. PRIESTLEY: Q. In relation to the first of the documents like Exhibit 25, would you explain whether it would not have been equally as convenient and businesslike to adopt the first July 1973, as the starting point of the twelve months' cycle? A. In business ways, 1973, July, and what was a good proposal was 1974; because the negotiation was still going on and a time and motion changing the business all the time; which represented different money value of your income statement and what - 30

Q. So you were trying to pick a commencement time that you estimated to be going to correspond roughly with the commencement of the business? A. No, nothing to do with it.

Q. If that has got nothing to do with it why would not you take the nearest convenient calendar or fiscal year commencing next after the calendar month when you were preparing such a budget? A. I did such a thing and choose another date which quite possibly result in the income statement. 40

Q. So you had chosen some fiscal year for an earlier version of Exhibit 25, had you? A. I had an earlier version, yes.

Q. Are you able to recall what was the commencing month in 1973 for the first of these documents like Exhibit 25 that you prepared? A. During April.

Q. So that the very first one, commencing July 1974, no commencing April 1973, is it? A. I cannot remember what I put on it.

Q. I am sorry. My question was can you remember the month in 1973 which you chose as the starting point of the twelve months' cycle for the first of the documents like Exhibit 25 that you prepared? A. If I made one April, quite possibly I made it from 1st July, 1973.

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Q. Yes, and then --? A. If I made another one during May -- (Not understood) -- chose the time in 1973 --

Q. Is that your best recollection now --

MR. BANNON: The witness seemed to be asking the question, not answering. (Last question read.)

WITNESS: 1973, July, I don't know, I cannot remember.

MR. PRIESTLEY: Q. In your recollection it is quite possible, is it, that the first one of these documents took as the starting date of its twelve months' cycle July 1973? A. I am not sure. I cannot say yes. I am not sure.

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Q. Now after the first document had been given to Mr. Brooks, did you understand from him that he was having some discussions with the General Foods Cottees? A. Yes, that was the purpose, was to prepare the document.

Q. And did he tell you that he would like a similar document but with a later projected commencing date? A. No, never said such thing to me. We were talking about money, not later or earlier commencement but in money terms. Inflationary fund was -- (not understood.) -- or otherwise in a new programme and quite possible that document form, was prepared in that base, that in 1974 in a money result of this project quite possibly different from the earlier one because certain purchase price change, the services change, the labour change; quite possibly the selling price changed; and that is how we projected the whole things for a certain period to be a realistic approach to the deal; what was to happen with Cottees General Food and Mr. Brooks. It is not the case problem here, but the money side, the whole budget.

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Q. If I can clarify a further point. You have told us that in regard to Exhibit 25 which is before you, which is one of an identical document, of which you retained only that particular sheet --? A. That is correct.

Q. In regard to the other documents like Exhibit 25 that you have been telling us about, were they also single documents forming part of a larger bundle, or documents, or were they on each occasion a single document alone containing only the detail --? A. No, bundle of documents. When I completed one I hand to Mr. Brooks; when I complete another one hand on to Mr. Brooks.

Q. You have told us that you asked Mr. Brooks what were the new products referring to on Exhibit 25 that you have before you? A. Yes. 10

Q. And you had not shown the names of the new products that are shown in Exhibit 25 on any of the earlier versions of Exhibit 25, had you? A. I cannot get you quite, what happened?

Q. The earlier versions of Exhibit 25 that you have told us about --? A. Yes.

Q. - contain the line "new products", I suppose, in three places. That first appears on Exhibit 25? A. Yes.

Q. But the earlier versions do not contain an asterisk? A. May not - I don't know. 20

Q. Would you agree they did not contain an asterisk because it was not until you got up to this version of the document, namely Exhibit 25 that you asked Mr. Brooks to - which were the new products he was referring to? A. That is incorrect, because the earlier documents show the Passiona Bottling Co. budget and the earlier for that sized product are --

Q. Look at Exhibit 25, would you now. --under the ten ounces the figure "4" and under the 32 ounces the heading, the figure "4" there, is that right? A. That is meaning four flavours, you see the Cottees, you see three, abbreviated flavours, and for the new product representing four flavours. 30

Q. You told me you asked Mr. Brooks in relation to this particular document that is before you? A. No, I did not say that.

HIS HONOUR: Do you say that was not intended and you had better listen a little more carefully to the questions. -

MR. PRIESTLEY: Q. Do you recall my asking you earlier about that document and the asterisks that are written on it? A. Yes. 40

Q. And asking you whether you had added those asterisks at a date later than your preparation of the document?

A. Yes, I did. I prepared the document one day and I met Mr. Brooks a particular day; that when I questioned him, "There and any new products you want including this budget."

Q. That was something you had not included in the earlier versions of Exhibit 25, isn't it? A. I included all the new products in all the new versions.

Q. You say that in the earlier version you had shown new products in the same way it appears here and also had written somewhere what those new products were? A. Yes. In another document.

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HIS HONOUR: Q. I don't know. All I can say is that the note I have in relation to this matter is that you were shown Exhibit 25. Your attention was directed to the wording "new products". You said you did not know what they were, the new products when that document Exhibit 25 was first prepared. You subsequently asked Mr. Brooks what they were, and having been told you then added the material, being the asterisks. That is the note that I got? A. That is correct, for the --

Q. Mr. Mojsza, please; you have assented to the proposition that having been shown Exhibit 25, that very document in front of you, you said and meant to say that when you prepared that document Exhibit 25 you did not know what were the new products. Now is that correct, or isn't it? A. Correct. It is correct. That is why I asked Mr. Brooks to disclose to me that new product to enable him to make the cost of what is behind that page.

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Q. The necessary consequence of that is that if there were earlier versions of Exhibit 25 prepared at a time prior to the preparation of Exhibit 25 at the time when you prepared them, you did not know what the new products were; and there was nothing in the form of asterisks or information on those earlier documents. Is that correct? A. Yes. I have a document in my hand. The origin of Passiona Bottling Co. budget, that all the new product was disclosed to me by Mr. Brooks.

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Q. When you prepared the earlier document, Exhibit 25, you did not know the new products to be an earlier version of Exhibit 25? A. The first thing I knew was what new products Mr. Brooks wanted to put on the market which he disclosed to me; and I asked before I start anything --

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HIS HONOUR: I think we are at cross-purposes, Mr. Mojsza.

HIS HONOUR: Q. You did not know what were the new products to be incorporated in the sales to be projected on the earlier version of Exhibit 25? A. Before I made any document to Mr. Brooks the whole product on the other document was written down in my handwriting. I can prove it.

Q. All I can say is, it is abundantly obvious you are not prepared to listen to the question and answer it. A. I try to do my best.

Q. It is very obvious you just want to say what you want to say without answering the question. I am sorry, Mr. Priestley. You may go on.

MR. PRIESTLEY: Q. When was it that you first tried to re-collect when the handwriting in your hand was placed on Exhibit 20. That is the first sheet of the documents that came from General Foods Cottees? A. During April when I meet Mr. Brooks. 10

Q. No. I suppose you recall the start of this case last year, this particular case before the Court. Mr. Brooks would have come to you and said to you some day, "Somebody has started a case against us", I suppose. A. Yes.

Q. And after that at some stage the document, which is Exhibit 20, would have been brought to your attention for you to look at; is that correct? A. I start to search in my memory what I would have done and I find the file in the rest of my documents, my filing cabinet. 20

Q. Yes; and was anybody with you when you found the file which contained Exhibit 20? A. No. That was my own office. Nobody was there.

Q. But who asked you to look for documents? A. Nobody. I do it on my own.

Q. But did somebody say to you, "Have you got any documents that may help us to find out when there was first anything written down about the words "Pub Squash"? A. It was obvious that should come up, yes. Who should discuss that question first of all that we came amongst -- 30

Q. Following that did you search for any documents that might contain the words "Pub Squash"? A. That is right.

Q. When you found the document which is contained in Exhibit 20 did you show that document to Mr. Brooks? A. I did.

Q. Did you show it immediately or very soon after finding it? A. That was a week back in my office and when he came over I showed it to him, yes.

Q. Would you agree that upon the evidence that document -- You were not completely clear about how the handwriting had got on to it, your handwriting? A. Please repeat the question again? 40

Q. When you first found the document which is now Exhibit 20 in your files after you began to look for it for the purposes of this case -? A. Yes.

Q. - I suppose you looked at it and noticed the handwriting on it? A. Yes.

Q. In your own hand? A. That is right.

Q. And was the position that on first looking at it you were unable to remember distinctly how that handwriting had come to be placed there? A. Not immediately. I started thinking about it and all cases come back to me. 10

Q. Then the next morning did you discuss the document with Mr. Brooks? A. Yes, I did.

Q. And in the course of that discussion did he say anything to you about when it was that he thought the handwriting had been placed on the document? A. No. He just, supporting my recollection of my memory, he said, "I remember that is writing, even I forget that you have got the document."

Q. What was he filed under? A. The same file.

Q. What was the name of the file if it has got a name or a heading, or tag? A. Just "budget paper". 20

Q. Mr. Brooks said that he had forgotten about that piece of paper, did he? A. He did say that he had forgotten, but he said, "I remember now". He did say he forgot.

Q. Would not you agree that the words on that budget Exhibit 20 and the words on the back of it could have been written any time during 1973 or the first part of 1974? A. That was April 1973.

Q. And when you say that Mr. Brooks told you within a week or so of meeting you the names of new products that he had in mind that he did not want anybody else to know -? A. Yes, he said to me, yes. 30

Q. - and that was within a week of meeting you personally for the very first time? A. About that, yes.

Q. And at a time when as far as he could see there was no certainty at all that he would ever be able to get his company to start? A. I was not, no.

Q. And that was something that you believed was clear to him, wasn't it, namely that this company might never be able to get off the ground? A. I do not know what was clear to him. 40

Q. And in April Mr. Brooks was still with the Coca-Cola organisation, wasn't he, in 1973? A. I don't know.

Q. (Approaching with m.f.i. 15) Just coming to m.f.i. 15 and looking at the top sheet as it now appears, the one which is numbered 2 in the top right hand side, there is some handwriting on that sheet next to the sub-heading "32 ounces returnable bottles" and there is written, add in number of names. Is that writing yours? A. Yes.

Q. Are you able to tell us now whose that writing was, when that writing was put on this? A. The same day when the first document because the No. 1 page is out of this file and the same day when we discussed with Mr. Brooks what is the new product and size he wants it on the market. 10

Q. You say, this was placed on at the same time because it was part of the same set of documents? A. And continuance for the next size and for the next group of sizes to conduct for the full budget.

Q. But do you have any recollection of putting this on in April 1973? A. Yes. 20

Q. Then the next sheet which is numbered 3 on the right hand side also has words added in next to the heading, "Ring pull cans". What is your recollection in relation to those words? A. The same. They were written, the same day as written, date when written, the first page of this budget.

Q. And that is also your handwriting? A. That is my handwriting.

Q. And then the fourth page of this series, the one that is numbered 4, is written in a different hand. Do you know whose names of the flavours it is in? A. Yes, the cost clerk. 30

Q. Whose cost clerk? A. I couldn't remember his name.

Q. Did you say Pepsi Cola cost clerk? A. No, I said Cottees' cost clerk.

Q. Now this is a page of m.f.i. 15, which you drew on for information to use in borrowing money from Pepsi Cola. Have I got that straight? A. No, that is not right.

Q. That is not right? A. Because the one you were looking at of approaching Pepsi Cola for a loan for the bottling plant. For example, Exhibit 25 --

Q. And this one m.f.i. 15 and Exhibit 20 together are the documents Mr. Brooks was looking at solely to inform himself 40

as to the actual position of the Cottees company, so that he could make a proper --? A. That was at a time when -- (objected to by Mr. Bannon: read: withdrawn.)

Q. Mr. Mojsza, the documents m.f.i. 15 and Exhibit 20 that we have discussed this morning were shown to Mr. Brooks, will you agree, so that he could inform himself about the position of General Foods Cottees Company business? A. Yes.

Q. And so far as you know that was the only purpose disclosed to you why he wanted to look at those documents? A. Yes, but I would like to add something there which I think the confusion comes from two of the documents you are saying. Because when I meet Mr. Brooks I show him the budget file to the purpose to prepare a submission to Cottees where he have to prove himself that the loss situation in the company he can turn into a profit situation. Now when I show to him I ask him what size and flavour you are willing to sell to the market so that you can properly cost out such size and flavours to allow for this same statement. When we page through the document he said, "Yes, yes, yes, no, and when we page in them he said, "I would like to add certain new flavours to the sizes". Then that writing was done by me for a very day. Now when I get information from here the rest was my work to present him with a figure at that conversation and note it could go. That is how that preparation and budget was coming to and which we had a confusion in time for. 10 20

Q. What I want to put to you directly, although you have answered it to some degree already, is this: that at the time when you first showed Mr. Brooks those documents there was no reason whatever for you to make the handwriting additions to them that you did make because -- I just want to put that to you. A. No reason, I cannot recollect. I had a lot of reason to make note on that particular present a size budget for the purpose he asked me for. 30

Q. What I am putting to you is on the first occasion you showed him the documents it was to inform him about the situation of Cottees? A. Yes.

Q. And there was no reason on that, those pages as to what new flavours he might introduce. Is not that correct? A. It is not correct. He had to get a new flavour, at his request; a volume budget which would come, his income return statement later on. 40

Q. I put to you there was no occasion at that first or second meeting with Mr. Brooks to make the handwritten additions on the documents? A. Which documents?

Q. Exhibit 20 and m.f.i. 15? A. That was the very very

reason why he disclosed to me because he wanted to cost out the size volume.

Q. I just want to put this to you, suggest this to you finally on this aspect of the matter -- that it was not until you had known Mr. Brooks for some considerable time that he disclosed to you the names of the new flavours he had in mind? A. On the second meeting was as I told you before, he disclosed that in April 1973 --

Q. The figure, I put it to you it was not until a considerable time after you had known him that the handwriting that appears on m.f.i. 15 and Exhibit 20 --? A. One was the first time and the second time it was put by him, that new flavour was disclosed by him. 10

(LUNCHEON ADJOURNMENT.)

MR. PRIESTLEY: Q. If I can just ask you a few more questions about Exhibit 25, Mr. Mojsza, if I understand you correctly, at the time when you prepared Exhibit 25 you prepared a number of accompanying documents as well. Is that correct? A. Company documents? 20

Q. No. A number of other documents that went with it.
A. Yes.

Q. It was just part of a set of documents? A. That is correct.

Q. And what was contained in the balance of the set over and above Exhibit 25. What were the kinds of details and analysis and so forth contained in it? A. Contain volume sales, cost sales --

Q. Cost, did you say? A. Of sales, a total projected income -- 30

Q. And what sort of information did you use in regard to costing? A. For the Cottees product we use mainly Cottees actual cost with case of product, with adding certain inflationary content to the different costs. We use the same method to arrive at the total income; and all the other expenditure was there, estimating wages tender at the time; and at the time of the whole to summarise the whole work was the company income tax statement whereby we show month by month income, and the total income for the calendar year. When I finish that comment made we catch a few out, so called, another document, catch few out of it; which shows month by month against the income expenditure what was the money situation for the supposed to be new company -- 40

Q. Would it be very much the same sort of material and analysis as is contained in Exhibit 20 and m.f.i. 15? A. In principle, similar, yes.

Q. And you had completed a set containing the information you have just described in Exhibit 25 which you handed complete or showed complete to Mr. Brooks? A. When I complete it we have a look and agree on the result and he took it out for typing purposes.

Q. And it was after you had completed that particular set that you asked him what were the new products? A. No, much, much earlier. That was the second meeting between us, Mr. Brooks had with me, when the whole new product question arose. 10

Q. You have got Exhibit 25 before you, haven't you? A. Yes.

Q. That is the one I was asking you about before lunch when I asked you about new products? A. Words written in when the new product was produced and the asterisks written on a later occasion. Do you remember that? A. About one week later I say at the most.

Q. What I asked you a moment ago was this: when you showed that whole set of documents to Mr. Brooks first it contained Exhibit 25 without the asterisks and the additional writing that went on approximately a week later, is that correct? 20
A. When I showed the document for Mr. Brooks from compilation one week later I showed to Mr. Brooks and that is when the extras came on to the document.

Q. So that the set was completed a week before the day on which you described the asterisks and that additional comment; is that correct? A. Yes.

Q. And the completed set had contained the detail costing figures, the projected figures that you have told us about; is that correct? A. That is correct. 30

Q. And you had been able to prepare those costing figures and complete your projections without knowing which the new products were that were referred to on the sheet, being Exhibit 25? A. That is incorrect.

Q. What is incorrect about that? A. Because the whole set of work, when was prepared before that, we prepare another set and another set of work; so that all new products' details were already there in another work sheet and the necessary was this paper here to disclose completely on this page which I hold back for myself for tax purposes to ascertain what type of glass we have to buy or have for Mr. Brooks for three months' start. But all other flavour, Pepsi flavour, 40

was all the time discussed in another document, on another document, Cottees General Food, 97, for fiscal budget.

Q. Why was it that you needed to ask Mr. Brooks after you had prepared Exhibit 25; why was it necessary to ask him about a week later why the new products that were dealt with in Exhibit 25 -? A. I asked new products and he gave me the details - no special reason - just at the time especially number, whole of the glass, we have to buy that --

Q. But what you said a moment ago was you already knew the products on which Exhibit 25 was --? A. That is right. 10

Q. But you asked Mr. Brooks? A. Yes, this page alone.

Q. That was because you did not know which page he was referring to? A. Which size, what he want, I knew glass, the new glass for containers' purposes.

Q. You have got the number "4" after new glasses on each line? A. Yes.

Q. There are only three new glasses shown next to the asterisk, are not there? A. That new glass, that is right, yes.

Q. Would you have needed to know each of the four of the new glasses in order to do your costing properly? A. If that "4" new products were in the containers I was not interesting -- 20

Q. Was not it possible, indeed easy, to produce these documents without knowing the names of these products, but simply knowing the number of them? A. Quite possible, yes.

Q. Was not that what you actually did. You were able to prepare the costing without knowing which of the new products that Mr. Brooks had in mind? A. That is correct, yes.

(m.f.i. 15 tendered without objection. His Honour says for the purpose of distinguishing them he will mark the existing Exhibit 20 as Exhibit 20A and the bundle of documents in the form of m.f.i. 15 will be added to Exhibit 20 under the description of 20B.) 30

MR. PRIESTLEY: Q. When the company got under way in May 1974 it occupied you full time for quite a long time, I suppose? A. It did.

Q. Long hours? A. Yes.

Q. And were you working mainly on the financial and administrative side? A. That is correct.

Q. Did you have any hand in the getting for the market of new products as they were got ready for the market? A. In the first I was not in ordering at all.

Q. You recall the order in which the new products come to the market. Which was the first one? A. I am not sure. I do not know.

Q. And you would have been aware at the time those products came on to the market what the cost of any advertising was in regard to them? A. No.

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Q. Did not that come under your supervision or anything at any rate, the expenditures involved? A. The registration costs in company books, yes, but my decision, how much was expended on it and when and how, that was not my decision.

Q. I did not mean to stop there. But you were aware of the advertising costs? As the advertising proceeded? A. From time to time, yes.

Q. It is correct, isn't it, that the first expenditure on a television commercial devoted solely to one new product was expenditure on the commercial concerning Pub Squash? A. I cannot recall.

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Q. You can't recall that. Would not you agree from your recollection that there was no television commercial devoted either to Seven-time, Six-time when those products were brought on to the market? A. No, I don't and I was not interested in that.

Q. Who in the company was it whose duty it was to concern himself with advertising and marketing in particular? A. The decision principally was taken by Mr. Brooks.

Q. And were there other personnel in the company whose duties were devoted to advertising, marketing and the like? A. Not in this stage, no.

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Q. What is your recollection of the first time you yourself became aware that there was a lemon squash product on the market known as Solo? A. I did not know it was lemon squash. I knew it was Solo because see on the television one evening.

Q. Approximately when was it that you first became aware? A. I cannot remember the time.

Q. You had no knowledge of the product Solo on the market prior to seeing it advertised on television? A. No.

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Q. That is the first knowledge you had of the product Solo

when you saw it advertised on television, is that correct?

A. Yes, that is correct.

Q. And at that time, so far as you were aware, what position had been reached in regard to any lemon drink that your company was contemplating bringing on to the market? A. It was the time a commercial was - I cannot recollect the time - I cannot compare it with other company, the other company, what was doing the same to --

Q. You would agree, wouldn't you, that you were particularly interested in the success of this company, Passiona Marketers?

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A. Yes, sure, yes.

Q. It was important to you personally that the company succeed if at all possible? A. I would not say personally about the company, because it was a big challenge to me.

Q. It was a challenge enough to fit in with your own hopes of remaining in your chosen occupation in particular? A. My chosen occupation is I am an accountant and if I have no chance to work with somebody, even before, I work with another company.

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Q. Yes. But you regard it as most suitable for you to work with your accountancy skills in an area that you had become familiar with over seven or eight years when you went into this job? A. That is correct, but I have seven or eight years under experience, too --

Q. What I want to put to you is you would have been very interested to know that a competitor was bringing onto the market a product in competition with one that as you understood it your company was proposing to bring on the market, would you not agree with that? A. No, I don't, because the whole thing, when you look at the whole market from the financial point of view, make a provision, market, Schweppes or or (not understood) market was not known at all because I did not know them. I knew Coca-Cola operation --

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Q. Would this be right: that in the first case of the operation of Passiona Marketers you yourself did not place much expectation in any new lemon product to be produced by Passiona Marketers? A. I cannot say we did not expect because at the moment we walk into the company and find Cottees flavour was run down and the public refuse to buy it, the whole flavour was under examination and bought by Mr. Brooks --

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Q. The standard product was orange flavour? A. That was called Tango and Mr. Brooks exchanged it for another product, C-Time.

Q. You yourself if I understand correctly, had most understanding of the Cola side of the market? A. Yes.

Q. You yourself were particularly interested in the lemon side of the market? A. I had to look at the sides of the market as a whole, not Cola, but Coca-Cola operation as a whole, how, what they knew of the market.

Q. You were aware of the Cadbury-Schweppes group of companies? A. I did not know at the time. I knew Cadbury-Schweppes were selling soda water at the time; that is all I know about that. 10

Q. Was the television commercial we have heard so much about of the man Mr. Ace and the Canoe, the one with the drink running down his chin --? A. It was not with the canoe; it was something else -- fighting with some horse, I believe, I don't know.

Q. Did that appear to you to be a television commercial which was an experienced one? A. I was not making a talking about it.

Q. You did not think about it? A. No. 20

Q. Did not it occur to you that you had seen part of a major advertising campaign when you saw that commercial? A. No.

Q. Does it occur to you that you had seen part of what was essentially the launching of a new product, new type of product? A. No, it did not.

Q. It did not cross your mind? A. No, time to time I see the proceedings of advertising; it did not ever say that Solo was issued by Schweppes at the time.

Q. When did you first hear Mr. Brooks or anyone in the company say anything about Solo being a competitive product? (Objected to as not having been said: rejected.) 30

Q. Subsequently to your seeing the commercial, did you at any stage discuss or hear discussion in the company of other executives of Passiona Marketers of the product Solo? A. Next morning I working at office and told Mr. Peter Brooks, "What advertising" -- I seen television and the drink was dribbling out from the man's chin, and he said that was Solo from Schweppes. That is how I mean.

Q. Did you ask him more at that stage? A. No.

Q. Did he tell you anything more? A. No. He knows very well I hate advertising on the television and hate the whole 40

concept of advertising that way, and we never talk much about that.

Q. So this incident of your seeing television had gone on before Pub Squash had gone on to the market? A. I cannot recollect because I cannot compare one with other -- Pub Squash was on the market - I just don't know.

Q. Did you at any stage form the opinion that the drink Solo had obtained a good-sized market in the Sydney area? A. No.

Q. Did you ever consider whether the product might achieve a good sale in the Sydney area? A. No. 10

Q. Were you yourself hoping that Pub Squash would obtain a good sale in the Sydney area? A. No.

Q. Did you yourself take no interest in the prospective sales of Pub Squash? A. I took interest in the company organisation, financial organisation; but I was not ever in worrying about the market aspect of it.

Q. But it is possible to be interested in the fate of a product, isn't it, without being in the marketing side of the product? A. Of course. I was happy to see the product take off and the public accept it. 20

Q. And was the launching of this product something which Mr. Brooks had said to you he was hopeful would be successful? A. Please repeat the question?

Q. Before Pub Squash was launched had Mr. Brooks said anything to you along the lines that he was very hopeful that it would be a good money spinner for the company? A. That is correct. He did not use words what you say.

Q. What did he say? A. He had a lot of hope that product would succeed on the market. 30

Q. You were aware before for some time before the product went on to the market that he had that hope? A. Before, yes.

Q. Yes. And did he at any time express worry to you about Solo being on the market before Pub Squash? A. No, no, I cannot recollect such.

Q. Did he ever say anything to you about the fact that Pub Squash would appear to be looking for the same sort of market as Solo? A. No. He did not because we did not discuss that problem at all.

Q. And between say, December 1974 and April 1975, were you 40

present at the meetings of the Executives of Pub Squash, either formal or informal, where the Solo advertising campaign was mentioned? A. No.

Q. Not at any? A. Not at any. This time when that company form, that company work at least 80 hours weekly. We start everything from scratch to organise and build the company up and I work from a skeleton staff, so design those invoices, build up our system - haven't much time to feed, time and leisure time outside the company. When I get home I was just happy to lie in bed and sleep. That is very big task for a man to organize that time and synchronise the operation for one man, with the very huge staff. 10

MR. PRIESTLEY: Q. You were doing everything within your own capability to get this company properly organised and going successfully, were you not? A. Certainly.

Q. You were doing your very best yourself to see that the company would succeed? A. Yes.

Q. Are you able to say whether Pub Squash did become a profitable line for the company as time passed? A. The product itself, did it become profitable? 20

Q. Yes. A. From the first time we released it?

Q. It was an excellent money-maker for the company, wasn't it? A. I would not know. I would not say it was an excellent money-maker.

Q. It was a profitable product, is that correct? A. I would not say it was profitable. It was some contribution.

Q. It was instantly successful upon sale, upon being launched, was it not? A. It depends what you mean by "successful".

Q. I suppose if a product loses money long enough the company ceases to sell it, do you agree with that? A. No. 30

Q. What long-running lines has Pub Squash got at the moment? (Objected to: withdrawn.)

Q. Do you understand the notion of a product being profitable? A. Yes.

Q. Was Pub Squash a profitable product from the moment the company began to sell it? A. A successful product, but not necessarily profitable, but it was a contribution.

Q. I asked you whether you understood the notion of "profitable" in relation to a particular product, do you remember that? A. Yes, I do. 40

Q. Was Pub Squash a profitable product from the time it was first sold by the company? A. No, but it was successful.

Q. Did it ever become a profitable product? A. Not necessarily. We are not losing on it, but not making money either.

Q. When you say it is successful, what do you mean? A. It is accepted by the public.

Q. It is unlikely it would be exactly a break-even proposition, is it not? A. We never took Pub Squash again as a single product, break-even or not.

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Q. From some date in 1975 did Pub Squash become the product with the biggest turnover for the company? A. It is not true. No.

Q. Which one was bigger? A. Pepsi Cola was the same. Big Boy Lemonade was the same.

Q. With Pub Squash? A. Yes.

Q. Those three were approximately equal, were they? A. Yes; you have to take a certain period or duration to estimate such things, which product is the best. It is up to the customers how they buy drinks.

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Q. Did Pub Squash during 1975 achieve a sale as much as Pepsi sales for the company? A. I cannot recollect from memory. I would have to look at the details.

Q. Would this be right, for the year after the introduction of Pub Squash the three biggest sellers the company had were Pub Squash, Pepsi Cola and Big Boy? A. C-time and Seven-time were not too far behind them.

Q. The three biggest sellers were Pub Squash, Pepsi Cola and Big Boy, not far behind them being C-time and Seven-Time, is that right? A. Yes.

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Q. You mentioned that the television commercial you saw was one having something to do with a horse, did you not? A. I think so. Taming a horse.

Q. Are you quite sure that was the commercial you saw first in regard to Solo? A. I remember the one television programme by Solo with the man drinking, and the drink down his chin. What was associated with it I do not know. I am not sure.

Q. Are you sure in the same commercial, when you saw the man with the drink on his chin, there were used the words "Squash

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like the pubs used to make'? A. No, I cannot recollect.

Q. On the occasion of the conversation with Mr. Brooks, when you mentioned the dribble down the chin, when you saw the television commercial, was that a conversation when there were other people present with Mr. Brooks? A. No.

Q. Just him himself? A. Yes.

RE-EXAMINATION

MR. BANNON: Q. You said you were working about 80 hours a week in 1974, and you did not like watching television advertisements. Do you recall that? A. Yes. 10

Q. How old are you now? A. Fifty.

Q. You told us you graduated from Budapest in 1954, did you not? A. Yes.

Q. When did you come to Australia? A. During 1957. The uprising in my country was crushed by the Russians.

Q. You had lived all your life in that country before that, had you? A. Yes.

Q. When you were being asked about these other products, Pub Squash, Pepsi and Big Boy and C-Time and Seven-Time, and their volume of sales, I do not think you mentioned Passiona, did you? A. I did not. 20

Q. Can you say whether Passiona sales in 1975 were as much as those as Pub Squash, or larger? A. They might be equal. They might be larger.

Q. My friend asked you about Exhibit 25, and the notes of the new products which you say you put on this document about a week after you prepared it. Do you recall that? A. Yes.

Q. With regard to each of the other draft budgets you say you prepared before that, did you also make a note on the handwritten copy of the new products? A. I cannot remember now. 30

Q. Can you remember whether or not the costing of the new products was done after you showed this document to Mr. Brooks, or before? A. Before, because the whole document was completed when I showed it to Mr. Brooks.

Q. How could you cost the new products if you did not know which ones to put on the document? A. The original new flavour range was disclosed to me by Mr. Brooks much earlier in the Cottee sales volume budget. 40

Q. That was the conversation you mentioned in April 1973, was it? A. Yes.

Q. Can you now recall your reason for asking the names to put them down on this document? A. To cost out that product.

Q. Did you say earlier that you prepared a cost schedule to go with this document? A. I do not know how I can explain myself. As I said earlier in my testimony, most of the products, which name the Cottees products, we used the approximate costing which already Cottees worked out, and then we did similar things with the Pepsi product. The question it was how I can cost out the new product which Mr. Brooks says he has. The new product. To be able to cost out the new product I have to ask Mr. Brooks what the new flavours are, and at the time I made notes on the original budget, Cottees budget. 10

Q. I am talking about the note you made on the new document, Exhibit 25. What is the purpose of putting that note of the new flavours on this document? A. The new product represented the new returnable containers that Mr. Brooks had to get for the new product. It is quite possible that he disclosed that product - when he disclosed that product he disclosed those details. I cannot remember ... (remainder of answer not understood). I did prepare a document for cost. Just as a matter of repetition, the main reason for the new product there I repeatedly said was to get the new returnable containers calculation estimation. 20

Q. And this sheet is the sheet you kept so as to calculate the amount you were going to ask ... (interrupted). A. The number of the glass we need and how much glass to buy.

Q. When the defendant company was formed, my friend asked you were the drinks released in a particular order, whether C-time or Seven-Time came first. Do you recall that? A. I said Seven-Time or C-Time, but I cannot remember. 30

Q. And after those two drinks, what was the third new product that was released? A. Pub Squash.

Q. This sheet is a volume budget, according to the heading, is it not? A. That is correct.

Q. Against each month have you put an estimate of volume? A. That is correct.

Q. In order to estimate the volume of glass bottles you needed, did you need to know the order of release of the new products? A. Not really, no. 40

Q. Have you set out on this document the new products in a particular order? A. Yes.

Q. Have you put a varying quantity against the new products for each month? A. I did, yes.

Q. Does that quantity show a rise in the volume of glass needed in the summer months, that is in November, December and January? A. That is correct.

Q. Would the volume estimates vary according to the date from which the budget started? A. Yes.

Q. Of these different budgets you prepared, can you say whether or not the budget estimate of volume of product varied or remained constant? A. Varied. 10

Q. Does this document in front of you contain any information about costs? A. No.

Q. It solely deals with volume, does it? A. Volume.

Q. And you say that the names of the new products had been disclosed to your earlier at the conversation in April 1973? A. That is correct.

Q. Had Mr. Brooks at that time told you the order of release of the new products? A. He said to me ... (interrupted).

Q. Did he tell you the order in which the new products would be released? A. Yes, he told me the new products that would be released, but I cannot remember the order. I think the C-Time was No. 1. That is what he wanted released first, and Seven-Time followed it. 20

Q. As each new budget was prepared, did you have to take into account the conditions for releasing each new product? A. Yes.

Q. Is there any particular period which affects the release of lemon squash? A. Yes, I remember now.

Q. What does that depend upon? A. That depended when the drink was ready, when the raw material was available, when the containers for the drink were available. 30

Q. Of the raw materials for lemon squash what is the most important? A. Lemon juice.

Q. Do you know whether or not that is a seasonal production? A. It is a seasonal production.

Q. Against two of these matters my friend pointed out to you on Exhibit 25, in the second group and the third group, new products, there appears the figure 4. Do you see that? A. Yes. 40

L. Mojsza, re-x

Q. Then he pointed out to you it had on it only three headings. Do you remember he asked you questions about that?

A. Yes.

Q. Look at No. 3. Was that Pub Squash to replace Lemon and does it add "if possible Cola"? A. Yes. Cola was an existing drink.

Q. It was not a new product? A. No.

Q. Do you know what the 4 signifies? A. I have tried to think for the last hour, but I can't.

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Q. Anyhow, you have noted down 3, is that right? A. Yes.

Q. You were asked questions about talking to Mr. Brooks about this advertisement. Do you know that after work there were occasional informal gatherings and people had drinks? A. Yes, after work people walked in the room and chatted freely among themselves, saying what problems they had during the day.

Q. Did they have a drink on these occasions? A. Yes.

Q. What did they drink? A. Beer.

Q. Do you drink beer? A. No, I like wine, not beer.

Q. Did you join in this beer drinking after work? A. Very very seldom.

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(Witness retired)

JAMES PURDY GOODALL
Sworn and examined:

MR. BANNON: Q. Is your name James Purdy Goodall? A. Yes.

Q. Do you reside at 62 Rathowen Parade, Killarney Heights?
A. Yes.

Q. Are you the marketing manager with Canada Dry Corporation?
A. Yes.

Q. Does the Pub Squash Co. manufacture a range of mixed drinks under franchise from your company? A. As well as other drinks, yes.

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Q. Have you known Mr. Peter Brooks for a number of years?
A. Yes.

Q. Do you remember having a conversation with him some years ago prior to the formation of the Pub Squash Co., at your home?
A. Yes, I do.

L. Mojsza, re-x, retired
344. J.P. Goodall, x

Q. When was it you had that conversation? A. In 1972, on my birthday. 12th March.

Q. What did Mr. Brooks say to you in that conversation, as closely as possible using the words he used? A. Generally in relation to the industry, I am not sure whether I raised it or he raised it, but we spoke of three very important matters, as I remember it. (Objected to). We discussed the business generally, and one of the conversations was, I asked Peter how the Cottees franchise business was going, and he said "it is in the same state as it was when I was in Coca-Cola." He said it was in decline. "Falling apart" I think were the exact words. We both agreed it would make an excellent vehicle for home delivery products that were then on a fairly high rise within the industry. My being ex-Coca-Cola, we discussed the fact that Pepsi was a sleeping giant, and well handled Pepsi could take over from Coca-Cola with a nice share of the market.

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Q. Can you say what Mr. Brooks said to you, if he was saying it? A. He said, "I think it is a sleeping giant and with some decent management in it I could do it very very well." We then talked further, and he said that he believed that the lemon segment could be developed quite well within the total industry. He said "What do you think of Pub Squash as a name?" I remember him saying that. I said, "It really does not do a lot for me." He said he was interested in going into business himself, and would I be interested in joining him in a business and I said I would not be at the time, because I was quite happy.

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Q. What fixes the fact that this conversation was on your birthday? Was it a party? A. A slight party.

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Q. What fixes it that it was your birthday in 1972 rather than 1971 or 1975? A. I think I must have been a neglected child, I have had two birthday parties, one on my 21st and this one.

CROSS-EXAMINATION

MR. PRIESTLEY: Q. How long is it since you left Coca-Cola? A. About 1970.

Q. Did Mr. Brooks try out any other names for flavours on you that night that you can remember? A. Yes, we talked about a red drink, but I do not remember the name.

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Q. He was raising with you fair comment, was he? Names for different types of drinks that if the opportunity ever arose he may be interested in trying to sell? A. Not necessarily. We were talking about segments. First of all Cottees and then

the Cola segment, which were of interest to us, and we talked of a way of working into this large cola segment, which was through the lemon, and that is how the name came up.

Q. Did he say anything to you about a trademark "Pub" that you can remember? A. He asked me if I thought Pub was a good name, but there was no suggestion of trademark in the discussions.

Q. You realise that the answer you just gave, "He asked if I thought 'Pub' was a good name ..." (interrupted). A. Pub Squash. 10

Q. Which is it? A. Pub Squash.

Q. Are you sure? A. Yes, I am, because we were talking of a lemon cloudy drink.

Q. I suggest to you you were talking about lemon squash, and in association with that he said, "How about the name Pub for the lemon squash?" What do you say to that? A. No, I believe he said "Pub Squash" to me. Remember that I came out of the soft drink industry - I spent a lot of time in it - and our terminology and discussion about drinks and segments would be far more in depth than with somebody who had not been in the industry. 20

Q. How does that relate to this conversation? A. We would be talking of Pub Squash rather than Pub or lemon or red because we were talking about marketing.

Q. Is this what you mean, you would be talking in trade terms when talking about particular drinks? A. And names.

Q. Does the word "squash" have a particular signification, a particular meaning in the trade? A. Yes.

Q. Do the words "lemon squash" have a particular meaning in the trade? A. To me, yes, and generally in the trade. 30

Q. What I was suggesting to you was what he tried out on you was the thought it might be good to call lemon squash by the name "Pub". What do you say to that? A. No, Pub Squash.

HIS HONOUR: Q. That may mean one or other of two things. It may mean "Pub Squash" or it may mean "Pub" squash. I think that is what Mr. Priestley has in mind. A. No, the connotation I had of Pub Squash goes back many years when I was a child. Probably all my age group is the same way. When you went to an hotel with your parents or grandparents the squash you used to drink there was unique and different from that which you would get in a milk bar or which you would try to 40

make at home, and Pub Squash had a definite connotation in relation to this drink you bought at the hotel.

Q. I am not sure you followed the distinction I was trying to make. A. I understood Mr. Brooks said to me "Pub Squash".

MR. PRIESTLEY: Q. Your recollection is you said to him, "That name does not do much for me," or words to that effect, is it?
A. Yes.

Q. At that time, 1972, your opinion apparently was there was not anything particularly attractive about it as a name, is that so? A. No, that is not true. It was not a case of not being attractive. From a marketing standpoint, from a professional standpoint, I did not see it as a name that would be one that would set the world on fire. 10

Q. I suppose you have remained friendly with Mr. Brooks up to the present time, have you? A. From time to time we did some business together. Not socially. From a commercial point of view.

Q. And you have kept up your interest in the soft drink industry, have you? A. I am back in the soft drink industry now. 20

Q. Was there a period when you were out of it? A. Yes, between 1970 and 1977 I was in the automotive industry and the electrical industry.

Q. During that period did you remain interested in the soft drink industry? A. Yes, it gets in your blood.

Q. Where were you living in 1973? A. Where I am now.

Q. In Killarney Heights? A. Yes.

Q. Have you been living there all the time? A. Yes, since about 1969-1970. 30

Q. Did you at any stage become aware of the product Solo being on the market? A. I was aware of it when I saw a fairly heavy advertising campaign.

Q. What is your recollection of when that first came to your attention? A. About 1974.

Q. What is your recollection of the advertising campaign? What did you see? A. Because of my job I have seen films of their advertisements. The one that sticks to me is the one of the man in the canoe. I am not speaking as a layman. I know what advertising campaigns are all about. 40

Q. I am not asking you as an expert. A. I am not an expert. I am well informed.

Q. What is your recollection of it? A. A man's drink, and an image of a very robust sportsman as the origin of the campaign.

MR. PRIESTLEY: Q. At the time, in 1974, were you a fairly regular television watcher in your evenings? A. Certainly.

Q. I suppose you saw the various advertisements pretty frequently when your campaign was at its height? A. Yes, I did. 10

Q. Did you notice that there was used in all the television advertising that was shown in Sydney at the end of 1974 and during the beginning of 1975 amongst other slogans the line "Squash like pubs used to make"? A. I don't honestly recall it at that time.

Q. You have probably only been asked about these things quite recently and you are trying to remember back years, but were you in contact with Mr. Brooks socially or by way of business towards the end of 1974 or the beginning of 1975? A. At that time I - the contacts, before we came back into the business, were at parties because we had only seen each other a couple of days before. 20

Q. Just confine yourself to the end of 1974? A. 1974, 75 I offered him some assistance when he was flooded out because I was managing a plant further up the road and I offered him a forklift assistance to help him out and in 1975 I arranged for him to get some wholesale electrical goods.

Q. Would this be right that if you had noticed the use of the line "Squash like the pubs used to make" that would have caused you to remember what he had told you earlier on about a possible name for a product "Pub Squash"? A. At the time I was out of the industry and while - I am of the age that is not influenced to change my soft drink, you know at this stage you are either cold or a beer, and I was not going to be influenced to buy lemonade or lemon squash and it registered with me that Solo had a heavy campaign and it was a good attractive advertisement and then I switch off. Same thing would apply to advertisements that are now outside the soft drink industry right now. 30

Q. I just wish to ask you whether you think that if you had taken in the line at the time "Squash like the pubs used to make", you would have connected that what Mr. Brooks had mentioned to you about a possible name some years before, or don't you think you would have made a connection? A. Personally, I think any lemon squash - 40

Q. Just try to attend to the question? A. I don't know if I could have because there is so much confusion since then I really couldn't attempt to guess what I'd have thought then.

Q. Did you speak to Mr. Brooks about that time in connection with the Solo advertising or did he mention it to you in passing? A. No, we discussed the few little business deals we did and, knowing each other from the soft drink industry, always asked how he was going, that's the sort of thing, not specifics.

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Q. What have you in mind when you mention, as you did a moment ago, the confusion that has taken place since? A. The confusion that has taken place with me since because now I have gone back into the industry I have looked at historical advertisements or advertising to bring me up to date and when I talk about confusion I am talking about the confusion I would have in trying to remember what I thought then against what I think now.

Q. Do you have any difficulty about that? A. What, thinking back then, that advertisement?

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Q. Yes. A. I don't remember the term then.

Q. What is there that has caused you confusion in trying to think back? A. The fact whether I saw that line or not, "The one that the pubs used to make".

Q. Did you notice that a pub squash product did come on to the market at some stage? A. Yes, but I don't know the timing of it.

Q. What is your recollection, as well as you can think now, of the interval between the time when you noticed the Solo campaign and the time when you noticed that Pub Squash was available? A. Can I explain something before I answer the question? To be quite fair, our company in the U.S.A. has been looking at the lemon squash products and I have done some research to give them information on when Solo was brought on the market, so I am quite au fait with when all that happened and so I don't really know if I am giving an opinion that is unbiased. I have a feeling that it was round about '74.

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Q. Pub Squash? A. Yes.

Q. From the research that you have been doing, have you established that Solo came on to the market in Victoria in 1973? A. I thought it was first introduced in December and shipped out of here in December - must have been December 1973 - but not completely on the market. I think there was a test market when they were using it as an orange.

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J.P. Goodall, xx

Q. I asked you whether you had ascertained whether in Victoria there was a full scale launch of Solo as a product in December 1973? A. Not on the cuttings that we sent to the States, no.

Q. Have you formed an opinion concerning the lemon segment of the market as it stood in Sydney towards the end of 1974?
A. Round about that period, you mean size or -

Q. Whether there was any scope for development in it?
A. Certainly it was a two per cent cloudy lemon segment and squash was a traditional Australian drink and, as we discussed - I discussed with Mr. Brooks back in 1972 - it was a potentially untapped segment and we - I saw it as the way to go, the way right now I see other segments developing. 10

Q. To your observation did Solo make the first extensive inroad upon this potential market when it commenced in Sydney towards the end of 1974? A. I don't know.

Q. You have not been able to find that out? A. I don't know that, I wasn't in the industry at the time.

Q. But you have been doing research recently with this very -
A. Yes and I believe the two products were fairly simultaneous. 20

(Witness retired and excused.)

MAXWELL ALLMAN
Sworn and examined:

MR. BANNON: Q. Is your name Maxwell Allman? A. It is.

Q. Do you live at No. 15 Waterhouse Avenue, St. Ives?
A. I do.

Q. You are a company director? A. That is correct.

Q. You are the technical director of the Pub Squash Company Pty. Limited? A. That is correct. 30

Q. Have you worked for that company since May of 1974?
A. Yes.

Q. Did you become a director in April 1976? A. That is correct.

Q. Do you hold an honours degree in industrial chemistry from the University of New South Wales? A. I do.

Q. Awarded in 1960? A. Yes.

J.P. Goodall, xx, retired
350. M. Allman, x

Q. You are an associate of the Royal Australian Chemical Institute and the Australian Institute of Food Science and Technology? A. That is correct.

Q. Most of your career has been in the food and beverage industries? A. That is correct.

Q. Were you employed by Coca-Cola Bottlers in Sydney, which was a business owned by the Coca-Cola Export Corporation?
A. I was.

Q. Were you working for them from May 1969 till May 1974? 10
A. That is correct.

Q. Did you resign then to join the Pub Squash Company, as it is now called? A. I did.

Q. While you were working for Coca-Cola Bottlers in about the middle of 1970 was Mr. Peter Brooks the marketing manager of Coca-Cola Bottlers Sydney? A. He was in the early 1970.

Q. At that time did he ask you to do something about a lemon squash type product for Coca-Cola's post-mix market? A. That is correct.

Q. What did he ask you to do? A. He was interested in the 20
opportunities available in the sweet lemon type of beverage in that segment of the market and he asked me to develop such a product for that plan during 1970.

Q. Did you do that? A. Yes.

Q. How long did it take you to do it? A. I think probably about four to five months, I think all told.

Q. Is there a certain amount of technical work involved in developing a new beverage? A. There was for me at that stage. It was a matter of finding suitable sources of the correct type of lemon juice that would give us the flavour that we were seeking. 30

Q. Did you have to test different mixtures to arrive at a suitable recipe? A. Yes.

Q. Was a product developed as a post-mix product and marketed by Coca-Cola Bottlers Sydney to hotels? A. That is correct and clubs, licensed clubs.

Q. Did it have a brand name? A. No, it was just referred to as lemon squash.

Q. Was this well received in the hotels and clubs? A. I believe so. 40

Q. Is it still being sold? A. I believe so, to the best of my knowledge.

Q. After it was developed or at some stage during development did Mr. Brooks say anything about developing a lemon product for bottling and canning? A. Yes, this was in 1971. He was interested in arranging some test packs for this product in both non returnable bottles and in cans.

Q. Did you arrange such a test product? A. Yes, this product was produced in bottles and cans. I think it was in December 1971. 10

Q. Was that put on the market as a going product or not? A. No, the product contained fruit pulp and because of this it was contrary to Coca-Cola's then concepts quality control procedures for its factories and they would not allow it to be released or even produced in its plants.

Q. What was the problem about that as far as Coca-Cola were concerned? A. The fruit pulp was regarded as being something that would dirty the machinery, particularly the beverage processing equipment and the beverage filling equipment. It was difficult to clean the pulp off the machine and, therefore, became a source of microbiological hazard for beverages, so they didn't want to proceed with it. 20

Q. The machinery used in canning and bottling soft drinks, is that simple machinery or is it complex? A. No, it is reasonably complex, but it is designed with a view to it being sanitised.

Q. When you commenced duties with the Pub Squash Company as it is now known what position were you given? A. Technical manager. 30

Q. What were your responsibilities? A. Initially to get a very run down plant operational and at the same time to improve some of the products which far from satisfactory to our standards.

Q. Did you have any difficulties in bringing the production plant to an acceptable level? A. I'd say all of 1974 and very early in 1975 it was a constant ongoing problem.

Q. During 1974 did you do any work on product review and development? A. Yes, as I said, we had to review some products, the lemonade and orange drink and we wanted to develop the concept of the lemon drink further. 40

Q. Your company took over products sold as Cottees drinks, did it not? A. That is correct.

Q. Amongst the Cottees products was there a drink called a sweet lemon drink? A. Cottees lemon drink.

Q. Was that a lemon squash? A. Not really.

Q. What was it? A. It was a lemon squash type of beverage - well, I guess it is, in terms of it being - it had fruit juice in it, so it would have been a lemon squash, but in accordance with the food regulations it would not have rated as a lemon squash.

Q. It would not be treated as a lemon squash under the regulations? A. No. 10

Q. Is that something to do with the quantity of juice?
A. Fruit juice in a product, that is correct.

Q. It would be classified as a lemon flavoured drink rather than a lemon squash? A. Just a lemon drink would have been adequate.

Q. Did that have any particular brand name apart from being called Cottees lemon drink? A. Cottees Sparkling Lemon Drink, I think it was called, from memory. We didn't make very much of it. 20

Q. Did you have any difficulty with it? A. I myself did not like the flavour of it very much. This is one of the reasons why we were looking at developing a different lemon drink.

Q. Did you also take over Big Boy Lemonade, Tango Orange drink and Passiona? A. Yes, we did.

Q. Was there some trouble with the orange drink? A. Yes, the orange drink was not a very satisfactory flavour in our opinion and we did have problems with the microbiological stability of the product so we wanted to develop some different formulations. 30

Q. Did your company have ongoing commitments in this field?
A. We did have an ongoing arrangement with Cottees that we wanted to keep these products on the market.

Q. Was the orange drink replaced with another drink?
A. Yes, later in 1974 we developed a product we called C-time, which had a different flavour profile and was better from the microbiological stability standpoint.

Q. Was another product put on the market called 7-time?
A. Yes, that was a lemonade that we released.

Q. Can you remember which came first, the C-time, or the 40

7-time? A. The C-time came first, from memory, then the 7-time followed about a month apart.

Q. During 1974 did you have any discussion with Mr. Brooks about a lemon squash? A. Yes, as I said, lemon was in our agenda from the outset and we started some formulation work on lemon squash at about the time we finished the 7-time and C-time. I think that was around about late August, from memory.

Q. Can you tell me when Mr. Brooks discussed this lemon squash with you in 1974? A. The concept of lemon drink was generally discussed very early in 1974 before the company was formed. 10

Q. Was anything said to you at that time or at any other stage as to the name of the lemon drink that was the lemon squash? A. No, I think Mr. Mojsza made some reference to the name Pub Squash in August when Arthur and I asked him how we were going to code the material for costing purposes.

Q. In August of which year? A. 1974.

Q. To whom did he make that reference? A. I had asked him how we were going to identify the product for costing purposes and he made reference to Pub Squash. 20

Q. How long did you spend developing Pub Squash? A. We would have been working on Pub Squash through August, September, and October, I think, of 1974, and then we came into the summer period and we had to drop it for a while.

Q. Why did you have to drop it in the summer period? A. We didn't have sufficient production capacity to proceed with developmental work at that stage, we were too busy in actual beverage production.

Q. What about the supplies of lemon juice? A. That was also a factor which had to be taken into consideration in launching a new product. Lemon juice is seasonal and the lemon juice season runs from June through to early August. We would not have been able to secure quantities of the juice we were requiring for this product in time to release it during 1974 Summer season. 30

Q. While you were working over the period of this - I think you mentioned three months working on the lemon squash, were different recipes being tested for it? A. Yes.

Q. Was there a Mr. Newell working for the company as a food technologist? A. Yes, he was. 40

Q. Was he working under your direction? A. Yes he was.

Q. Was there any other factor that affected the immediate release of the Pub Squash drink? A. Yes, there was. Coming into February of 1975 we had overcome most of the mechanical problems associated with the production facility, but then we were hit with a series of power strikes that you may recall and these restricted our production significantly during that period of time.

Q. In February 1975, did you have a test run of the Pub Squash? A. We did a test pack that time. 10

Q. I just ask you this: this test run, is that in a can or in a bottle? A. When we do a test pack we have to do a production scale run. It requires a quantity of materials and we did test packs in both bottles and cans at that time.

Q. Did these bear any brand name on them at the time of the test run? A. No, they wouldn't have. The test pack can would have been plain test pack cans supplied by Pacific Cans and the bottles would have been bottles with a Crown seal that we nominated for that particular purpose.

Q. What was done with test pack material, do you know? 20
A. The product is normally stored in the warehouse, we move them around, expose it to the sun and weather conditions a bit to try and recreate the conditions you would experience during distribution and the product was held for a medium term evaluation of up to three months.

Q. This evaluation, would that include examination of the containers? A. The product would have - the packed product would have been sampled at regular intervals.

Q. Tests for fermentation and stability? A. Microbiological problems in the product which relate to fermentation - flavour stability primarily, tendency of cloudy material to settle. 30

Q. You say you worked over three months on developing the product, there is a further period in which the product, a test run was made and that was held for a period of up to three months for evaluation? A. Yes.

Q. Is this the normal procedure with lemon segment products?
A. It would be a normal procedure with any soft that I was involved in.

Q. Then the product was put on the market. By the way, did you have anything to do with ordering the cans or the labels or anything like that? A. No. 40

Q. Do you know when it was first launched on the market?
A. We did a - we started small scale production during

April, from memory, of 1975, but we weren't able to go into large scale production until we were able to secure adequate quantities of lemon juice, which would have been about June and July of that year at the earliest.

Q. Do you know that your company received a Commonwealth Industrial Research and Development grant? A. Yes, I do.

Q. Did you provide any information to support that application? A. Yes, an investigator spent some time with us going through our records and confirming that the expenses that we were claiming in this context were, in fact, correct. It was virtually an audit.

10

Q. Have you ever seen any television advertisement for Solo lemon drink? A. Yes, on very rare occasions.

Q. Can you remember when you first saw them? A. I don't think I would have seen them before some time in 1975 probably, or early 1975.

Q. Can you remember whether that was before or after the launch of Pub Squash? A. I think it might have been about the same time, I am not too certain.

20

Q. Can you remember what it was the first Solo advertisement or the message that it gave, the impression it gave you?
A. No, I can't. As I said, I am not a person who watches commercial television a great deal. That is why I am certain when I first saw the first Solo advertisement on T.V. I remember one commercial where a guy is drinking Solo, I think, and he dribbles some beverage down his chin.

Q. Did you ever see any advertisement which referred to Solo as being a "Squash like the pubs used to make"? A. In 1975 I remember seeing such an advertisement.

30

Q. Did that convey any impression to you regarding Solo?
A. Only that they were trying to relate it to a lemon squash type of drink, I think.

Q. Had you yourself ever had a squash in a hotel? A. Yes, on many occasions.

Q. Did you regard this phrase in the Solo advertisement about "A squash like the pubs used to make" as having any reference to the sort of product that Solo was? A. I thought it was an attempt, as I saw it, to describe the product.

Q. Did you ever think that that phrase - Solo had acquired a reputation in that phrase prior to the launch of your product? (Objected to.)

40

Q. When the Pub Squash was launched on the market did you consider there was any danger of it being confused with Solo because of that advertising? A. I don't think so, no.

Q. Did you think so at that time? A. No.

Q. The product that your company put out, Pub Squash, does that in your opinion approximate to the sort of squash that the hotels used to make? A. It would be similar.

HIS HONOUR: Q. How long have you lived in Waterhouse Avenue?
A. Since February, 1967.

10

Q. Is No. 15 up near Sheather? A. Yes, it is.

HIS HONOUR: I have to observe that Mr. Allman and I apparently live within 300 yards of each other, but I have never seen him in my life before.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. When you say that you think Pub Squash is similar to "squash like the pubs used to make" what did you have in mind as being the type of squash that pubs used to make?

A. The original concept of the lemon drink was to create a drink along those lines. That particular type of drink, historically - I am going back to when I was a small boy, now - was based on a lemon squash like Blue Bow and Long and Bard topped up with lemonade.

20

Q. What was the second name you mentioned? A. Long and Bard.

Q. You were trying in the product that you developed to produce a taste similar to what you remembered those tastes as being? A. That is correct.

Q. At the time when you had been developing the post-mix product for Coca-Cola had you been after more or less the same result? A. Yes, only in that context we were looking for a product which more fitted the food regulation kind of lemon squash.

30

Q. In the case of Pub Squash what you were aiming at - and correct me if I misunderstand you - was a taste without necessarily conforming to the food regulation requirements about lemon juice content, is that right? A. No, that is not correct. The food regulations regarding lemon squash per se required that the product be made from only lemon juice, sugar and water. This is not possible with -

Q. You say only lemon juice - you don't mean 100% lemon juice?
A. No, lemon juice, sugar and water.

40

Q. What was the distinction you were drawing between the Coca-Cola post-mix lemon squash as to content and the Pub Squash?

A. As I said earlier, Coca-Cola wanted a product which was to be loosely styled lemon squash. I believe that the formulation for that production should be approximately in conformation with that. As it turned out later, I was wrong, because to be a lemon squash the product must have fresh expressed lemon juice.

Q. Whether you were right or not at the time you were attempting with the Coca-Cola product to comply with what you understood the regulations concerning squash products to be? A. Yes. 10

Q. In regard to the Pub Squash product you were not so attempting, is that right? A. Yes.

Q. So that in regard to the two products you were aiming at the same result so far as taste was concerned but by use of different mixtures of materials? A. Yes.

Q. Did the work that you had done on the post-mix product with Coca-Cola provide a starting point for the work that you did with Pub Squash and the development there? A. Inasmuch as I learnt something of the types of lemon juice concentrate to use, yes. 20

Q. I think you said you began to work on the lemon squash product in your new company, then called Passiona Marketers, through August, September and October, of 1974, is that correct? A. Yes.

Q. You also said that the lemon juice season comes from June to early August? A. That is correct.

Q. Does that mean that say, for instance, at the present time you need to get in a stock of lemon juice during June to August or soon thereafter that will serve you until the following June in the production of pub squash? A. You could say that. 30

Q. Would it follow then that once the commencement of the experimental work for the new product had been left until August of 1974 it was going to be difficult to get a full scale production on any product that emerged from the experiment until at least June of the following year? A. That would be substantially correct.

Q. You said to Mr. Bannon that you thought that the first time you saw Solo advertisements on television was about the same time as Pub Squash was launched? A. I thought I said early '74 - I beg your pardon, early '75. 40

Q. I noted that you said early '75, but then you added, I

thought - and correct me if you wish - that it was about the same time as the launch of Pub Squash? A. Yes.

Q. I just want to get what your actual recollection is of the order of events. If you have any hesitation about the order, please let us know because I want to ask you whether at the time Pub Squash was launched, isn't it the position that you had not had any opportunity of making any assessment of what effect the advertising for Solo might have had on the people who were potential purchasers of Solo or Pub Squash? A. It would not have crossed my mind to even try, it is not my area of the business. I am only technical and I was more involved with product development and getting plant operational.

10

Q. What you said was that Mr. Mojsza told you to use the name Pub Squash at the time when you needed to have some reference name for the commencement of work in regard to the product that you were attempting to develop? A. That is correct.

Q. Is it correct that at the time when you raised that matter with him he simply stated "Well, we'll call it" or "We'll code it" or whatever words he used, "Pub Squash" for the time being or something like that? A. He just said call it Pub Squash.

20

Q. And that was all that happened at that stage? A. Yes.

(Discovery document 108 called for; copy produced.)

Q. I don't know whether you recognise the handwriting here?

A. Yes, that would be John Newell, I think. I don't recognise all this.

Q. Some things have been masked out of the original. What I was going to ask you was whether this would be the first entry made in whatever records you were keeping in regard to cost?

A. Not necessarily the first, but it would be one of the early worksheets that we were using at that time in relation to materials and formulas and whatever.

30

Q. Again, I am not suggesting it was necessarily the end of the month, but from your recollection was it towards the end of August rather than start that you got under way with this experimental work? A. Yes, it would have been more towards later in August rather than early in August when Pub Squash work commenced, I think, from memory.

(Original of discovery document 108 produced.)

HIS HONOUR: I will note that Mr. Bannon has produced a bundle of documents which include the original of discovery document 108 and that the documents are produced to Mr. Priestley at this stage with access limited to counsel.

40

MR. PRIESTLEY: Q. (Approached.) And you recognise this bundle of documents? This is the bundle of documents which contains one numbered 108 at the top of which I showed you a copy a moment ago. Do you recognise the bundle of documents as a whole? A. I do.

Q. How would you describe them generally? A. These would be worksheets and tentative formulations for syrups to be used in manufacturing beverage.

Q. Do they come from any particular time? Of working in your department? How come this particular bunch is all in a group? 10

A. Well, I guess they are all related to lemon drink which would have been associated with Pub Squash. I haven't gone through them all in detail.

Q. Just looking at the sheet that you have open at the moment, for the sake of elucidation it has got two words at the top, one Pepsi and one Pass., what does that sheet relate to?

A. That would be Pepsi Cola and Passiona.

Q. I don't want to get into any technical details. Would that have anything to do with the preparation of the lemon drink that became Pub Squash? A. No. 20

Q. Can I just draw your attention to several of the documents here: one headed "lemon drink" and to identify it has got a figure at the bottom .809629. First of all, whose handwriting is that in? A. That is John Newell's handwriting.

Q. Secondly, does it relate to the work that was being done and the lemon drink that was being worked on in August, September, October of 1974? A. To be quite honest I am not too certain. Perhaps it was.

Q. Then there is a document behind it which is dated 15th August, 1974, batch 11. I think it refers to lemon drink, one gallon. Would that be one of the very earliest documents relating to the developmental work on the lemon drink which became later known as Pub Squash? A. The particular formula you are looking at is a base lemon squash style, the formulation used in it just has the flavour. 30

Q. Would this be a document within your worksheet dating from the time before Mr. Mojsza had told you to use the name Pub Squash? A. Quite possibly, this would have been in the very early developmental stage of the produce where we were developing flavour standards, if you like to use that expression, from which to develop formulation. 40

Q. I show you the sheet of which, apparently discovery document 108 is a copy, although this is not actually numbered 108.

M. Allman, xx

That bears the date 29th August, 1974. So far as I have been able to see at a quick glance at those documents there is no earlier document bearing the name Pub Squash with a date on it earlier than that one of 29th August? A. Yes.

Q. You are certainly welcome to look at this to check that I am right, but assuming that is right would you agree that it would be round about the end of August Mr. Mojsza mentioned the name Pub Squash to you for the first time? A. I think that was about the time because that is when I went to him with a request for a code for costing purposes. 10

Q. There are other documents through here in the same handwriting, some in the same handwriting with the same heading "Pub Squash" but without dates. So far as you can tell us, would they be documents which came into existence probably after 29th August? A. Quite possibly, yes.

(Witness stood down.)

(Further hearing adjourned until 10 a.m. on Wednesday, 8th February, 1978.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PROPRIETARY LIMITED

v.

THE PUB SQUASH COMPANY PROPRIETARY LIMITED

TWELFTH DAY: WEDNESDAY, 8TH FEBRUARY, 1978.

(Work sheets and tentative formula work sheets in bundle
tendered without objection and marked Exhibit 27.) 10

(On application by Mr. Priestley leave granted to plain-
tiff to call further witness on the confusion aspect.)

(Mr. McGlinchy appeared in answer to a subpoena served on
Cottees General Foods: compliance with subpoena deferred
until 2 p.m.)

(Mr. Everett appeared in answer to a subpoena addressed to
Pepsi Cola Company of Australia Proprietary Limited and
produced four sheets of paper printed "P. Brooks proposal
cash flow, cash flow work sheet, profit and loss statement
and sales estimate". Other documents were produced 20
but production of same was not pressed by the plaintiff.
Access granted to parties.)

(Transcript corrections:

- *Page 299 fifth question, Substitute "Batch 11" for "p.11"
- *Page 258 last question, second-last line, substitute word
"when" for "where".
- *Page 270 last line, "Exhibit 125" should read "Exhibit 25"
- **Page 272 fifth last question, answer to commence with the
words "May be true to say" rather than with the words
"If he gave to in April". 30
- **Page 273 question commencing, "In relation to the first of
the documents" word "where" in second line changed to
word "whether".
- **Page 274, second last question, word "ones" changed to
"ounces".

*See now pages 360, 306, and 321 respectively.

**See now pages 323, 324 and 326 respectively.

*Page 277, seventh question, word "ones" changed to word "ounces". Ninth question, word "see" changed to word "say".
**Page 278, second question word "cross" changed to word "cost". Sixth question, change word "cross" to word "cost".)

MAXWELL ALLMAN
On former oath:

MR. PRIESTLEY: Q. (Approached.) I was showing you yesterday some of the documents in what has become Exhibit 27? A. Yes.

Q. I had asked you about one of them, which was identified yesterday as being the one with a number .809629 at the foot and that, I think you said, was in Mr. Newell's handwriting, is that correct? A. Yes. 10

Q. I want to ask you about some of these documents, the meanings of some of the terms, but I don't want to get into an area where the answers would require you to reveal anything you thought was confidential, so if I inadvertently do ask such a question would you mention if you think the answer would be confidential. Just looking at this sheet, there is a word there relating to some ingredient. What is the ingredient referred to? A. That would be sodium benzoate an added preservative. 20

Q. Another word that appears in various places in these sheets is the word Brix? A. Yes.

Q. What does that refer to? A. That is percentage of dissolved solids by weight expressed as sugar.

Q. There is a document which is dated at the top 15th August 1974 which I have asked you about yesterday also, but I did not ask you in whose handwriting that is. Do you recognise the handwriting? A. It still could be John Newell's, I must say it looks a little different. I couldn't be certain about that. He did have some assistants working for him at the time. 30

Q. Just so I can see whether I have understood in broad outline what the document is, does that record the ingredients for what is called Batch 11 of some particular mixture on the first part of the sheet? A. Batch 11, I think I mentioned yesterday, referred to a base 11 squash-type of product. The subsequent batches would have used some of that together with other additives for flavour adjustment purposes.

HIS HONOUR: Q. This was the one I think you described as being in the course of trying to fix the taste that you were then going to try and match? A. Yes. 40

*See now page 330
**See now page 331

MR. PRIESTLEY: Q. Following what is written about batch 11, does the document say there were batches 12 through to 22 when you looked at the back of it with slight alterations in each batch? A. That is correct.

Q. We go to a sheet which is headed "22nd August 1974" and for full identification its top line reads, "Lemon Squash 100 G.L.S. 22nd August 1974". Do you recognise that also as being in Mr. Newell's writing? A. Yes.

Q. Following up what I was asking you yesterday, would you agree, seeing that, that as at 22nd August 1974 the name Pub Squash had not as yet been assigned to this experimental work that was going on in respect of the Lemon Squash drink? 10
A. That sheet could have been any one of a number of sheets. I am not too sure which order they were in, but it would have related to the same basic work, I would imagine.

Q. It is not headed "Pub Squash"? A. No, it would not be headed Pub Squash because that would not be a Pub Squash formula.

Q. Coming back to a document which has at the head of it 100 GLS P.M.N.F.R.I. "16th July 1974", do you recognise that as being in Mr. Newell's handwriting? A. Yes. 20

Q. What does the P.M.N.F. stand for? A. That was a code we assigned to a product which is not pertinent to this case. We were looking at developing a juice-free passionfruit drink at that time.

Q. Does P.M.N.F. stand for Passiona Marketers? A. Non-fruit.

Q. So it was another possible flavour? A. This was other experimental work which does not relate to this case. 30

Q. I have noticed in some of these documents reference to acidity content and acidity syrup content or words of that kind? A. Yes.

Q. What does that mean? A. The figures would be percentage of citric acid by weight.

Q. Does the blending in of that particular ingredient have any importance in the formulation of a lemon drink? A. It would, indeed.

Q. What is the importance of that particular ingredient? 40
A. When we are trying to make a lemon drink as opposed to a lemon squash we are substituting juice with other flavour components and because we are adjusting juice, which has a high acid content, we must also adjust the acid content to compensate for the reduced quantity of juice.

Q. Does the amount of that acid content included in the blend have a distinct bearing on the final taste? A. Depending on the flavour base that you end up with, yes, it would. It is more related to the sugar and acid ratio.

Q. So far as taste is concerned and in the context that you just mentioned, can small differences in the acidity content have a marked effect on flavour? A. Depends what you call small and what I call small.

Q. Would you describe what I am asking about in your own language? A. A ten per cent difference in acid would have quite a dramatic effect in the way it can throw up some of the flavour additives and the effect they have in the final mixture. Could I make just one added rider to what I just said? The acidity is also partly related to the amount of carbonation in the product. Carbonation tends to increase the apparent acidity in the beverage, so this must be taken into account in adjusting the acid content in the syrup. 10

Q. Can it be the case that depending on the carbonation content an even smaller difference in the percentage in the acidity content can cause distinct difference in flavour? A. Yes. 20

Q. There is a sheet headed "Pub Squash" (spelt "SQ") "One G.L.", is that again in Mr. Newell's writing or some other writing? A. No, that would be Mr. Newell's writing.

Q. There is a figure here which I will not name in case it is confidential; it is the three numbered figure on the right-hand side of the page. What does that refer to? A. I am not too certain, to be quite honest. I imagine it is either an acidity figure or a titration figure.

Q. There is a sheet headed "Lemon Drink 1 G.L." Again, is that in Mr. Newell's handwriting? A. Yes. 30

Q. This is the same sheet that I have also referred to as .809629? A. Yes.

Q. Is there anything about acidity content on that sheet that you can see? A. Not that I can see, no. I am not too certain what he was dealing with there.

Q. Returning to the document, part of which was discovered as discovery document 108, it is headed, "Pub Squash 5:1 29.8.74", looking at the left-hand side of it first, what is the calculating process going on that is recorded there on the left-hand side? A. Looks like a subtraction to me. 40

Q. Over on the right-hand side we see, "Brix 53". Do you know what that indicates? A. That would be the percentage of dissolved solids expressed as sugar.

Q. Then underneath that it has got "Acid" and a figure, what does that refer to so far as you can see? A. That would be a reference to the acid content in that syrup, I imagine.

Q. Do you see underneath that the next word written is "Solo"?
A. Yes, I can see that.

Q. Would you understand the figure given next to the word Solo to be the acidity content of Solo? A. It could be, I really couldn't say. I am not familiar with the analysis of it.

(Mr. Priestley called for discovery document 108: not produced.) 10

Q. Do you see this sheet which is headed on the left-hand side "Pub Squash 5:1"? A. Yes.

Q. It follows in the bundle, as it presently appears, two after the last one I was asking questions about. Do the words and figures in the top left hand corner underneath the words "Pub Squash" refer to a calculation again referring to an acidity content? A. No, the figures in the top left hand box related to the ingredients, quantities of ingredients used to make a base syrup. 20

Q. Then do you see that other box underneath the one I have just asked you about which has some letters which I don't understand and then some figures to the right of them. Are you able to tell me what the letters represent? A. Looks like something mls. The mls would be millilitres. Again, it could possibly be a titration, I am not sure.

Q. Underneath that do you see the word "Solo"? A. I do.

Q. And against that the figures 9.05? A. Yes.

Q. Can you tell us what they represent? A. If I am reading them the way they appear, it would seem that the acidity in the mixture that has been made was higher than in Solo. 30

Q. Just first of all sticking to Solo equals 9.05, what do you understand that to be saying? A. Within the context of the previous remark, would have to be another titration figure for acidity.

Q. A titration figure for the acidity of Solo? A. Yes.

Q. Is that a figure that can be arrived at by taking a sample of Solo and analysing it? A. Yes.

Q. Is there any way that you are aware of by which that figure in relation to Solo could be obtained otherwise than by analysis of Solo drink? A. Not without knowledge of the formulation of the product. 40

Q. Underneath that appear the letters J.N.'s equal particular figure. Does J.N.'s stand for John Newell's formulation, would you think? A. That would be a reasonable assumption.

Q. Does this indicate to you that beneath the figure stated in relation to Solo the figure stated in relation to Mr. Newell's formulation is tabulated? A. Would you say that again, please?

Q. Would you agree that what appears in this second box is, first of all, a statement of what appears to be the acidity content of Solo by the titration method? A. Yes. 10

Q. Followed by a statement of the acidity content by the same method of Mr. Newell's formulation? A. Yes - well, can I just qualify that?

Q. Certainly? A. That would be of the base syrup that he has got at that time.

Q. You would be pretty confident, wouldn't you, that when you referred to the base syrup that he had at that time the time was the experimental period that went from August through September and October of 1974? (Objected to.) A. It is not a formulation as such. If it is anything, it is a comparison, possibly. 20

Q. You were in charge of the work that was being done by Mr. Newell during August, September and October of 1974? A. I was directing him in a broad sense.

Q. I am not suggesting you knew intimately from day to day what he was doing, but he was under your supervision in regard to that work? A. Yes.

Q. You do recognise these documents as being documents of the Pub Squash Company produced from your section? A. Yes. 30

Q. And are you able to tell us from your own knowledge and your own recollections of what happened in the company in 1974 and your recollection of the practice of the company in 1974 that this sheet that I am now showing you, which you previously identified as one that came into existence during August, September or October of 1974? (Objected to.)

Q. Would you like me to repeat the question or do you follow it? A. No, I think I got the general trend of the conversation. It appears to me that part of the document has been overwritten, if you like, at a different time. The ink or whatever, pencil, was obviously different. It could well be that Newell came back and compared some data later on and just put scribbled notes on the side of the sheet at a later date. 40

Q. You are saying, I take it, that you yourself would not know what the date was when he put that on? A. Not specifically, no.

Q. You see on the right hand side of the same sheet "Want acidity syrup of" figure, do you see that? A. Yes.

Q. What do you read that as meaning? A. Well, I think that gets back to our basic concept of the style of the drink. We have a basic lemon juice formulation on the other side of the sheet here he has apparently calculated what the acid was in the syrup, now he has made some adjustments with some additives and he is wanting to correct that to that same acidity, I would imagine, because there is also in these additives here an acid addition. 10

Q. Do I take it from that that you say that he, after making his adjustments and the like, was aiming at getting the syrup acidity figure which is in the small box on the far right hand side of the document? A. I would imagine he was aiming at that, although it could equally mean that he was aiming to increase it by that amount. I could not be quite specific, but I would assume that he was aiming for a total acidity figure represented by that number. 20

Q. Going back two sheets to the sheet headed "29th August 1974", do you see on the right hand side the acidity figure that I had mentioned to you before and then the acidity figure for Solo that I asked you about before? A. Yes.

Q. You see the actual figures there and is, in fact, the figure on the sheet that I now return to headed simply "Pub Squash 5:1" a figure in between the two figures on the sheet two sheets previously? A. That is so, but you must relate it to what is on the following line. It says add 1.5 grams of citric acid, which would relate to that 1.5 very possibly. As I said, I am not sure whether that was an actual quantity of acid in the syrup expressed as a percentage or as a sought after addition. The numbers tend to relate, so far as I can see. 30

Q. It might be, of course, that Mr. Newell is the right person to ask these questions of, but I need to ask you while you are here? A. Sure, I appreciate that.

Q. Looking at the two documents that I have lastly been showing you, the one with the dated 29th August 1974 and the one simply headed "Pub Squash 5:1", would you agree that they appear to be related documents in the sense that Mr. Newell went from the document dated 29th August 1974 to the document headed "Pub Squash 5:1"? A. He might have gone to or from, I wouldn't like to say. As I said at the outset I am not certain 40

about the chronological order of those documents. The other thing that is apparent, if I may say, is that the references to Solo on both those documents have both been overwritten subsequently, as far as I can see.

Q. The word Solo in the document dated 29th August appears to be written with a different pen? A. Yes.

Q. In the same handwriting? A. Yes, it obviously is not as black as the other writing.

Q. It is a different writing instrument from the other? 10
A. Yes.

Q. On the document headed "Pub Squash 5:1" the word Solo appears to be written by the same instrument as the top left hand box, does it not? A. I am not sure. (Objected to.) To me, it still appears to be different writing - sorry, not different writing, a different instrument.

Q. I turn to a document which is two sheets before the one dated 29th August 1974 in the bundle and which is headed simply "Pub Squash". Do you recognise that as Mr. Newell's handwriting? A. Yes. 20

Q. I turn to the document which is fourth from the front of Exhibit 27 which has got the numbers "87 percent" on the top right hand side of it. Again, is that Mr. Newell's handwriting? A. Yes.

Q. Does that show an acidity figure about the middle of the page on the right hand side? A. It does.

Q. Is that an acidity figure very much in the same area as those on the two sheets that I have been showing you before? A. It appears to be.

Q. Being a sheet headed 29th August 1974? A. It appears to be. 30

Q. Are you able to say whether an acidity figure of that order was ultimately used in the manufacture of Pub Squash? A. Without referring to the syrup formulation I wouldn't say that.

Q. Would you agree after looking at the two documents that I have shown you, the document of 29th August 1974 and the document two sheets later in Exhibit 27, that Mr. Newell must have obtained some Solo and analysed it at some stage in the course of his experimental work in regard to Pub Squash? (Objected to.) 40

HIS HONOUR: Q. Having seen the documents and bearing in mind your knowledge of what Mr. Newell was doing, do you not agree that at some stage during the course of the experiment Mr. Newell obtained samples of Solo or a sample of Solo and analysed it? A. It could have been during or later.

MR. PRIESTLEY: Q. Have you got any direct knowledge of that yourself? A. No, I haven't. As I said, I had given him a certain style I wanted him to work to. If he off his own bat chose to do some comparative work during or later that was not to my definite knowledge. 10

(Document first produced in answer to the call for discovery document 108 and referred to on p. 298 tendered without objection and marked Exhibit "X".)

(Original document marked discovery document 108 called for; not produced.)

(Mr. Priestley sought leave to use two documents from Exhibit 27, one dated 29th August 1974 and one two sheets following, to seek technical instructions from his clients or, alternatively, from some other independent source.) 20

(Short adjournment.)

(Mr. Bannon informed his Honour that the defendant will agree to Mr. Priestley having the assistance of Mr. Francis Joseph Swan on the basis his Honour had suggested in chambers.)

(For judgment on application to extend area of disclosure of documents contained in Exhibit 27 see separate transcript.)

MR. PRIESTLEY: Q. Prior to Pub Squash actually being launched on the market in April 1975 were you aware that the product Solo had been sold in Sydney or tested previously at the very least? A. I was aware, I think I said yes, of T.V. advertising sometime early in 1975. I assumed the product was being sold at that time. 30

Q. As distinct from being aware of the product being advertised, were you aware prior to learning of the product being advertised that that product was being sold in Sydney?

A. No.

Q. Did you at any stage have any discussion with Mr. Brooks before the end of 1974 in which he mentioned to you the existence of the product Solo on the market? A. Not that I can recall. 40

*See now page 359.

Q. Similarly, can you recall any conversation with Mr. Mojsza prior to the end of 1974 in which he mentioned to you the existence of the product Solo? A. No.

Q. So far as Mr. Newell's activities in August, September and October 1974 were concerned, did any instructions that were given to him pass always through you? A. Largely.

Q. On technical matters it would not have been the situation, would it, that either Mr. Brooks or Mr. Mojsza would have given him any instructions without your knowing about it? A. Unlikely. 10

Q. In the last three months of 1974 who were the active executives of the Pub Squash company who were superior to you in the organisation? A. Peter Brooks and Leslie Mojsza.

Q. Would those two persons together with yourself have constituted the three chief executives at that time? A. That is correct.

Q. In the course of the preparation of this case, did you have any part in collecting the documents together for the purposes of discovery? A. No. I do recollect I wrote an affidavit. 20

Q. You are aware, I suppose, that the solicitors for Pub Squash gathered together a number of documents for the purpose of causing a list to be made and then that being called a list of discovered documents or some such term; you are aware of that general procedure? A. Yes.

Q. Did you yourself take any part in searching out documents to be handed over to the solicitors for that purpose? A. No.

Q. Are you aware also that an interrogatory procedure was carried out before hearing actually commenced? A. I heard about it. 30

Q. You are aware that that involved questions being listed and handed to the solicitors who then assisted in the preparation of answers to the questions? A. Yes.

Q. You are aware that Mr. Brooks was the one who actually made the affidavit relating to the answers to the questions?
A. I understand that happened.

Q. Did Mr. Brooks speak to you at any stage seeking information from you in regard to the answers to the questions?
A. Not that I can recall.

Q. Have you yourself looked at the questions and answers at any stage? A. I have not seen a complete set of questions 40

and answers. I do not think I have seen any of the questions and answers, to be correct.

*Q. Are you aware that, in substance, one of the answers to the questions says that "various members of the board and employees of the company have informal discussions outside normal working hours"? A. From time to time, yes.

Q. Are you aware of that much? A. Yes.

Q. Are you aware also that in regard to the period which, in the answer to the interrogatories at any rate, is specified as being on and after approximately October 1974 discussions of that kind took place at which the types of matters discussed included (1) the fact that it was unfortunate that Solo lemon drink had been launched when the defendant was preparing to introduce the Pub Squash onto the market (Objected to; discussion ensued as to witness' earlier evidence.)

10

WITNESS: I am not aware that was a question to which I answered in the affirmative. I thought I had answered to a question pertaining to activities between the board and personnel of the company.

20

HIS HONOUR: That may be the problem; but it does mean, I am afraid, you are not listening as carefully to the questions as perhaps you might and the result is that we get answers that might not be any use to anybody.

(Question and answer marked * read.)

WITNESS: I would like to change that to "no", if I can.

MR. PRIESTLEY: Q. What you are saying is that it is true that such discussions did take place from time to time, but you were not aware of that being contained in an answer to interrogatories?

A. Thank you, that is correct.

30

Q. Just going to the facts then rather than what the interrogatories dealt with, do you agree that informal gatherings of the kind I have described did occur on and after October 1974? A. I understand they did; in fact, they did.

Q. Dealing with the period of five months after the end of October 1974, are you able to say that from time to time you were present at such informal gatherings? A. Occasionally, yes.

Q. Have you any recollection at any of such gatherings of there being discussions concerning the launching of the Solo lemon drink? A. Not that I am aware of, no. I think I said earlier that I spent a lot of my time in at the plant, I was not present at all of these discussions.

40

Q. Were you present at any stage when there were discussions concerning the overall advertising of the Solo product?

A. No.

Q. Were you present when there was any discussion of the consideration or the thought that statements such as "squash like the pub used to make" might be misleading? A. No, I was not.

Q. then, were you present on any occasion when there was any discussion along the lines for your company to call its lemon squash product the squash like the pub used to make might be inaccurate? A. No, I have not heard of that. 10

Q. At these informal discussions of the kind I have asked you about, and at which you did attend in that five months period I have specified, can you recall who else was present? A. The managing director is often there. We used it as informal staff meetings. Sometimes the accounts people were there, the distribution people.

Q. Can you specify who might have been there of the accounts people? A. Particular names? 20

Q. Yes? A. Mr. Mojsza would have been there occasionally. Mr. Clark, who was then company secretary, on very odd occasions. That is about all I think, that is, from the accounts.

Q. What about the distribution side? A. Mr. Holland.

Q. What was his position with the company? A. Distribution manager.

Q. Is he still with the company? A. He is, yes.

Q. Anybody else? A. Mr. Hanna.

Q. Is that the whole of the distribution side that you recall? A. Yes. 30

Q. What about Mr. Newell, would he be there from time to time? A. On odd occasions, yes.

Q. Is there a Mr. Robinson connected with the company? A. Yes, he is our Melbourne manager at the moment. I think he was market services manager.

Q. Did he attend at those discussions occasionally? A. Very rarely. To my knowledge he may have been there twice, I think.

RE-EXAMINATION:

MR. BANNON: Q. Do you remember at any such gatherings any one

M. Allman, re-x

saying something about, "Why don't we come out with Pub Squash" or similar words? A. No, I do not recall that.

Q. You told us it was in August 1974 that you were given the name Pub Squash? A. I was given the name by Leslie Mojsza. I did not know whether that would be the name for the company.

Q. Did you ever hear of any other name for the product from then on? A. No, I did not.

Q. In March 1975 did you know whether or not you had cans for the product in hand in the company? A. Not that I can recall. We certainly did not have them when we did the test pack.

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Q. When did you first see the cans? A. In April when we started producing it, I think.

Q. Have you ever had anything to do with the ordering of cans yourself? A. No.

(Witness retired and excused.)

(Further hearing adjourned to 10 a.m. on Thursday, 9th February, 1978.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PROPRIETARY LIMITED

v.

THE PUB SQUASH COMPANY PROPRIETARY LIMITED

THIRTEENTH DAY: THURSDAY, 9TH FEBRUARY, 1978

(The transcript was altered as follows:

*P.300 - the name "Mr. McGinty" altered to read "Mr. McGlinchy" and the name "Mr. Evatt" altered to read "Mr. Everett" 10

*P.301 - the last question: the name "Passiona Markets" altered to read "Passiona Marketers"
Question 8: the abbreviation "G.L.S." altered to read "GLS"

*P.304 - Question 1: the word "giure" altered to read "figure"

**P.312A - Question 11: answer amended to read "This is November 1977:" 20

**P.314 - Question 7: the last word of the question amended to read "them"

**P.324 - Statement by Mr. Priestley, line 4, the word "whiter" amended to read "lighter"

**P.327 - Question 10: line 1, the word "taste" amended to read "test")

MAUREEN BURKE
Sworn and examined:

MR. PRIESTLEY: Q. Is your name Maureen Burke? A. Yes.

Q. Do you live at 4 Broad Street, Wagga? A. Yes. 30

*See now pages 362, 364 and 367 respectively.

**Not reproduced in this evidence.

Q. Are you a receptionist by occupation although not presently employed? A. Yes.

Q. Were you living before 1972 at Oaklands? A. Yes.

Q. Did you leave there to go to Albury? A. Yes.

Q. How long did you live in Albury altogether? A. Four years.

Q. What was the year when you went to live in Albury?

A. 1973.

Q. What was the year when you left Albury? A. 1977.

10

Q. And when you left Albury did you go to live in Wagga?

A. Yes.

Q. Are you acquainted with a soft drink known as Solo?

A. Yes.

Q. Can you recall in what town you were living when you first became aware of that drink as being available to buy? A. In Albury.

Q. And after you became aware of its availability did you at some stage buy some Solo? A. Yes.

Q. At any time did you become aware of any advertising in regard to Solo? A. Yes. On the television.

20

Q. That was the television in which town? A. Albury.

Q. Do you remember whether you bought the drink before you saw the advertising or after you saw the advertising?

A. After.

Q. Have you got any recollection of any particular advertisements on the television in regard to Solo? A. The one with the man in the canoe.

Q. Is the advertisement about the man in the canoe the only one you recall seeing in regard to Solo? A. No. I have seen others.

30

Q. Do you recall which one it was you saw first about Solo?

A. The man in the canoe.

Q. What do you remember about that advertisement? Just tell us of the pictures and the words in the advertisement that you remember? A. That it was a man's drink and just from going through the rapids.

Q. Do you remember anything about the man in the advertisement in particular, things he did that you recall now? A. Just that he came down the river and stopped and he had a drink.

Q. And on the question of the actual advertising that was done by words in the advertisement, what is your recollection there?

A. That it was a man's drink and that it was squash like the pubs used to make.

Q. What sort of shop was it that you first bought any Solo in?

A. A cafe.

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Q. When was the first time that you became aware of the product known as Pub Squash? A. When I moved to Wagga.

Q. When was it that you went to Wagga? A. 1977.

Q. Do you remember what month? A. March.

Q. In what circumstances was it that you first encountered Pub Squash? A. When I went to buy a drink and I couldn't see Solo so I thought - I got Pub Squash instead.

Q. Was this a drink handed over the counter? A. No. From a refrigerator.

Q. One you went and chose, yourself? A. Yes.

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Q. And when you took the can out of the refrigerator did you look at it? A. Yes.

Q. I think you said you had first looked for a Solo can?

A. Yes.

Q. Did anything in particular attract your attention to this can, the one that you did pick up? A. That it was very similar. Yellow in colour.

Q. And when you decided to take the can, what did you think about the product that you were getting in the can? A. I thought it was the New South Wales side of Solo.

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(Luncheon adjournment.)

(Mr. Garry Godfrey, Sales Executive of Coca-Cola Bottlers Sydney Pty. Limited appeared in answer to a subpoena to that company and produced documents. Access granted to both parties.)

CROSS-EXAMINATION:

MR. BANNON: Q. Have you ever had a squash in a hotel? A. Yes.

Q. Very often? A. Now and again.

Q. How long have you been having squashes in hotels? I am not trying to push you, but before 1977, I take it? A. Yes.

Q. I take it too that when you said that you remember Solo advertisements about it being "a squash like the pubs used to make", you tried a Solo, did you? A. Yes.

Q. Did you find out for yourself whether or not it was a squash like the pubs used to make? A. Well, it actually depends on which hotel you drink it - it depends at which hotel you get a squash at. 10

Q. The squashes change from hotel to hotel? A. Yes.

Q. But you regarded this as a mere description of the sort of drink, I take it? A. Yes.

Q. I think you mentioned that you had often seen it advertised as man's drink? A. Yes.

Q. I suppose you thought that was also intended as a mere description? A. Yes.

Q. You never went into a shop and said "I want a man's drink", did you? A. No. 20

Q. To get Solo and you never went into a shop and said "I want the drink for the man in the canoe"? A. No.

Q. You never went and said, "I want the drink that is the squash like the pubs used to make"? A. No.

Q. These terms you regarded as either mere descriptions or mere advertising? A. Yes.

Q. When you tried the Pub Squash I suppose you compared that in your own mind to the squashes such as the hotels used to make, too, did you? A. No.

Q. Did you think it was like some of the squashes the hotels' used to make? A. Not really, no. 30

Q. You say that the hotel squashes differ from hotel to hotel? A. Yes.

Q. Did the Solo seem to you to be like the squash in any of the hotels that you went to? A. Yes.

Q. Did the Pub Squash seem to you to be like the squash in any of the hotels you had been to? A. Not that I can recall.

Q. Was it a bit more bitter than the ones you had had in hotels? (Objected to.)

Q. Did it seem more bitter to you than some of the squashes you had had in some of the hotels? A. I can't recall.

Q. Did it seem sweeter than some of them? A. It just seemed more fizzier.

Q. In the hotels you had been to to have a squash, did they use one of these machines to mix it or did they mix a bottle of some sort of syrup with some soda water or lemonade, or did they do it out of a machine? A. No, they mixed it. 10

Q. With a bottle? A. Yes.

Q. They didn't use a machine with a handle on? A. No.

Q. They mixed it with what, lemonade or soda water, did you have? A. I didn't really notice.

Q. Would you agree that the amount of fizz or carbon dioxide in the drink would depend upon the amount of soda water or lemonade that was put in the squash? A. Yes.

Q. You had seen the cans of Solo before, I take it? A. Yes.

Q. (Exhibit "A" shown to witness.) Is that a can which you recognise as one of the cans of Solo that you used to buy? A. Yes. 20

Q. Did you notice on it when you bought it that it has got a name on the side of it, as the manufacturer? A. No.

Q. Did you notice any reference on it to Tarax? A. Yes.

Q. Did you believe it was a Tarax product when you bought it? A. Well, I never really examined the can.

Q. But you had seen the word Tarax on the cans, had you? A. Yes.

Q. Albury buys most of its products from Victoria, doesn't it? A. Yes. 30

Q. When you were buying Solo there you thought you were getting some from Victoria, is that right? A. Well, I didn't really think about it, just most things come from Victoria.

Q. When you bought the Pub Squash in Wagga, I think what you told us what that you went to buy Solo, you couldn't see it, so you grabbed Pub Squash instead. So that means, of course, that

you realised they were different, didn't you? (Withdrawn.)

Q. Isn't this what you said: "I went to buy Solo, I couldn't see it so I grabbed Pub Squash instead"? A. Yes.

HIS HONOUR: There was more to it than that.

MR. BANNON: Q. I will read out the whole of my note of what you said. You became aware of Pub Squash at Wagga and you went there in March, 1977, is that right? A. Yes.

Q. "I went to buy Solo, couldn't see it, so I grabbed a Pub Squash instead", is that part right? A. Yes.

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Q. It was a self-serve, is that right? A. Yes.

Q. "I looked at it", you said that? You said you looked at it when you went to buy it? A. Yes.

Q. The can was very similar, yellow in colour, you said that?
A. Yes.

Q. And you said "I thought it was a New South Wales Solo"?
A. Yes.

HIS HONOUR: The New South Wales side of Solo.

MR. BANNON: Q. But when you saw the can you realised it was different from Solo, didn't you? A. A different name.

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Q. Did you look at it to see who made it? A. No.

Q. You said the can was very similar yellow in colour?
A. Yes.

Q. Is that the thing that made you think it was the New South Wales side of Solo? A. Yes.

Q. And nothing else? A. Well, they are very similar when they are in the shops together.

Q. But it was that fact, the similarity in colour, that made you think it was the New South Wales side of Solo? A. Yes.

Q. And no other factor? A. The name could have influenced .. 30

Q. In what sense? A. In that it is similar to Solo slogan.

Q. You did tell me earlier that you thought that slogan was a mere description of Solo? A. Yes.

Q. You didn't believe, did you, that it identified Solo?
A. Yes.

Q. You did? A. Yes.

Q. Did you believe that the man in the canoe going through the rapids identified Solo? A. Yes.

Q. Did you think that "a man's drink" identified Solo?
A. Yes.

Q. So you believed that any advertising at all identified it, is that right? A. When you saw the advertisement you knew it was Solo.

Q. Would you expect to be served Solo if you went into a shop and asked for a man's drink? A. No. 10

Q. Would you expect to be served Solo if you went into a shop and asked for a squash like the pubs used to make? A. Not necessarily.

Q. If you went into a shop and said "I want a drink associated with a man going through the rapids in a canoe"? A. It depends whether they had seen the advertising.

Q. If you saw an advertisement saying that something was good and best or cheap and best, you would realise that that was a mere trading - (Objected to). 20

Q. If you saw an advertisement saying that something was a "perfection soap", you would realise, would you not, that that was mere advertising?

HIS HONOUR: I don't know that you would, because I think that is the name of a brand of soap.

MR. BANNON: Q. Would you believe that perfection regarding a soap referred to any particular brand? (Objected to; withdrawn).

Q. If you saw something said to be a perfection soap would you believe that was any particular brand? A. No. 30

Q. If you saw something described as the best product on the market would you regard that as being any particular brand?
A. No.

Q. If you saw something described as "a squash like the pubs used to make" would you regard that as any particular brand?
A. Well, that comes back onto the advertising.

Q. Yes, I know it does. A. So, I would naturally assume it was Solo.

Q. If you saw it described as "a man's drink", would that mean to you any particular brand of drink? A. Solo.

Q. Didn't you tell me earlier that you would not go into a shop and ask for a man's drink when you wanted a Solo drink?

A. Yes.

Q. If you did ask for a man's drink when you went into a hotel, what would you expect to be served? A. I don't know - beer.

Q. If you went into a hotel and said you wanted a squash like the pubs used to make what would you expect to be served? 10

A. A squash.

Q. Any squash? A. Whatever they made there.

Q. Whatever they mixed up in the hotel? A. Yes.

Q. Have you seen other lemon drinks in lemon coloured cans or yellow coloured cans apart from Solo and Pub Squash?

A. Yes.

Q. Shelleys, for example? A. No, I haven't seen Shelleys.

Q. You realise that the name Pub Squash is quite different from the name Solo? A. Yes. 20

Q. By the way, what were you doing before you were a receptionist? A. In Wagga?

Q. In Wagga, yes. A. I was at college.

Q. What were you doing at Albury? A. I was working at the Murray River County Council.

Q. Have you ever worked in a food store? A. No.

HIS HONOUR: Q. Is what you say that although you would not go into a food store and say "Give me a squash like the pubs used to make", nonetheless, if somebody said to you "What's the name of that stuff that they call the squash the pubs used to make", you would immediately think of Solo? (Objected to by Mr. Bannon: withdrawn.) 30

Q. If somebody did ask you that question, "What's the name of that soft drink they keep calling the squash like the pubs used to make", what would you say? A. Solo.

MR. BANNON: Q. (By leave.) You know of other names applied to Solo, don't you? You know of it being called "A man's drink"? A. Yes.

Q. You know of it being called the "thirst crusher"? A. No.

Q. Would you agree that there has been no reference to it as a squash like the pubs used to make for nearly two years in any advertising you have seen? A. Well, I haven't seen any of their advertising for a couple of years.

Q. Do you watch television? A. Not very often.

Q. Would you agree that when you go to a hotel you would not expect to be served Solo if anybody referred to a squash like the pubs used to make?

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HIS HONOUR: I rather think that does not arise out of my question.

MR. BANNON: Q. Would you agree that if you went into a hotel and you heard people talking about a squash like the pubs used to make you would not expect the hotelkeeper to be giving you Solo when that phrase ----

HIS HONOUR: I don't think that arises out of it, either.

MR. BANNON: Q. If you heard somebody talking about a soft drink as a man's drink would you expect any particular soft drink to be given to you?

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HIS HONOUR: Again, that does not arise out of it.

MR. BANNON: Q. When you gave that answer to his Honour just now, were you aware that Pub Squash has been on sale for quite a long time? A. I only came in contact with it since I moved to Wagga.

Q. That was in 1977? A. Yes.

Q. Have you drunk it since then? A. Yes.

Q. You have been aware that it was a different brand from Solo? A. I didn't know straight away.

Q. How quickly did you know that? A. When Solo started coming on in Wagga.

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Q. When was that? A. It would only be about four months ago I have noticed it.

Q. And you realised that the two drinks were different?
A. Yes.

(Witness retired and excused.)

JAMES RICHARD NORTHEY
Sworn and examined:

MR. BANNON: Q. Is your name James Richard Northey? A. Yes, it is.

Q. You live at No. 33 Gordo Avenue, Wattle Park, South Australia? A. That is right.

Q. What is your occupation? A. I am now retired.

Q. Were you formerly the manager of the soft drinks division of General Foods Cottees? A. Yes, Cottee's General Foods.

Q. When were you asked to give evidence in this case? 10
A. The day before yesterday.

Q. While you were at Cottee's General Foods, who was the overall manager there at the time, in 1973? A. '73, it was Bob Lasley, Robert Lasley.

Q. In 1974? A. Gerry Wollert. He took over at about Christmas.

Q. In 1973? A. Yes.

Q. In 1973, were you involved in discussions with Mr. Peter Brooks? A. Yes I was.

Q. Concerning him taking over the soft drink division of Cottees General Foods? A. We were talking about his taking over the Sydney operation. 20

Q. When did those discussions first begin, to your recollection? A. In May of 1973 was the first discussion I was involved in.

Q. Did the discussions continue throughout 1973? A. Yes. Right through 1973 into the early parts of 1974, until in fact the deal was done.

Q. In 1973, did Mr. Brooks supply your company with documents being projections of volume sales for his proposed take-over? 30
A. Yes, as I recall it - after it was agreed that we would carry on negotiations, we provided him with any information that he wanted. That was in the winter of 1973 and then about the end of winter he came back with a number of sales estimates which were turned into cash flows which depended on when any agreement might be struck and Peter Brooks might start his business, so obviously it would affect the finances of the deal.

Q. When you say "came back for sales estimates and cash flows" who came back with them? A. Peter Brooks - to Cottees General Foods. 40

Q. Did he give you a number of these projections of volume sales? A. Yes, because as I have said, it depended on when in fact the deal might be struck, he might be in fact start his business, so, it would have, you know, significant effect on the early trading profits and cash flow. It is very different in this industry going into it in the summer as opposed to the winter.

Q. Were these projections for 12 month periods? A. Yes, I think they were - from memory.

10

Q. Did the various projections show different starting dates? A. That is right.

Q. Can you remember the starting date of the first one? A. Not precisely, but from memory, it was somewhere round about the beginning of that summer, i.e., it would have been the latter part of 1973.

Q. Can you remember the starting date or the projection date of the last one that you received? A. It went through to the middle of winter 1974 - July I think it was.

Q. When did you receive the last of these documents? A. In other words, the one for July?

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Q. July 1974? A. As I recall, they were all done more or less at the same time, because as I said, this was necessary in order to see what would happen if in fact there was a delay as in fact there turned out to be, before the deal was struck and therefore the business was commenced, i.e., Peter Brooks' business, in the middle of the winter.

Q. Can you tell me when you received the last projection? A. They were all done - let me see - if it started in December, there was time to get it all established from the time he received the data and this would have been round about September/October, I would think.

30

Q. Of which year? A. 1973.

Q. That is when all these projections ---A. As far as I can remember.

Q. ---were received, and did you receive any projections in 1974 of volume sales? A. Well, there was updating and refinements right through until the whole thing was finished but I do not recall any sort of fundamental change which took place - they were just general polishing up jobs.

40

Q. So the July 1974 projection, you say --- (requested not to lead). When was it that you say you received that one? A. Which one?

Q. The one commencing in July 1974? A. There were a bunch of these that came in round about September and then there were refinements.

Q. September of which year? A. September 1973 that would have been.

Q. Did the refinement relate to the volume or the costing out of them? A. The volumes, if at all, to a minor degree and of course polishing up and costs and that sort of thing, but the fundamental figures were done, as I said, at that time and there were refinements afterwards. 10

Q. During these discussions about the take-over, did Mr. Brooks say anything to you as to the sort of product he proposed to sell if he took over the business? A. He had in the estimates some volumes for new products and he talked to us in general terms as to what he had in mind, i.e., that it was his intention to put on a new orange - which was not very surprising, because the Cottees Orange was a bad product.

Q. What was it called? A. Tango. That he intended to put on a Lemon, another lemonade, a limey-American type lemonade. There was some talk of his possibly doing his own Cola. That revolved around what deal might or might not be struck with Pepsi Cola, and that was the degree of detail into which he went - the flavours. 20

Q. So they were an orange drink? A. A lemon and lemonade.

Q. And possibly a Cola? A. Yes. Possibly a Cola and possibly some mixes. Again, that would depend on the Canada Dry situation.

Q. Did he tell you anything about the names he was going to give these new products? A. No. There was never any discussion of names, packages, design, presentation - anything of that sort. 30

Q. Did he tell you whether or not he had names in mind for them? A. Yes. I believe he had names and ideas for all of them and how they would be presented, but it was not discussed.

Q. Did he tell you that? A. Yes.

Q. You say that he was given access to documents? A. Yes he was. Well, I can recall that I was personally told that there was nothing which he could not see concerning the functioning of that plant and the recent profit history, the production history, the sales history etc. 40

Q. Did you know a Mr. Lazslo Mojsza? A. I do.

Q. Do you know whether or not Mr. Mojsza had permission to give Mr. Brooks any access to any documents that he had?
A. I am not too clear. These documents are Cottees documents?

Q. Cottees documents, yes. A. Well, I can only - I remember Peter was told and agreed that he would keep it as confidential as possible. Whether or not Mr. Mojsza was working on them in those early stages, I do not recall, but I do not remember Mr. Mojsza being involved at that time in 1973.

Q. Would the permission that Mr. Brooks had obtained include any Cottees documents that Mr. Mojsza might have had? A. Yes, I suppose so. I must admit that I cannot remember clearly the situation with Mr. Mojsza as at that time. Mr. Mojsza, I know, worked for Pepsi Cola at one stage and I cannot myself remember when he stopped at that job - whether he immediately started with Mr. Brooks and, you know, therefore would have been looked upon as part of Peter Brooks' team. 10

Q. Was Mr. Mojsza at some stage seconded from Cottees to Pepsi Cola or vice versa. Do you remember that? A. No. He was involved with Cottees. This is complicated, because Cottees have the Pepsi Cola franchise, so that there were certain, you know, financial matches where in effect he was part of the Cottees organisation. 20

Q. Have you at some stage also worked for Cadbury-Schweppes?
A. Yes. I did. That was immediately previous to going to Cottees General Foods. I went to Cottees General Foods in 1969 and I was not in soft drinks at that time.

Q. In 1973/74, were you still with Cottees General Foods?
A. Yes. I was with them right up to the end of 1974.

Q. Where were you stationed at that stage? A. I was still in Sydney at that time. 30

Q. Do you remember the launching of Solo Lemon in Sydney?
A. Yes. I mean, I remember the product coming onto the market and obviously it was of interest to me, because I was looking after the Cottees franchise at that time.

Q. Do you remember at some stage there was advertising material on television about Solo being a "Squash like the pubs used to make"? A. Yes. I remember that quite clearly.

Q. Can you tell me when it was you first remember hearing that? A. From memory, Solo came in the summer period of 1974-5 and I must admit that I am guessing now, but presumably the advertising followed up the launch of the product in the normal fashion, so I presume it would have been somewhere around the beginning of 1975. 40

Q. Did that phrase "Squash like the pubs used to make" appear to you to be a reference to Solo or a mere description of the sort of drink that it was (Objected to as leading - not allowed.)

Q. How did that phrase "Squash like the pubs used to make" appear to you, in relation to Solo? A. I saw it as a sort of quality endorsement, rather similar to the way people say "Homestyle cooking" - that sort of approach.

Q. Have you ever tried it as a drink? A. Yes.

Q. Have you ever tried Pub Squash as a drink? A. True Pub Squash? No, I never have. 10

Q. Mr. Brooks' drink? A. I beg your pardon. I thought you meant the true Pub. Of course I have, oh yes.

Q. Have you ever considered that there is likely to be any confusion between Mr. Brooks' product and Solo? A. In terms of them being lemon drinks - I suppose one has to be honest and say that with lemon drinks from reputable manufacturers there is an enormous difference between any of them. If you say that there could be confusion in that sense, I would say yes - there could be, but it would be equally true of those manufactured by Coca-Cola and other reputable manufacturers. One cannot claim vast differences. 20

Q. Have you considered whether or not, arising out of the Solo advertising of that product as being a "Squash like the pubs used to make", there is likely to be any confusion between their product and Mr. Brooks' Pub Squash? A. I see. With the Solo advertising, it was a slogan that was used on television, if I remember rightly. The other one, from memory, was "a man's drink" and other than people who are sort of in the industry following the whole thing very closely, I would rather doubt whether people would be conscious as to whether one company was using something in its advertising and another competitor had it in its brand name. I would say the chance of confusion is very small. 30

Q. As far as whether Solo is a "Squash like the pubs used to make", you were going to say something? A. I was going to say that I would not be competent to judge. I do not know whether this product still exists in the pubs as it did back in history. I probably would not have had the opportunity to try it, as I did not come to Australia until 1966, so if it was an old-fashioned one, I would not have been here. 40

Q. After you left Cottees General Food, what did you then do?
A. I then went to Passiona Bottling Company in Melbourne which was a company with which Cottees had links in two ways; it was a minority shareholder in that company and it also

carried the Cottees franchise which was sold to Canada Dry during the time that I was there.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. When was it that you gave up your position as Manager in South Australia for the Pub Squash Company Pty. Limited? A. On 30th June last year.

Q. Was that when you retired? A. Yes.

Q. That was your most recent position? A. Yes, that's right.

Q. To what extent did you become acquainted with the marketing side of the soft drink business? Would you give us an indication? A. I was fairly extensively involved with it in the days when Cottees had their own plant in Sydney, because there was not a marketing manager there. There was a sort of sales operation and the marketing was done, in effect, by head office and I was closely involved in that and I was also involved in marketing in the Wagga plant and to a lesser degree with the franchise bottlers, so there were really two levels. The company owned the operation and the franchise. 10

Q. In connection with that marketing, did it come about that you became acquainted with competitive products put on the market by other companies and other organisations? A. Oh yes. 20

Q. Was it really a necessary part of your job to try and keep up with what was happening so far as new products were concerned from competitors? A. Yes. That would be so in general terms.

Q. How widely ranging were your interests so far as competitors were concerned? A. Well, there was a normal flow of information on what was going on in the market place and we kept an eye on what advertising was being done. It was monitored by the Agency in terms of the amounts of money being spent, where and by whom. 30

Q. What agency was that? A. That was Masius.

Q. What did they monitor for you? A. The amount of advertising being done by competitors, which is the normal thing that advertising agencies do.

Q. How would they present it for you? What information would you actually get from Masius? A. They brought in information from another agency who specialised in this, whereby one could see the number of television spots. For the sake of argument, say in Melbourne there were so many. You know, this information is available, for a price. 40

Q. So you would have available information naming competitors and specifying to some degree at any rate the extent of the advertising being done by those competitors? A. That is right. We did not always keep up with everything. It was when we thought that it was relevant to our own product, obviously.

Q. Just taking up your example of Coca-Cola in Melbourne. If Coca-Cola brought out a new product in Melbourne, would that show up in the Masius material available to the Cottees hands in Sydney? A. From memory, the way things went, it probably would not, because the new products that appeared on the market had to have some sort of track record before they were justified in being followed by this system. I am not even sure in fact whether the data was available. We would be aware of it and as and when we thought it was worth following, we would have asked for information to be given to us, if it was available. 10

Q. Again, taking that example, it would not be right, would it, that Cottees in Sydney would be aware of a new product launched in Melbourne as soon as it was launched? A. Well, as I say, if it was important we probably would have done because of the franchise situation. Do you remember that I mentioned yesterday that there were two tiers of industry. Because you see, Cottees in Melbourne, as I said just now, had an equity holding in the Company there and that company held the Cottees franchise. In Sydney, the whole thing was closer to home - you know - it was geographically closer to home because we own the plant. 20

Q. Would it only be in regard to the activities of Coca-Cola in Melbourne that Cottees would have an interest here in Sydney? A. I just use that as an example of the leading brand and, you know, two of the major cities. Please don't read anything into it. That was a product in a particular city that we were particularly interested in. If we had been interested in Coca-Cola sales in Melbourne, that would have been the way. 30

Q. Would this be right - that there was available to Cottees in Sydney information concerning, not only the Sydney market but any other major markets which Cottees might care to make use of? A. Might take an interest in, yes - that's right.

Q. Do I understand you correctly? The information was provided by Masius on a regular basis? A. Yes. If it was something we had asked for, yes. 40

Q. I think you mentioned in the beginning of this aspect of your evidence, the monitoring service? A. That's right.

Q. Would you just explain what that was? A. There is a company which does in fact audit television - particularly

advertising - on behalf of advertising agencies particularly, and also therefore indirectly the manufacturers who place advertising through them.

Q. Did Cottees have that service supplied regularly to it by that company? A. As I said, we had it available as and when we wanted it for those products which were of interest to us.

Q. This is where I become a little bit lost, Mr. Northey. Do you mean by that that there would only be available to you things that you specifically asked for? A. Yes.

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Q. That is what you mean, is it? A. Yes it is.

Q. How would you become interested in something new, so that you would know to ask for it? A. Well, this would be a question of you having a general feel for the market place - one's knowledge of the market. Let me take a hypothetical example; if somebody were to come out with a low calorie raspberry drink - and I am deliberately using that as something which would have a miniscule share of the market because it is an unpopular flavour and its low calorie, no way in the world would anybody be bothered about it until its track record had been proved. If, on the other hand, the Coca-Cola organisation suddenly decided to come out with almost any of their drinks, I would say that this would be something that one would keep one's eye on and probably it would develop into something worth following in detail - if one had a product in competition with it or one intended to put a product on the market in competition with it.

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Q. If Coca-Cola suddenly produced a lemon drink and had a big advertising campaign, would that be something that would fall into that category? A. Yes it would. Going back to 1973, the time we were talking about, I would probably say, yes. Again, it would have been marginal because lemon was not the biggest segment of the market. It developed, as you probably well know, after 1973.

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Q. Do I understand you correctly - Coca-Cola being what it was, if it had brought on a lemon drink, even in 1973 before the market was developed, Cottees would have been alerted to it?

A. We would have been alerted to it and interested, yes.

Q. Say it happened in Melbourne and not in Sydney? A. A bit less so, but probably still so.

Q. Would you be able to say that in 1973 there were three major companies or groups of companies in the soft drink industry in Australia, or would there have been more or less?

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A. No. There was ----

Q. I am asking you as an expert, Mr. Northey. I do not want

to put words into your mouth, but could you just tell me who were the biggest three in 1973? A. Well, there is of course a degree of overlap, because of franchise, but I suppose at that time one would have talked of Coca-Cola, Amatil and that is where an overlap comes in, and the Schweppes organisation.

Q. Cottees would have been alert to any major development or innovation by any one of those three companies, would you think, or those groups? A. Probably, yes.

Q. In regard to markets in 1973, which were the most important markets for soft drinks? A. Cola was then --- 10

Q. Geographically I am speaking about? A. Concerning population - Sydney and Melbourne were the two biggest cities, but it wasn't so on a per capita basis, whereas South Australia is, and I think then it was the biggest in terms of total gallonage. They would have been the two biggest cities.

Q. You have mentioned you had at one stage, been in an executive capacity with Cadbury-Schweppes? A. Yes.

Q. And you have maintained some interest in the commercial sense in that group's activities, since then, in so far as they overlap? A. Yes. I do not know any more or less than I did, say, in Coca-Cola. I think my interests stem from being a competitor more than the fact that I was once employed by them, but, yes is the answer. 20

Q. Are you aware that the drink Solo was launched in Melbourne on a large scale, some nine or ten months before it was launched in Sydney? A. If you had asked me that question where it was launched first, I could not have told you, but now you have said it, it is not something I would have been aware of at that time, I am sure. 30

Q. The evidence is that in around December 1973, Solo was launched as a Tarax product in Melbourne? A. Yes.

Q. And having told you that, in the light of your earlier answer, is the position that you think you would have been aware of that when you were working for Cottees at around the time it happened? A. Yes, I think I would have been.

Q. It is the sort of thing that keen marketing men in the soft drink business in Sydney, would have been aware of? A. Yes.

Q. The sort of information that would be available through Mr. Mojsza's service, too? A. Yes. This would have been picked up all through our own network. That is not the sort of thing we would have got through an advertising agency. We were talking about advertising when you asked me about the advertising agency and about the launching, previously. 40

Q. You would not have needed the services? A. No.

Q. This is the sort of thing you ought to know, and if you wanted details? A. That's right, we could have picked it up later.

Q. So far as the soft drink business is concerned, is there any sharp division between the activities of the major companies in the Melbourne and the Sydney markets? A. Yes, there are some fairly significant differences. The retail trade is different in structure which means they operate differently. Up in Sydney, of course, Coca-Cola have their own plant and run their own show. Shelleys is, even now, reasonably significant, whereas the Amatil subsidiary down there in Melbourne, Marchants is all but disappeared. There are differences, yes. 10

Q. I appreciate what you say about differences. What I was seeking to get at really was the two markets are not, by any means, each self-contained are they? There is a good deal of overlapping between them in the way of personnel and company movement? A. I would say a "good deal" might be a bit of an exaggeration. There is some overlapping and again, it depends on the company. For example, an organisation like Cadbury-Schweppes with its company's own bottling, presumably the overlapping would be greater than with an organisation like Coca-Cola, which has its own one company, own bottling in Sydney and a franchise in Melbourne. 20

Q. You yourself are not a bad example of an executive who has moved from State to State and company to company within the industry? A. Yes. Whether one could read into that that was typical of the industry, is another question.

Q. Is it not correct quite a number of executives had followed that sort of a path in their career in the soft drink industry? A. There have been a number, yes. 30

Q. There is a good deal of movement from company to company by the higher executives? A. Personally, from my experience. I would question those words being as strong as a "good deal". It does happen.

Q. On the same aspect, would you not agree that the senior executives of the main soft drink companies in Sydney are personally acquainted with their counterparts in Melbourne (objected to). 40

Q. Would you not agree that you are personally aware that a number of executives who were known to you in the Sydney companies, are acquainted with a number of executives who are also known to you in the Melbourne companies? A. You are talking of, say, a Sydney manager or company, knowing a manager of another company or in their own company?

Q. Both really? A. Their own company obviously in the main, they would. I would say to some extent with other companies, yes, but probably lesser than I have the impression you believe.

Q. There is a good deal of information exchanged within the industry by word of mouth from one person to another, across companies? A. It is a fairly gossipy industry, yes.

Q. To your knowledge, that applies both in Melbourne and Sydney and - in all of them, Melbourne, Sydney and Adelaide? A. Yes, I think the further one gets from the eastern sea-board the less probably. It tends to be a law within itself. 10

Q. But as between Melbourne and Sydney, the adjective "Gossipy" would probably apply in full measure (objected to).

Q. From your own knowledge the Melbourne and Sydney executives tend to talk a good deal amongst themselves? A. I think I have already said other than within their own company, I rather doubt whether an awful of that does go on. Some of it, certainly.

Q. You have told us your recollection is, that your assumption is that you did know of the launching of Solo in Melbourne at the end of 1973? A. Yes. 20

Q. Based on your experience in the industry, you would expect, would you not, that if the launching of the product there was successful, there would in due course, be a follow-up launching in the Sydney market? A. Yes.

Q. And that would be yet another reason why people such as yourself in a company such as Cottees, would be interested in knowing what was happening in Melbourne? A. Yes.

Q. Can you recall now, whether you were aware of a television campaign being commenced in Melbourne in conjunction with the launch of the product of Solo in Melbourne. I am not asking whether you saw it but whether you know it was going on? A. I do not recall that but I think I would have to say that if the product was brought to our attention, it probably would have been together with that. We would have been told it was on television. 30

Q. I will limit this to your own experience in Cottees in 1973 and 1974. Did Cottees keep, as it were, a file of any advertising material of a competitor that might come to its notice? A. Yes, from memory that used to be kept by the people out at the Sydney Soft Drink plant. They used to keep a scrap book of advertising and that sort of thing. 40

Q. Is that the Auburn plant? A. Correct.

Q. Were they the premises where Mr. -? A. Peter Brook.

Q. Did not take over, he moved into? A. That's right.

Q. And that advertising material, can you recall whether that was part of what changed hands? A. I do not recall but I would say certainly not because of, you know, company files were obviously not part of - it was considered the company file, it was not an asset of the plant.

Q. I understand that at the selling level, soft drink companies employ salesmen who go around to the milk bars and the points of selling of that kind? A. Yes. 10

Q. Before a new product is put on the market, with a view to getting the merchants to place orders for the new product, on an occasion when the new product is going to be introduced?
A. Yes.

Q. And, of course, in respect of existing products, I suppose they go their rounds the same way and try and get them to repeat orders or commence orders if they have not had them before?
A. Yes.

Q. And they take advertising material with them? A. If there is any, yes. 20

Q. And leave it with the storekeepers very often? A. That is often the case, yes.

Q. There is a type of such material which is called a "presenter" or "sales presenter" which is commonly used. Are you aware of that? A. Yes. If it is what I believe you are meaning, this is - you are talking of something a salesman may use to get the story across.

Q. Sometimes uses to put the story across. He uses to leave behind him to make sure the story lingers? A. Yes, in the way I normally use it, it would be something the salesman normally would not leave but if you mean the summary of the sales points, that is done, yes. It is a question of terminology. 30

Q. If the salesman from the rival company comes around the next day and is shown this by the storekeeper, he is just as likely to take it back to Sydney and show them (objected to)?
A. There are two things, as I see it. There is something a salesman uses which is really a kind of guide to himself to get his sales story straight and make sure he does it properly. Then, there may be a piece of material which can be given to the retailer which will emphasise the points from the retailer's point of view, which may be of use to him. This has been done. It is a question of whom the pieces of material are of use. 40

There is the first to the salesman himself, to make his sale and secondly, there is something again for a retailer to help him make his sale to his customers.

Q. If a salesman from a rival company following perhaps the next day on the predecessor, happens to be able to lay his hands on such material as left behind like that -? A. Yes.

Q. It is useful for his company, if he takes it back to Head Office? A. Yes, that would be so. I mean, in the same way as an advertising show card or even a sample of the product as part of the things that salesmen are looking for, that's right. 10

Q. Called, I think, point of sale material. Is that the sort of thing? A. Yes, that would be one of the things.

Q. And anything that one company learns about the way other companies or competitors are merchandising their material, will be of interest to the marketing department? A. Yes. (Objected to.) Can I explain? I am saying I believe it would be of interest to companies in the case we are talking about, of soft drinks, that other major companies are doing, X, Y, Z, in the market place and a salesman of any company, would have his eyes opened for, say, a show card, of a competitor. Certainly, I mean, it would not be interested in what was going on in the retail store in general terms, those things which he earns his living, for the company which he works. 20

HIS HONOUR: Q. If he can pick up and take back to his employer, a rival's point of sale material, he would be regarded as fulfilling his duty to his employer? A. Obviously, yes.

MR. PRIESTLEY: Q. ("Presenter" shown to witness.) Would you agree, although this has not got colour on it, it is a photo-static copy of the type of material that I called "presenter" earlier on. I think you agreed? A. Yes. 30

Q. Is this the sort of type of - this is an example of the presenter material that salesmen leave around with storekeepers and the like, when they are beginning - making a new product (Objected to)? A. This is. This appears to me to be a bit of a borderline one, as to whether, in fact, it is something the salesman is taking around for his own use or something he left in a store, and, you know these sort of points could well be points that have been left with the store but "Stock up now for the newest development in soft drinks" does not sound to me like the kind of words written on something left in the store. If I had to back my judgment, I would say, this, if this is a true document, is one which is probably a salesman's one not one to be left in a store but it is borderline. 40

HIS HONOUR: Q. Have you ever struck any material of this type which performed the dual function? A. Yes, because that

can be done where a salesman is given a number of show cards and as part of his sales presentation he has been taught to go through - use them as a guide, a mind jogger, in giving his presentation to the retailer but this is - it seems to me, sort of stereotyped too much. The sales manager sitting down and writing it out rather than an advertising agency approach. It would appear to me, I am more and more convinced, this is a salesman's document not a retailer's document.

MR. PRIESTLEY: Q. Are you aware yourself of having seen the original of this document at any time previously? A. I cannot remember if I ever did. It is possible but I cannot remember. 10

Q. Do I understand that when you were at Cottees, you would from time to time look through whatever material there was, that had been brought back from the field by a salesman?

A. People who worked for me brought in things they thought I should see and that sort of thing.

("Presenter" m.f.i. 17.)

Q. The people in the company connected with sales, who would be interested in the type of material that the men in the field would bring back? A. Yes. 20

Q. Are you able to say within your own experience that those people also pay close attention to television advertising in their spare time, in their field? A. Yes.

Q. And taking yourself as an example, would you yourself find yourself taking a business interest in television advertising relating to soft drinks? A. True, yes.

Q. Particularly of major competitors? A. Yes.

Q. Could we just come back to the position in May 1973 and May 1974, between Cottees and Mr. Brooks when the negotiations were going on? A. Yes. 30

Q. You mentioned the different sales estimates and cash flows? A. Yes.

Q. That were presented as projections by Mr. Brooks to the Cottees management? A. Yes.

Q. Were you directly concerned with that negotiation. What was the extent of your connection with your negotiation?

A. I would say in the early months I was involved with a large part of it. In the latter months less so because it tended then, to be more the financial details and a lot of legal work, you know, and in neither am I professional. 40

Q. As to the projections that you have described to us, which were presented from time to time - I will try and summarise your evidence. You were saying that the fundamental aspects of the projections were all done for a differing 12 months period at one time and later on there were refinements?

A. That's right.

Q. You did say they were all done, more or less at the same time. Try and recall as well as you can, the period over which the basic projections for the differing periods? A. That first batch of documents was complete.

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Q. Came to your attention? A. I would say that if I said, "More or less" I was just thinking probably that they may not all actually have arrived on the very same day. I am talking of a very narrow period of time, probably not more than a couple of weeks, two or three weeks. We may have had two meetings.

Q. When refinements were made afterwards, did that consist of the same basic documents being produced again with differing figures in them for the same periods that had originally been dealt with by the first batch of documents? A. Not to any significant degree. There was some that were going on all the time. The point I was trying to make was this. I was trying to be rather precise about it. Was these documents were brought in which essentially stood right the way through but I could not put my hand on my heart and say the projection which we saw in about September 1973 went in, is the one that was in the final legal document we signed with General Foods down to the last detailed figure. Essentially the thing was kept intact. The principles were agreed.

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Q. When the negotiations began, was it foreseen that it could conceivably last for as long as the 12 months which in fact it turned to last out for? A. I think there were two stages when in the early stages I do not honestly think that Cottees expected any results to come at all. But the company had significant problems in Auburn and was willing to talk solely because of that. Then, when there appeared to be some very fundamental basis for a deal being worked out, everybody said "good, this shouldn't take terribly long". They were wrong. I am now talking say, from the first having taken place at the beginning of winter to around the end of the winter of 1973. People at that stage were probably hoping - certainly Peter Brooks was - that he would be in the market to get a good chunk of that coming summer. Cottees General Foods being the kind of company it is it took an awful long time. There are two or three reasons for this. One is the change of management.

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Secondly, so much had to be cleared with the U.S. and the original director, for example, was a person who had to give authority for certain things to be done. There was always a

tendency to await his next visit. Many multi-nationals are like this. When you got into the nitty-gritty when the principles were all agreed, the legal work was absolutely enormous. I am not an expert but even I was somewhat astonished with the pile of documentation that eventually went back, especially as the American lawyers were all working with American based documents and using American terminology. I am sure you can realise ---

Q. You mentioned earlier that your recollection is it was September, October, 1973, when the first batch of projections came? A. That's right. 10

Q. To Cottees. At that stage, if I followed your last answer correctly, you said Mr. Brooks was still hoping to get on the market that summer? A. Yes, you recall I said in the beginning - I in fact worded it the other way around. I do remember he was hoping to get on the market the earlier part of that summer and the documents were with us in a time which, at least Mr. Brooks, even if Cottees General Foods did not agree, thought was time for them to be worked upon and an agreement to be struck. 20

Q. I think you said the last of the 12 months cycles for which a projection was made? A. Yes.

Q. As you recall it, was one commencing in July 1974?
A. That's right.

Q. Throwing your memory back, would you consider whether it is a possibility that that projection was first brought into Cottees hands some time after the first batch of projections that you have made, bearing in mind that that projected commencement date over six months after the date that Mr. Brooks was originally hoping you might have started? A. No. I would say not because the fact that it gave more time for something to happen was not the way Cottees were looking at it. The essential point was whether from their point of view and also from Mr. Brooks, the two interests happened to coincide were better possibly delaying the start, assuming the deal was struck at all, because of the cash situation, etc. In other words, it enabled comparisons to be made. That was the most important issue, not the fact that the deal gave the longest possible breathing space before anybody had to theoretically do anything. 30 40

Q. What is your recollection of the starting date of the earliest of the 12 months cycles for which a projection was made? A. I remember, Peter Brooks wanted to get in and get most of the summer. I cannot remember exactly but my memory would probably would have been before, to try and get in before Christmas of that - probably about December 1.

MR. PRIESTLEY: Q. Would you look at this exhibit, number 25, and say whether you recognise that as being of the style, one of the budgets, at any rate, of the various budget projections?

A. Yes. The layout in terms of the products down the left and the "Twelve months" and numbers look right. The only thing that confuses me a little, if this in fact is one of those early documents.

Q. I am not suggesting that? A. It is the name of the products. The general layout, yes.

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Q. What I was going to suggest to you, was that down to the asterisk and the words "New products" next to the asterisk under the main body of the document. Omitting that and just looking at what is above that? A. That was the sort of style that was being used, yes.

Q. Was there any order of consideration of these budgets? Were the budgets which dealt with the cycle beginning 1st December dealt with and looked at before the budgets for the later cycles? A. No, I don't think so, because you recall I said just now probably the main purpose was, from Cottee's point of view to get from them the differences being thrown up by different starting dates on the cash flow implication, etcetera, rather than how soon can we get this deal on the road, if in fact, it happens.

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Q. You mentioned that the main or fundamental batch of projections for the different cycles came to hand within the two week period? A. You said, "Was it quickly" and I said it would have been within a matter of a few days. But, essentially, they were there together.

Q. And I thought you said they came within one or two weeks? A. You did ask me that. I said it would be no longer than a couple of weeks, I think I said.

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Q. In what order did they come in, can you recall, so far as cycles are concerned? A. No, I can't.

Q. Earliest one earliest? A. Logically one could say, yes, but there may have been a query on something to do with one of the earlier ones thereby requiring some revision work which would put the thing out of sequence. I don't think I could say with firmness, yes.

Q. You have shown, if I may say so, a very clear grasp of the sequence of events and your recollection of the order of events. Does that recollection flow from a naturally good memory or from access to documents or to what would you ascribe the detail of your recall? A. I think I have a good memory.

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Q. Have you had the opportunity of refreshing your memory from any documents? A. No, I haven't seen any documents to do with this. They are all up in Gordon, if they exist at all.

Q. Arriving at the September/October 1973 dates which you put to the arrival of the main batch of documents, that is a kind of reverse calculation is it, based on your recollection of Mr. Brooks wanting to be started by the summer? A. Yes. The summer is clearly in my mind. The period when I was handing over information is clearly in my mind.

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Q. What was that period? A. That was sort of May, June, July and that included - I remember going with Mr. Brooks to the plant and Mr. Allman, if I remember rightly, was there, too, so he could get what he required to do his work and then he came in as soon as he possibly could with the documentation to start as soon as he possibly could. No way in the world could that period from his start - and I know he wanted to get in before Christmas - have been less than three months even with the most fast-moving organisation, from the time the documentation was submitted.

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Q. So that is why you take it as late as September/October?
A. I think I said "September".

Q. Originally you said "September/October"? A. I was working backwards from the Christmas with a timetable for discussion and debating, getting a deal down, and that can't be done in twenty-four hours.

Q. You have a recollection of two distinct steps, amongst others, in this course of negotiation, that first period when you were engaged in discussion and handing over information and then the second period which began with the submission of these fundamental budgets? A. Yes.

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Q. Do you have any other means of dating the receipt of those budgets over and above what you have already told us, such as birthdays or marriages, that sort of thing? A. No, I don't think so. Even in June if I remember rightly, we had a visit from the head of General Foods Holdings and National Division, a man called Otterbine.

Q. From the U.S.? A. Yes. And even at that stage there had been sufficient come to Peter Brooks on top of what he knew and he obviously had some information to start off, with to start talking to him about the way things might go and Peter Brooks met Mr. Otterbine, came in and talked to him about his views and what he hoped he might do with the business so I am using it as evidence, at least Peter Brooks had his things in a reasonably advanced state although not then totally committed to paper and what have you.

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Q. Are you aware of which of the months through which copies fiscal year extends or did in those days? A. Yes. They started April 1 from memory, in those days. They did, in fact, change it two or three times.

Q. In Cottees' language in 1973 a reference to fiscal 1974 would refer to a fiscal year commencing in April of what year? A. Fiscal 74, that would have been the year ending March 31st, 1974.

Q. Were you aware that Mr. Mojsza had in his possession with him whilst he was employed by Pepsi Cola photocopies of the sales volume projection for copies that had been made in 1972 for Cottees fiscal 1974? A. Are you also asking me whether I would be surprised if that is so? 10

Q. I was going to ask more directly whether you can tell us whether Mr. Mojsza had permission, being in possession of such documents, to show them to Mr. Brooks in April 1973? A. Pepsi had quite a lot of documentation about Cottees because you perhaps don't know Pepsi Cola had originally had a plant of their own in Sydney closed down, Cottee took over the franchise and started manufacturing their products and the organisations were working very closely together from then on. On the other hand, Mr. Mojsza's boss was a Pepsi Cola man and what he was permitted or not permitted to do I would have no knowledge of other than just to make an observation as any other person employed in business. I have no special knowledge of his terms of reference. 20

Q. You told Mr. Bannon that your understanding was that after the negotiations commenced in May, at any rate Cottees management was pleased for Mr. Brooks to have reasonably free access to any information that belonged to Cottees? A. That is correct. 30

Q. Is it your understanding that that permission extended to the disclosure by Mr. Mojsza of the sales volume and costs projections for fiscal 1974 to Mr. Brooks as early as April 1973. You may not know the answer? A. I don't know the answer. It could have just come within the timetable that - you know, Pepsi was given the OK in May, I think I said, and maybe Mr. Lazslo talked to the Pepsi Cola people before he did to me.

Q. The documents I am asking you about, although in Mr. Mojsza's possession while he was an employee of Pepsi Cola had come into his possession in 1972 when he was working for Cottees and were Cottees documents? A. When Mr. Mojsza was working for Cottees? 40

Q. Mr. Mojsza has given evidence that he was employed by Cottees in the course of 1972, during which time he prepared or either prepared or had some hand in the preparation of these

forecasts for fiscal 1974 and then later in April 1973 he was back with Pepsi Cola? A. I really don't think I can answer that.

Q. Would you be surprised to know that Mr. Mojsza had those documents and had permission to show them to Mr. Brooks?

A. There was a very significant interchange of documentation at that time. I think I said, in many ways we were almost working as one company so I would not be terribly surprised.

Q. Can you recall whether in the course of your discussions with Mr. Brook and the visit to the Auburn plant you together looked at the advertising scrapbook of Cottees that was kept there? A. I think I can say with certainty, no. It just wouldn't have been significant enough. 10

HIS HONOUR: Q. Would my notes be accurate? I have now got three possible dates for the discussions which led to information being handed over. According to my notes, the last date given was possibly April within the timetable. The next in point of time, according to my notes working backwards, is it might have been May and the earliest according to my notes, is the beginning of winter which, in my parlance would be the commencement of June. What is your best recollection or are my notes inaccurate? A. I believe I said "May". Did I say the beginning of winter? 20

Q. My note is the "beginning of winter"? A. That is a woolly way of saying "May" again and I believe I said "with April". It is possible that the explanation there might have been that my boss, in fact, talked to Pepsi a few days ahead of talking to me.

Q. But your best recollection is May? A. Yes, I would stick with May. 30

(Witness retired and excused.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PROPRIETARY LIMITED

v.

THE PUB SQUASH COMPANY PROPRIETARY LIMITED

FOURTEENTH DAY: FRIDAY, 10TH FEBRUARY, 1978

(Corrections to transcript:

*Page 334 question 10 second line the word "breach" changed 10
to "bridge". Question 13 third line the word "breaching"
changed to "bridging".

**Page 369 second last question first line "October 1975"
changed to "October 1973".)

DOUGLAS CYRIL FUGGER

Sworn and examined:

MR. BANNON: Q. Is your name Douglas Cyril Fugger, do you live
at 25 Smart Crescent, Cronulla and you are a company director
and you are the managing director of a business known as
"Incredible Cars" at Cabramatta, is that correct? A. Yes. 20

Q. I think you formerly ran a business called "The Magic Mile
of Motors", is that right? A. Nuford Sales, yes.

Q. Were you overseas sometime in 1973? A. Yes, that is
correct.

Q. When did you return to Sydney? A. The first week in
November 1973.

Q. After that did you receive a telephone call from Mr. Peter
Brooks at Nuford Sales Pty. Limited? A. Yes, I did.

Q. How long after you returned from your trip was that?
A. Within the week, it was three or four days. 30

Q. What did he say to you on the phone to the best of your

*Not reproduced in this evidence.

**See now page 401

recollection? A. Well, we had the usual opening, asked how my vacation or holiday or business trip was, and we spent a fair amount of time discussing the trip overseas and Mr. Brooks then said that he had a business proposition for me and would like to get together with me at my earliest convenience and I suggested a couple of days after that. It was either a Thursday or a Friday and we then got together.

Q. Did he tell you what it was about or what he had done or anything on the telephone? A. No, he didn't elaborate, but he did say that he was forming a new company, that he had left Coca-Cola (it was my association there with him when he was at Coca-Cola) and he said that he had left Coca-Cola and that he was forming a new company and was going into the soft drink business himself, but the proposition was about that, but he didn't elaborate. 10

Q. You say you arranged to meet him? A. Yes.

Q. Where at? A. Well, I met him at the Travelodge at Wynyard.

Q. How long after the phone call? A. It was only two or three days and I can remember that time a bit closer because it was either the Thursday or the Friday in that same week. 20

Q. Had you met Mr. Brooks before that? A. Yes, I had had a business association while I was selling cars to the Coca-Cola company when I was running Nuford.

Q. Did you meet him then at the Travelodge? A. Yes, I did.

Q. Which Travelodge is that? A. The Wynyard, just up from Wynyard station.

Q. In York Street? A. Yes.

Q. When you met him, what did he say to you then? A. Well, it was like these normal business type of luncheons, it started off social and then got down to business. 30

Q. When you got down to business, to the best of your recollection, put it as if he was speaking? A. Yes, all right. Well Mr. Brooks said that he was forming this new company and he was taking over equipment and property that was Pepsi Cola, I understand and that he would be marketing these new products.

Q. Was that the name, Pepsi Cola? A. Cottees, there was a company behind it associated with that. We had a general discussion on soft drinks and so-forth. I can't really recall any of the small details, but the main thing was that he was asking - 40

Q. Again, try and put it as closely as you can to what he said? A. Mr. Brooks said that he was looking for investors in this new company that he was forming and, of course, would I be interested, and, if not, maybe I knew someone who would; that he was going to get out and sell pretty well in the market, that he had had a long association with, and also that he was going to market Pub Squash that he called it - I can remember that side of it.

Q. Did he say what Pub Squash was? A. Well, no, not really, but I do remember the name distinctly, as it was, you know, sort of associated name and I thought it was a good marketing name. 10

Q. Did he mention any other names that he was going to use? A. He did, but I can't really recall them because I wasn't all that interested, really, in the whole subject at the time, I'm sorry to say.

Q. What did he say about these new names he was going to use? Did he say what they were for? A. They were for soft drinks and, as I said, the one that I do remember was the Pub Squash that it was that type of drink, squashed fruit of some sort. 20

Q. Did you say anything to him concerning that name or any of the other names that he mentioned to you? A. I did remark to him how I thought that was a great marketing name because of my recollection of the time before I started drinking alcohol when I left school and went into the trucking business with my father and I was associated with a lot of truck drivers and they all would go into the pub at odd times and I would line up with them and drink Pub Squash or squash made in the pubs or whatever and I thought to me it sounded like a great marketing name at the time. 30

Q. What did you say to Mr. Brooks about the name? I know that is what you thought, but what did you say to him about it? A. I say that is a great name and you can't go wrong by heavily marketing that name as an advertising interest on my side.

Q. Can you recall what else was said during this conversation? A. Yes, I said that in regards to the investment side that I was committed fairly well, I had just committed myself to an art gallery at Woollahra, Park Gallery, and also I had just committed into a property development, and I thought that my financial strings, would be a little bit tight, but that I would discuss it with my company secretary and come back to him later. 40

Q. Who was your company secretary then? A. Kevin Lonsdale.

Q. Did you subsequently mention it to your company secretary? A. Yes.

Q. What was it you mentioned to him can you remember? A. Well, I did mention the investment a couple of days later to him - Kevin Lonsdale had known Mr. Brooks from the Coca-Cola association - and I said that Peter Brooks was looking for someone to invest in his company and I thought it would be a good opportunity but our situation maybe weakened from the look of it and I also discussed with Mr. Lonsdale what Mr. Brooks was doing, that he was taking over the plant and equipment and property and I did also mention the name Pub Squash because it did intrigue me a little. 10

Q. Does Mr. Lonsdale still work for you? A. No, he doesn't. He is now working as company secretary for Metro Ford in Brisbane.

Q. He is in Queensland? A. He is in Queensland, in Brisbane, yes.

Q. Since that conversation that you told us about in 1973 have you met Mr. Brooks? A. Yes, I have.

Q. Have you met him often or seldom? A. No, I would say I met him on three occasions would be it, since. 20

Q. Have you any present association with him or his company, the Pub Squash Company Pty. Limited? A. No, we haven't at any stage - actually the only association was back in his previous employ with Coca-Cola.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. You can remember three occasions since this time you have given us some details on when you have met Mr. Peter Brooks? A. Yes.

Q. Can you tell us what those three occasions were? A. Yes.

Q. And approximately when? A. Yes. There was a time that I invited Mr. Brooks and his family to my home, which would have been early 1974 - would have been around March 1974. The second time would have been about, I'd say, May 1974 when Mr. Brooks then phoned and asked could he - I had a cruiser at the time on Sydney Harbour and he asked me could he hire the cruiser, that he had people coming from Cottes from overseas and just a few guests and could he hire the boat from me. I said, "Well, all I ever need is an excuse to get out on the water" and I made to go on that occasion, when I drove the boat around with some of his guests. The next time would have been very late 1974 - 1975, it would have been early 1975, when I was invited to Mr. Brooks' house as a return barbecue type-of-thing with my family. There was one other time that - now, I will just see if I can pin the date. It would have been 1977, Christmas - it would have been November - it would have been early December when I 30 40

called in for the first time over December 1977 to Mr. Brooks' factory and called in to say hello and I met him for the first time since all that time and just said hello on the way through and that was it.

Q. Just going through those, on the March 1974 occasion was there any discussion about soft drink business at the social occasion at your house? A. No, not really. There may have been but it would have been just ordinary talk that no-one takes much notice of.

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Q. In May 1974 when you had the visit with his guests and took them around on the boat, did you take part in the general conversation then or were you keeping to yourself? A. No, just very social. I left Mr. Brooks to handle that and I handled the cans of beer and so-forth and drove the boat, which is a bit of a handful.

Q. You yourself have been interested and active in the advertising side of television from time to time, haven't you?
A. Yes.

Q. I suppose you take an interest in novel or interesting advertising on television? A. Particularly the motoring side, yes.

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Q. Have you any recollection of seeing the Pub Squash television advertising when it first came onto television? A. Yes, I have a recollection of seeing it.

Q. Did you see that just as a viewer without any particular intention of seeing it or did you see it as a result of particularly setting out to see the advertisement? A. No, just as a viewer.

Q. Had you at any time noticed the advertising on television for Solo? A. Yes.

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Q. Have you any recollection of when it was that you first became aware of that advertising? A. It would be a couple of years ago, I'd say, a year or so ago.

Q. Can you recall whether you had noticed that advertising before you noticed the advertising for Pub Squash? Do you remember the sequence of it? A. No, I don't.

Q. Do you recall any particular features of the Solo advertisement as it first came onto the television screen, or as you first saw it? A. Yes, I remembered that canoe sequence which I considered a good ad.

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Q. Can you recall anything else about that particular sequence,

the audio I think is the trade word? A. "Man's drink" flowed in with the general sequence of the ad, that's about all. I am not a soft drink drinker. so ---

Q. At the stage when you first saw that ad did you have any recollection in your mind of what Mr. Brooks had said to you back in November of 1973? A. I would have had recollection, yes.

Q. Did it cross your mind at all that this was a product that seemed to be getting into the area that he had been talking of trying to get into? A. No, I knew it was a soft drink ad., that's about it. 10

Q. But what was your understanding after seeing the advertising of what sort of soft drink it was that was being advertised? A. Actually all I remember is the name Solo and it was a "man's drink" and it was a canoe ad, and I thought it was a good ad. and that was about all I remember of that ad.

Q. Did you form the opinion that it was a good piece of television advertising? A. The Solo ad?

Q. Yes. A. Well, I thought so because of the canoe sequence, 20 yes.

Q. That sort of advertising was something in which you were interested both personally and commercially yourself, wasn't it? A. Well, I was interested in advertising, yes, but my ads were a bit different, unfortunately.

Q. So is the product, I suppose, but you mentioned to Mr. Bannon that the words "Pub Squash" had stuck in your mind after Mr. Brooks first mentioned them to you? A. Yes.

Q. And the concept of squash that could be drunk in a hotel by somebody who didn't want to drink beer or other liquors in company with people he was with struck you as being a good concept? A. Well, the name Pub Squash itself did strike me as being a great merchandising name, yes. 30

Q. Correct me if I am wrong, but wasn't one of the reasons you thought it was a good merchandising name because it carried that with it, that you didn't want to drink beer when you went to a hotel with people? A. Probably could have had a bearing.

Q. Isn't that what you said before? A. Yes.

Q. And that was something that crossed your mind at the time when Mr. Brooks first mentioned this name to you? A. Yes. 40

Q. Was not that thought revived when you saw the first

television advertisement that you saw for Solo? A. No. Actually I don't even know what type of drink Solo is, I have never had one. I wouldn't know if it was lemon or what, actually.

Q. Today, you don't know what sort of drink Solo is?
A. No, I'm sorry.

Q. Did you hear in the audio for the commercial that you describe a phrase along the line "Squash like the pubs used to make"? A. No.

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Q. Do you think that if that phrase had been clearly audible in the audio it would have struck you very forcibly? A. In the Solo ad?

Q. Yes. A. No, not really, because I wasn't - I mean, it wouldn't have struck me as a name with Solo, I wasn't interested, I looked at the ad and saw the ad.

Q. If you had seen a product being marketed or advertised in connection with the idea this product is a squash like the pubs used to make, would you not immediately have thought back to the conversation that Mr. Brooks had had with you, don't you think? A. If I had heard the name Pub Squash mentioned in the Solo ad I guess I would have thought back to that, yes.

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Q. Because if an emphasis had been on squash like the pubs used to make you would have recognised that as trying to get into the very area which you had thought would be a good area for Mr. Brooks' product to aim for? A. Probably, but I didn't have Mr. Brooks' product all that much in mind. You know, I wasn't anything to do with it, investment-wise or anything else.

Q. The next occasion when you saw Mr. Brooks after May 1974 was when your family visited his family at his place, the return barbecue type of visit? A. Yes.

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Q. Can you recall whether at that stage when you had that visit Pub Squash was well on the market? A. No, I wouldn't know.

Q. Do you remember whether there was any talk between you and Mr. Brooks then about Pub Squash? A. I think there was - now, I can't recall definitely, but I think there was general talk - well, there was general talk about drinks and all that sort of thing and I think there was general talk about Pub Squash, yes.

Q. Do you remember whether he said anything along the lines: "Well, at long last we are going to get Pub Squash on the market" or "It is a good thing we have just got Pub Squash on the market" or any remarks along that kind of line? A. No, I

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think it had been on the market - or I had assumed it had been on the market for a long while at that stage.

Q. What is it in your memory which makes you think that at the time when you were visiting Mr. Brooks' home Pub Squash had been on the market for some time, do you recall what it was?

A. Well, there had been a lot of talk right from the time when I first met Mr. Brooks, but he was forming his company about the time I have said he formed it and I had that going, I think it was, not right back in that early stage, way before that time of our barbecues and things. 10

Q. In that name, or just a pub squash type of drink? A. No, Pub Squash. I couldn't even describe Pub Squash, but I could see it written on the can.

Q. Could we have Exhibit "F", any one of the Pub Squash cans. Preferably one with Pub Squash on it.

HIS HONOUR: Q. Before or after the change of the name?

Q. Pub Squash, not Pub Soda Squash.

Q. Would you look at that one, is that the one you have in mind, the one that you thought had been on the market for a while, at the time of the barbecue? A. I really don't know because I don't handle soft drinks, you know, it just strikes a chord, "Pub Squash", I feel that I have seen it around for a fair while. 20

Q. On this occasion you were visiting Mr. Brooks? A. I feel as though I have seen it around for a long while, can't remember how long, I wouldn't like to be said that I have seen it around because I don't really know.

Q. You are quite clear in your mind on this occasion of the barbecue at Mr. Brooks' house you then had been aware of the product you thought of as Pub Squash, for some time, are you quite clear about that? A. I am not really clear, although I say I have a recollection, a very hazy recollection, regarding the product being marketed because I don't handle those things, my wife buys the soft drinks for the children. We don't have it around the house. Actually it is more of a presumption or a semi-type recollection or an awareness, that's all. 30

Q. Is it awareness that you now think you had at the time when you were at Mr. Brooks' house for the barbecue in 1975?

A. Yes, I felt that he was marketing then at that time. 40

Q. And had been for some time? A. Hm.

Q. Have you any way of helping us establishing precisely with a closer date when you had socially visited Mr. Brooks'

house for the barbecue? A. I suppose with a lot of time and going through desk calendars I could pin it closer. I have only been asked the last couple of days to come along, and at this stage without sort of going back into desk calendars I don't think I could pin a date any closer than that.

Q. When you tried to recall dates earlier, when I was asking you to pick it up you were going through a mental process working it out, how was it you arrived at it in early 1975? A. I have had certain major events in that period and I have sort of put the event this side or that side of these events, it would be pretty close, I would say within a month at the time. 10

Q. Within a month of what? A. The accuracy would have a latitude of a month either way.

Q. Yes, but early 1975, it is something a bit hard to have a month either way of. Can you tell us what month in 1975 you took it within a month of? A. This is the barbecue, the return barbecue?

Q. Yes? A. Right. Didn't I say March? What date did I say? 20

Q. You said March 1974? A. The first one.

Q. Was the one the barbecue took place? A. Yes.

Q. And May 1974 was the trip on the harbour. Early 1975 was the return barbecue? A. Yes, because of the swimming going on.

Q. A pool? A. At my place, I am just thinking back at the times. It would have been March, within a month, it would have been March, it would have been maybe April, but not February, it would have been March.

Q. And not later than April and probably March, the way you put it? A. Probably March, yes. 30

Q. At that time, having got to naming the precise month, or a particular month, at that time I asked questions about the company, back to the Solo advertising, you recall whether you were then conscious of the Solo advertising as at March or April 1975? A. No, sorry.

Q. You can't recall? A. No, I can't recall when I was aware.

Q. Whenever it was you first heard the ad in the canoe and what ever you can remember now you agree that you listened to the whole of the audio on the ad? A. No, I don't think so. Well, audio is a funny thing, you have to think about it to find out whether you really listened to it, a couple of points 40

in it, may be that is about all, line up with the actual ad itself.

Q. You agree that the ad with the man in the canoe was shown quite frequently on television at a particular time? A. Yes.

Q. And that you would have seen it more than once?
A. Many times.

Q. And whether you were consciously seeking to pick it up in the advertisement you might have heard the actual sounds of the audio on a number of occasions? A. I would have heard sounds, yes ---- 10

Q. Would it surprise you to know that in every showing of that canoe television advertisement were words substantially to the effect of "A squash like the pubs used to make" were used? A. No, it would not surprise me.

Q. And they were used in each of the advertisements in some way, in each of the canoe advertisements, the same as the talk line "A man's drink" was used? A. Yes.

Q. You actually recall hearing the line "a man's drink"?
A. Yes. 20

Q. And although you don't now recall actually hearing it, you agree that the actual sounds must have crossed your mind, "Lemon squash the pubs used to make"? A. Well, it doesn't really, it has not. The only thing I do remember is "a man's drink". It simply comes out to line up with the ad itself with the character, or the actor, coming down in the canoe and I thought that's a great ad. I probably blotted out everything else, and that was it, I don't remember much else.

Q. Can I ask you, would you agree the commercial, visually was basically made up of shots of a canoeist shooting rapids?
A. Yes. 30

Q. And indeed with the canoeist sitting on the bank of the river drinking a can of Solo? A. Yes, running down his jaws, I remember visually.

Q. And there was a voice over at the point of him sitting on the bank drinking the can and saying, "You have never tasted a lemon drink like Solo before unless it was one of these great lemon squashes the pubs used to make, Solo lemon, a man's drink", I suggest that is the way and those were the actual words used in the commercial? A. Yes. 40

Q. Now I have read that to you. Do you recall that? A. The only thing that does it now is that I know it is a lemon drink, it sounds the right thing to say, I don't know.

Q. And having heard them read, don't you recall now having heard them without paying much attention to them at the time you heard and saw the advertisements on the television?

A. I wouldn't swear those were the words, they may not be, but it fits in there, that point of view, but I do remember, "It's a man's drink".

Q. Now I have read those words to you you recall hearing either those words or words like those words when you were watching and listening to the advertisement? A. I said it fits it, if I said I recall it it is probably because it feels it is the right thing to say. I really don't recall any of the words other than "It's a man's drink". It struck me because it fitted the ad. I would take a brief look at the whole thing and thought that is a great ad and switch off myself.

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Q. You do agree that you saw the whole of the advertisement, I have just done a brief summary of the visual of? A. I would have seen it, yes.

Q. And you heard the end line, "Solo, a man's drink"? A. I don't know where it was, but I heard it, "It's a man's drink", yes, "Solo".

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Q. When you were watching television was the sound off, turned off, or anything because of the commercials? A. No, would have run through.

Q. And you were there, not meaning it disrespectfully, with your eyes open and your ears working? A. Yes.

Q. And you saw and heard whatever there was to see and hear of the advertisement? A. Well, I would have, yes.

Q. If it is right to say that the words, I have read it to you, were used on the advertisement then you must have heard them? A. If those words were used I would have heard them in some sort of fashion, yes.

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Q. Do you remember discussing with Mr. Brooks at any stage the topic of, I will try to put it in a neutral form; you remember discussing with Mr. Brooks the drink known as Solo, in association with or in connection with a drink known as Pub Squash? A. No, I don't.

Q. You remember any conversation in which these two products were spoken of in the same conversation? A. No.

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Q. And in the March or April of 1975 at the return barbecue are you able to say positively there was no discussion of the product Solo in which the product Pub Squash was also mentioned?

A. The name Pub Squash was thrown around amongst the people but I don't remember anything with Solo, any talk of Solo, but I was not in the soft drink conversation so much.

Q. Was this a barbecue, one with quite a number of people at it in March/April 1975? A. Yes, a few people, there would be about five or six couples.

Q. And some of the men from the soft drink industry?

A. Yes. It was really a cross-section of people.

Q. And then coming up to December 1977 when you called in on Mr. Brooks at his office as you were passing did that follow any communication by telephone or otherwise between you? 10

A. Yes. I had phoned Mr. Brooks a couple of times prior to that saying that we must have lunch one day, and we actually never got around to it. This went over may be twelve months, eight months' period that I had phoned, may be every, say, within two or three months, elapsed and say we must have lunch, something like that, and it never ever happened actually.

Q. That would be during 1977 you were ringing up occasionally?

A. Yes. I always kept in communication with business associates even though I am out of the new cars. 20

Q. That phoning also goes on during 1976, an occasional phone call? A. Not too many, but might have been one or may be two, everyone was so busy all the time, including me.

Q. Did you notice in June 1977 some publicity in the newspapers about Cadbury-Schweppes starting proceedings against the Pub Squash Company? A. No, I didn't, but I had heard there was something on, some business associate of mine mentioned it to me.

Q. Then later in August 1977 you noticed in the newspapers some account of the commencement of the proceedings in Court and what was being said in Court? A. No. 30

Q. Approximately when was it when your business acquaintance mentioned to you the fact there was something going on? A. I don't know. As a matter of fact I don't even know whether a business acquaintance or not, but I was told by someone, I didn't actually read it, I never read anything in the paper at all, told by someone, that is why it is so hazy.

Q. What was it you were told? A. That there was a big Court case was on, but I didn't even know between whom, other than Peter Brooks was ---- 40

Q. On the receiving end? A. One end or the other.

Q. Did you inquire what it was about? A. No.

Q. When the person mentioned it didn't you say "What's it all about?" A. No, I didn't actually.

Q. Did he or she say, "It's a big court case", or that was something you just assumed? A. No, I think they said just that there was a mention, or a mention in the paper that there's a court case on, and left it at that, I don't think, I don't know it was a big case or anything else.

Q. Did you hear that around about the time you made one of your phone calls to Mr. Brooks about having lunch? A. No, no. 10

Q. Did any of the phone calls you made to him before December 1977, did you mention to him in any way you had noticed he was involved in a court case? A. No. I don't really think it was a big case, I don't know, I thought it was a small matter.

Q. When you first mentioned it just a few minutes ago you used the phrase, "a big court case"? A. Yes.

Q. What was it that put it into your mind it was a big court case? A. Now.

Q. And when you said you didn't read anything about it in the paper, was that because you don't read the newspapers very much or just didn't happen to notice? A. I do read them a lot, but I must have missed it somehow. 20

Q. Do you read the Financial Review at all? A. Yes, a couple of days a week I could have it, not every day, just for an occasional look to see how things are going.

Q. You remember who it was who mentioned to you that Peter Brooks had a court case? A. No, I don't exactly, I could remember the name of one or two or three people, friends of mine that it could have been, but I really don't know who it was, someone comes, you know, I was told by someone. 30

Q. I gather that although he is not a person you see with great frequency Mr. Brooks is somebody you regard as a business acquaintance with whom you are on friendly terms? A. Yes, that is right.

Q. Wouldn't you have been interested to know just what sort of court case he had himself involved in? A. If I had known a large case, I think, it was just some minor thing that crops up.

Q. Whoever it was told you about it mentioned that there had been some reference in the newspaper to this case? A. I think 40

so, yes. Someone had said, "Pub Squash or Peter Brooks has got a court case going". I didn't take an enormous amount of interest, because whoever told me didn't make dramatic sensationalism out of it, just mentioned it in passing, I guess.

Q. When you called in on Mr. Brooks in December 1977 was there then any reference by either you or him to the fact of the court case still being in progress? A. No, it was as a matter of fact Brooks had a meeting going on in there, and I called at the desk, and he popped out and shook hands, one of his fellows he introduced to me, and waited about maybe for a minute's conversation, mostly asking me how I was going, then we left. 10

Q. On that occasion did you say anything further to him about we must have lunch together some time? A. Actually I called in, it was just before lunch and I said, "What about lunch?" That is how the meeting was.

Q. It was not possible that day because of the meeting?
A. No, he was having the meeting, yes.

Q. Did either of you say "some other time then"? A. Yes. 20

Q. When was the next time after that you either met or spoke on the telephone? A. I don't know. I think it was about the last time, it was, yes.

Q. Up to that stage you didn't have any idea in your mind that Solo was a lemon drink? A. No, I had no idea.

Q. And you didn't have any idea in your mind that the case between Brooks or Pub Squash and whoever else it was concerned Pub Squash and Solo? A. As a matter of fact I am only finding out now.

Q. Then did you see Mr. Brooks again between that visit to his office in December and today? A. No. 30

Q. Did you talk to him by telephone between that visit to his office in December 1977 and today? A. Mr. Duffield was the first communication, Mr. Brooks' solicitor.

Q. Had you spoken to Mr. Brooks by telephone since December 1977 till today? A. No.

Q. When did Mr. Duffield first talk to you? A. About Monday, I think it was.

Q. In this week? A. Yes.

Q. He spoke to you by telephone, did he? A. Yes. 40

Q. Did he ask you anything about your recollection at that stage? A. Hmm.

Q. You recall what it was he said to you? A. Yes, he mentioned that Mr. Brooks had this Court case going on now, from December I think, he said, and that they were looking for a witness regarding Pub Squash, or dealing with Pub Squash or the company being formed and he asked me various questions on the evidence, the statement that I am giving now relating to it.

Q. What is your recollection of the first occasion he asked you about any of the matters that you have given evidence about? 10

A. Well, when did Brooks first approach me regarding forming a new company and when and how or what happened and what brands were mentioned, a lot of questions like that and from this, you know, we got my statement out.

Q. Did things get to the stage where a written statement was prepared of what you said? A. Well, there was a statement.

Q. I mean a typed statement? A. No, I don't think so. There was a statement made, only just out here when I arrived, by Mr. Duffield, that was the first time, it is all very fresh to me, that is why my recollections are a little bit slow. 20

Q. At the stage when you first spoke, or Mr. Brooks first raised the question as to you putting some money into his company or helping finance his company, the occasion when you discussed that with him at lunch, you place a date at early November 1973? A. Yes.

Q. By reference to your recollection of having very recently returned from an overseas trip? A. Yes.

Q. Having been away, have you been away for overseas trips since? When was the subsequent one? A. There was one in 1974. 30

Q. Would that have been about the same time of the year? A. It was the sort of winter period, you know, latter winter period here.

Q. You remember when you got back from that one? A. Yes, actually it was cut short. It was that we were away for five weeks, we left in early August, getting back the first week in September.

Q. Is it possible that it was after your return from that trip that you had the luncheon conversation with Mr. Brooks in which he was asking you what you wanted to invest in his company? A. No, it was not. 40

Q. I just want to see if I can either test or assist your

memory. The fact is that Pub Squash was only first put on to the market in mid-April 1975, and bearing that in mind, and bearing in mind the fact that as you have told us at the time you had the return barbecue at Mr. Brooks' place, you were then under the impression that Pub Squash had been on the market for some time? A. Hmm.

Q. Is it not possible you have misplaced the occasion of that return barbecue by perhaps a year? A. No, I don't think so, no, I am sure not.

10

Q. There is no doubt that Pub Squash first went onto the market in April 1975, about the middle? A. Yes.

Q. And if that is right, and if your recollection about then at the time of the return barbecue visit, having in mind Pub Squash has been on the market for some time, if that recollection of yours is correct, then you agree the barbecue occasion must have been later than March or April 1975, wouldn't you? A. No.

Q. The three things all can't be right, you agree with that? A. Yes.

20

Q. And we know the first one is right, that April is the time of the launching of Pub Squash, so even with your recollection at that time you thought Pub Squash had been on the market for sometime or the date of the barbecue must be wrong, do you agree with that? A. Yes, the barbecue would be right, the time would be right, but as I said I am hazy when Pub Squash came on the market, because I wouldn't know.

HIS HONOUR: Q. There is a product that you thought of as Pub Squash that had been on the market for a long time? A. I don't know, I wouldn't put authority, I wouldn't be an authority on soft drinks, my recollections through various other things, not through the actual buying of soft drink and drinking it.

30

Q. You apparently do have a clear recollection that at the time of this barbecue was March, possibly early April period, that there was a product which you associated with the name of Pub Squash which had been on the market for some time?

A. Could very well have been, but your Honour, my reason I keep thinking it was on the market, because there was a lot of conversation about it, just my recollection, I don't know how, but the date was right, the barbecue date was right, and I have a feeling the product was being sold, I don't know, I am hazy.

40

COUNSEL: Q. His Honour points out, I might well have been doing you an injustice, and it is possible the three things are right. The first being the social lunch in April 1975, secondly you are right on the date about the barbecue, which must have been before the actual launching of Pub Squash,

particularly your recollection that at the date of the barbecue, you had in mind, you were somewhat vague, but nevertheless the real impression that Pub Squash product had been on the market for some time, all these three things were right. Indeed, that is what your evidence amounts to, isn't it, they are your three, I am sorry, the latter two things, the date of the barbecue and your impression of the other are both the evidence that you have given? A. Yes, but I am saying my impression Pub Squash was on the market, it could be quite very well be the case on our discussion and association on the name and so forth, because I don't buy Pub Squash, I really wouldn't know when it came on the market, but I felt it was probably, felt it was because of this Pub Squash name association to me. 10

Q. Another matter that is not in contest in these proceedings, the fact on that evidence is established, is that the advertising campaign for Solo commenced in New South Wales during the October television campaign, October 1974. I put it as an assumption, I want you to assume that the television advertising campaign for Solo commenced in Sydney in October of 1974, and that the advertisement you have already described was one of the advertisements shown during the course of that campaign, and making that assumption and trying to throw your mind back to that period of time, would you agree that it is distinctly possible that you had in mind at the time you went to Mr. Brooks' barbecue the advertising of Solo and that you associated that with the notion of "The squash like pubs used to make", or "Pub Squash"? A. No, I didn't associate it at all with Pub Squash until now. I didn't know "Solo" was a lemon drink, in fact, I thought it was an orange drink. 20 30

Q. You agree that you must have heard the actual audio part of the Solo television advertising which you saw, even though you might not have taken it in? A. Yes.

Q. And notwithstanding that you thought until today, that Solo was an orange drink? A. No, I don't know what sort of drink it was, I would have just as easily thought it was orange, but a lemon drink, I didn't know.

Q. I ask you why it is that you feel sure it was after your 1973 trip overseas rather than after your 1974 trip overseas that you had the meeting with Mr. Brooks at which he talked to you about investing in Pub Squash? A. Yes, it was some time when I started big investments on the Park Gallery, and this other property development, which had just commenced. 40

Q. Did he mention at this meeting what he was proposing to call the company that he was in the process (question withdrawn).

Q. At the meeting which you placed as being before the end of

1973 after you came back from overseas, he was asking you about investing, did he say to you what stage the business had reached that he was talking to you about? A. Yes, he was virtually completed, from what I understand, the negotiations and equipment and all that sort of thing.

Q. Did he tell you what the company was that he was negotiating about? A. That is the name of it?

Q. Yes? A. No, matter of fact the name Pub Squash Company I didn't find out till later that he was calling it the name Pub Squash. 10

Q. Did he mention that to you on that occasion, any name in connection with the company he was going to ---A. Not in connection with the company.

Q. When was it you discovered the name was going to be Pub Squash Company? A. It would have been the year later, late 1974, or so.

Q. This is a particular item that could be of some importance, and I ask you to try and work out as accurately as you can the occasion and the date of the occasions when Mr. Brooks told you he was going to call the company Pub Squash Company? A. Actually he didn't tell me. 20

Q. How did you find out? A. It's a good question, I don't know, I don't know, I may have found out from him or someone else, I did find out, but can't recall Mr. Brooks telling me, but he may have.

Q. You said it was about a year later, I think? A. Yes.

Q. What is it leads you to that recollection? A. Just that I had really a thing, I can't understand what is the correct word, well I was amazed at myself, such a long period had gone when I did find out it was Pub Squash Company, that I had not actually asked before or found out before that that was the name of it, but it was a long while, I don't know whether a year, it was some time. 30

Q. Did you know at any stage that the name of the company was some time Passionate Marketers? A. No, I didn't.

Q. Do you recall whether on the occasion of the trip on the harbour with Mr. Brooks, Cottees executives, that the deal that Mr. Brooks was doing with the Cottees people had been actually finalised, is that right? A. No, the trip on the boat, that's right, there was a Coca-Cola, I really don't know Cottees, Coca-Cola, it was overseas people and an American and his offsider. I should remember that. I do not know where they came from, 40

but it was Coca-Cola or Cottees or something, an American and an offsider. They had been stationed, I think, in Hong Kong or somewhere there, South Pacific.

MR. PRIESTLEY: Q. Whichever it was, do you remember whether at that stage Mr. Brooks had concluded his deal whereby he was taking over some assets in order to start up a company which he was going to start up on his own? A. No, I do not remember, I am sorry.

Q. Between that occasion and the time in 1975 when you made the return barbecue visit to his place, have you been in touch with him at all, have you rung him? A. Maybe one phone call at the most; at the most two, maybe one. 10

Q. You would have rung him up, do you remember, at the company known as Passiona Marketers at that stage? A. I do not know. I had his phone number, I just phoned.

Q. If your recollection is correct about the time of the return barbecue, that time will have been very shortly before Pub Squash was launched. Do you recall whether there were any other executives or associates of Mr. Brooks from the company at the barbecue on that occasion? A. I believe there was one, I think, from there, from his company. I do not recall any of the names. It was a very social type of gathering. 20

Q. You do remember that there was some talk at the barbecue about Pub Squash? A. There was amongst the others, yes.

Q. Do you remember what other soft drink companies were represented at the barbecue? A. No, I do not know and I do not really think there were any others, I do not know. When you say representing people?

Q. Whether there was a person there who worked for Coca-Cola or Pepsi Cola? A. I do not think so. 30

Q. Or Cadbury-Schweppes? A. I do not think so.

Q. Can you recall whether there was any Pub Squash available for people to drink at the barbecue? A. There could have been, I would have kept away from that.

Q. The other thing is, at the meeting in or about November 1973, Mr. Brooks mentioned the name to you of Pub Squash. Can you recall whether that was at a point before you had indicated that you were probably too tightly strung out financially to help him or after you had mentioned that to him? A. Before. 40

Q. Did he say anything to you along the lines, either then or when you told him you were not going to be able to help

definitely, of keeping the names he had mentioned to you under your hat? A. No, not at all. He seemed very happy to talk about it.

Q. You would not have regarded yourself as being in breach of any confidence, say, if you had mentioned the name to anybody you talked to who happened to be interested in that sort of thing? A. No.

Q. The words he used when outlining his plans to you which included the words "Pub Squash", are you able to say whether he was talking about a pub squash that he was proposing to market or simply Pub Squash which he was going to market? A. Well, the name more than anything. I would presume it was a lemon drink. 10

Q. You described to Mr. Bannon some of the thoughts you had that made you think Pub Squash was a good name, and in particular, the line of thought about how a young person who does not want to drink hard liquor when he is in a hotel with somebody could have a good drink of a Pub Squash type, did you mention all those thoughts to Mr. Brooks in the course of the conversation? A. Well, no, not really that text, but I did say it was a great name and would market well. 20

Q. By the way, do you listen to radio advertising at all?
A. I listen to the radio, yes.

Q. Excuse me for not knowing, in your own activities do you advertise by radio as well as television? A. No, I never have. I have done a little bit of radio in the past, but mostly television and newspaper.

Q. On the subject of this initial conversation with Mr. Brooks that you have told us, I do not suppose that you are able to remember the exact words of the conversation? A. Just the general text. 30

Q. You have associated the name Pub Squash with Mr. Brooks continuously since the product came onto the market, have you not? A. I have associated it since our first meeting with that.

RE-EXAMINATION:

MR. BANNON: Q. Regarding the company name, you have no recollection of how you came to hear it; is that right? A. Not a definite recollection, no. 40

Q. Have you any certainty about when you heard it? A. No, I have not, no.

Q. Did you see this morning Mr. and Mrs. Duffield, the solicitors? A. Yes.

Q. Did you make a statement to them? A. Yes.

Q. Did Mrs. Duffield take that statement down? A. Yes.

Q. Apart from the two hyphens and the words "Managing Director Incredible Cars, Cabramatta" in the third line which are in my handwriting, does this document which I show you appear to be the statement you gave to Mr. and Mrs. Duffield?

A. Yes, it is. I would have to read it through, if you want me to, but in general, quickly, it is. 10

Q. Just look over the page, if you would? A. Yes, it is.

(Statement tendered; objected to; m.f.i. 18.)

Q. Before you came in and saw Mr. and Mrs. Duffield this morning, had you previously spoken to Mr. Duffield on the telephone? A. Not regarding this matter. Wait a minute, sorry, Mr. Duffield phoned me up before today, yes.

(Witness retired and excused.)

KERRIN JENNIFER HADLIND
Sworn and examined:

20

MR. BANNON: Q. Is your full name Kerrin Jennifer Hadlind?

A. That is right.

Q. Do you live at Flat 1, 4 Hollowforth Road, Neutral Bay?

A. Yes.

Q. You are a sales ledger supervisor by occupation, is that right? A. Yes.

Q. Have you worked as a barmaid on a part-time basis both in Australia and in England? A. Yes.

Q. During 1974 you were working for some time at a place called Black Eagle, Badger's Mount in Kent? A. Yes, I was. 30

Q. Early last year in 1977 did you work for a short time as a bar attendant at a restaurant at Willoughby, Sydney, which at that time rejoiced in the name of Tummies and is now called "The Apartment"? A. That is correct.

Q. Both in England and in Australia did you serve lemon squash while you were doing this work? A. I did.

Q. Sticking to the Australian scene, how was this lemon

squash served when you were working at Willoughby (objected to; withdrawn).

Q. Is it right that sometimes a lemon squash is mixed from different things in the bar and sometimes it comes direct from the bottle? A. That is correct. (Objected to.)

Q. Have you yourself in the past had lemon squash in hotels in Australia? A. Yes, I have.

Q. How far back does that go? A. How far back?

Q. How far back? A. Well, it goes back quite a long way. 10
When you are in - what do you call them - in pubs where there is a beer garden when you are a child, you go in and have squash and things like that with your parents, and, generally, I have had lemon squashes for quite a while.

Q. What does the phrase "Squash like the pubs used to make" mean to you? A. It means the original making of lemon cordial with the addition of either soda water or lemonade.

Q. Do you associate that phrase with any particular brand of canned lemon drink? A. No, I do not.

Q. Has anyone ever asked you while you have been working as a barmaid in Australia for a squash like the pubs used to make? A. No, they really have not. I do not think they have. I cannot remember whether they have or not. 20

Q. Has anyone ever asked you while you have been working as a barmaid for a man's drink? A. No, they have not, to my knowledge.

Q. Has anyone ever asked you for a drink like the one the man in the canoe had? A. I could not say they have.

Q. Have you ever seen the television advertisement for Solo lemon drink? A. Yes. 30

Q. How long ago is it since you first saw that sort of advertisement can you tell me? A. Within 3 years, anyway.

Q. Do you recall any of the details of that advertisement?
A. Basically just generally some sort of virile man trotting around the place drinking squash, lemon drink.

Q. Have you ever heard in any such advertisement any reference to it being a squash like the pubs used to make?
A. Well, I might have done, but really I do not pay much attention to advertisements, so I could not say yes or no.

Q. Had you heard any such reference, would you have regarded that as being a description of the product or being a name belonging to the manufacturers (objected to).

Q. You have seen both Solo lemon drink and Pub Squash lemon drink have you? A. I have.

Q. In cans? A. I have.

Q. Have you drunk both products? A. I have.

Q. Have you ever been confused between the Solo lemon drink and the Pub Squash or Pub Soda Squash? A. Never confused from the point of what I am buying. 10

Q. Have you ever been confused between them as a result of their packaging or advertising? A. No, I have not.

Q. You know they both come in yellow coloured cans, do you?
A. It seems to be the generally accepted colour for a lemon drink at the moment.

Q. If you went into a shop and asked for a squash like the pubs used to make what would you expect to get? A. A bottle or can of aerated lemon drink of some sort, any particular brand. 20

Q. No particular brand? A. No particular brand.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. You were in England in 1974, I understand?
A. That is correct.

Q. When was it you left Australia on your travels that took you to England? A. 1973.

Q. When did you get back? A. The end of 1974.

Q. Did you come to live in Sydney then? A. Yes, I did.

Q. Have you been living in Sydney ever since? A. That is correct. 30

Q. You are presently a sales ledger supervisor? A. That is correct.

Q. And employed by whom? A. Lever & Kitchen Pty. Limited.

Q. You were asked by Mr. Bannon towards the end of his questions whether you were ever confused between Solo and Pub Squash and you said, "Never confused from the point of view of what I am buying", I think? A. That is correct.

Q. Would you mind enlarging on that for us (objected to).

Q. Would you tell us what you meant by that answer? A. My sudden thought was - it is rather like Coke and some other products where they try to distinguish between Coke and Pepsi; if you line up a couple of glasses of lemon drink I could not tell which was Pub which was Solo or which was lemonade; basically, lemon squash I will buy for splitz purposes; in other words, to mix with drinks except if I am thirsty and I feel like a lemon drink and then I will have a lemon drink.

10

Q. Did you have in mind that, when you wanted a lemon squash type drink, it did not matter very much to you whether you got Solo or Pub Squash? A. It would depend what was there.

Q. Did you mean to indicate that you wanted something that would be suitable for mixing with the drinks you were proposing to have and for that purpose either Solo or Pub Squash would be equally useful? A. Yes, the same as Shelleys or whatever, or lemon squash.

Q. You mention the advertisement with the virile man trotting around drinking Solo. Have you any recollection when it was you saw that advertisement on television? A. I am afraid I really could not name a date, because I could not remember when. I have seen it.

20

Q. When was it in 1974 that you came back from England, when was it you got back to Sydney? A. The end of October.

Q. Of 1974? A. The last few days of October.

Q. I suggest to you that you will probably have noticed that advertisement on television very soon after you got back to Sydney. Can you help us by telling us whether that is right or not? A. You can suggest it to me, but honestly the last time I can remember really noticing that advertisement was, I think, the beginning of last year. That is one time I can recall seeing it, but I know it has been going before that.

30

Q. Would you agree you saw a number of advertisements with this man doing different virile things but always with the can of Solo? A. Yes.

Q. That series of advertisements went on for quite a period, is that right? A. That is correct.

Q. It is not so much the last one you can remember as the first one you can remember that I would like to ask you about, if you can assist with your recollection? A. I cannot. I do not take much notice of advertising.

40

Q. Do you remember when you first saw these advertisements on television when they contained some slogan such as a "Man's drink" or some such words used in the advertisements? A. Just generally what the advertisement was about.

Q. Do you remember the line being used, "Great squash like the pubs used to make"? A. I know it was used in the advertisement put it that way - when I saw an advertisement for Solo or something, I just think, "Solo" and just click off, so I never listen to the whole thing or really watch the guy, shooting down the stream in his canoe or anything like that. 10

Q. You said you did know that words like that were used in the advertisement, but you do not really recall how you became aware of those or words to that effect? A. No, not really.

Q. What is your recollection of how it was you came to know of that slogan being used "Great squash like the pubs used to make"? A. Well, that is not something I have really thought about. I suppose when this thing started, I know - really thought about it because I know it is used.

Q. When you saw occasional reports in the newspaper of the case going on? A. That is correct. 20

Q. You then remembered somehow or other you associated the phrase, or had in mind the phrase "Great squash like the pubs used to make" (objected to; withdrawn.)

Q. Is this the position, and correct me if I am wrong, when you noticed reports in the newspapers of these proceedings, it recalled something to you. Just stopping there for the moment, it recalled something to you? A. I am saying I cannot remember actually listening to a Solo advertisement, that sort of thing, it saying to me, "A squash like the pubs used to make" I know it is associated with that advertisement, therefore, well, newspapers through these whole proceedings - but I cannot say, truthfully, that I saw the Solo advertisement and it would come over to me as squash like the pubs used to make because I did not take that much notice of the advertisement. 30

Q. If you just tell us in your own words when you noticed the reports of this court case in the newspapers, what it was that you then recalled or what then came in your mind about the phrase, "Squash like the pubs used to make"? A. The original lemon squash - in other words just a cordial, a home made type of cordial, lemon taste with either lemonade or soda water or perhaps, if it is a very strong drink, just a bit of water. 40

Q. What came into your mind on this occasion, on reading the newspapers about Solo in relation to that particular line?

A. Well, I did not think any canned drink, whatever it says, is actually the original lemon squash. Probably because of that, they tend to be a bit more aerated and not as lemony tasting, but that is about it.

Q. Have you ever noticed any of the Pub Squash television advertising? A. Yes, I have seen some of them.

Q. What is the one - what is the first one of those advertisements that you remember? A. I am just trying to remember. I know I have seen them because I know when they came on it was - 10
the immediate thought was "Another lemon squash".

Q. Another one, what one did you know of before that one?

A. I am not really a connoisseur of lemon drink, so I really could not tell you.

Q. It is right that the only lemon squash on the market in cans like Pub Squash before it was Solo. Do you recall that?

A. I know that there is Pub Squash, there is Solo, there is Shelleys; there was Leed or something, there are a number of them.

Q. Do you know Pub Squash began to be sold in Sydney in the middle of April 1975? A. No, I really would not know when it started to be marketed. 20

Q. Would you agree that you were aware of the advertising for Solo before Pub Squash came onto the market? A. There again I could not tell you which one I recall seeing first of all. I do remember seeing Pub Squash advertised in 1977, the same as I remember Solo, but, prior, I am afraid I really cannot recall.

Q. Am I right in thinking you are only a very occasional buyer of either Solo or Pub Squash? A. I usually have lemon squash at home as a mixer with drinks, but I do not drink it all the time or anything like that. I mean, it is there for the general consumption of whoever. 30

Q. You would not have bought a great quantity of lemon squash over the last 3 or 4 years would you? A. Probably not.

Q. Do you remember that at one time you could not get a drink in a can which had the same sort of taste as the lemon squash that you used to get in the beer garden and so forth when you were younger? A. No, I really could not say that I could, no.

Q. I am not sure what you mean by that? A. I cannot recall a time where - I cannot recall when lemon squash was brought out onto the market as a soft drink in a can or a bottle. 40

Q. Can you remember whether you could get it before you went to England? A. No doubt you could.

Q. Do you remember getting any yourself? A. No, I cannot recall that far back.

Q. One final matter, if I may, when you first saw Pub Squash, as a product available for sale, had you previously seen advertising for Pub Squash that you can recall or did you see the product first and notice the advertisement afterwards?

A. I think the product first.

Q. When you first saw the product on the market, a can of Pub Squash available to buy, were you then aware of the Solo advertising that had been on television? A. Well, I mean that to me I did not immediately think of Solo or anything like that. I suppose what I thought of was another lemon squash and the variety of lemon squashes, and to me, as a buyer, if I walked through the supermarket and see all the lemon squashes there, if there is a new brand, I will try it, a different can, something new; but, no, I cannot recall whether I immediately thought of Solo. 10

Q. I asked when you saw the Pub Squash for sale did the thought come to your mind of the Solo advertisement? A. No, I really could not recall when I first thought of Solo. 20

Q. You did say that it came to your mind "Another lemon squash" when you saw Pub Squash for the first time. Right?

A. Yes.

Q. Would it be correct to say that thought came into your mind when you saw Pub Squash for the first time, "Oh, there is another lemon squash like the pubs used to make"? A. No.

(Witness retired and excused.)

(Further hearing adjourned to Monday, 13th February, 1978, at 11 a.m.) 30

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PROPRIETARY LIMITED

v.

THE PUB SQUASH COMPANY PROPRIETARY LIMITED

FIFTEENTH DAY: MONDAY, 13TH FEBRUARY, 1978

(Corrections to transcript:

- *p. 372: second correction referred to on p. 334 should read: "the word 'breaching' changed to 'bridging'". 10
- **Page 386 ninth question word "prejudice" should read "prejudiced".
- **Page 387 third last question third line word "and" changed to "on".
- **Page 391 answer to question in further cross-examination word "logo" to be substituted for "logger" wherever appearing.
- ***Page 393 third line of answer to fifth question delete the word "art" and substitute the word "Park". 20
- ***Page 394 first line fourth question change "May 1977" to "May 1974".
- ***Page 399 third question from bottom second last line change word "position" to word "visually" and delete word "the" appearing before "position".
- ∕Page 400 sixth question from bottom, third line, delete word "any" and substitute "in".
- ∕Page 402 answer to third question fourth line delete words "coming in" and substitute words "going on".)

JOHN RAYMOND GEORGE TOLLEY
Sworn and examined:

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MR. REEVES: Q. Your full name is John Raymond George Tolley and you live at 36 Sutton Street, Blacktown and you are the State organiser for the Printing and Kindred Industrial Union?

- *See now page 404
- **Not reproduced in this evidence.
- ***See now pages 406, 408 and 413 respectively.
- ∕See now pages 414 and 417 respectively.

A. That is not quite correct, it is the Printing and Kindred Industries Union.

Q. Are you familiar with lemon squashes which are served in hotels? A. I am.

Q. Do you recall how those lemon squashes are made? A. I do.

Q. Could you tell us how those lemon squashes are made? (Objected to; rejected.)

Q. From time to time over the years have you frequented hotels? A. I have. 10

Q. On those occasions have you asked for lemon squash? A. I have.

Q. On those occasions have you seen how those lemon squashes were made? A. Yes.

Q. Could you describe how those lemon squashes were made?
A. The ones I saw being made, the bar attendant would take a bottle of sort of lemon cordial and place about an inch or an inch and a half, depending on the bar attendant, at the bottom of the glass and then she would ask you if you required lemonade or soda and then put lemonade or soda in it and some ice and then stir it. 20

Q. Do you recall the particular cordial which was used in those drinks? A. I can remember the lemonade, that was Blue Bow, because I used always to drink it in a Tooheys Hotel. I don't know what the cordial itself, what brand it was.

Q. Does the phrase "a lemon squash like the pubs used to make" mean anything to you? A. Just - well, if you go in a hotel you get a squash like the pubs used to make, I suppose that is all it means to me. 30

Q. Does it have any other significance? A. Not really, just that they don't exist anymore.

Q. Do you associate the phrase "a squash like the pubs used to make" with any particular brand of lemon drink? A. No.

Q. Have you ever gone into a pub and asked for "a squash like the pubs used to make"? A. No.

Q. Have you ever asked for "a man's drink"? A. No.

Q. Have you ever asked for a drink like the one that the man in the canoe drinks? A. No.

Q. Do you know whether particular flavours of soft drinks are placed in cans of any particular colour? A. Coca-Cola, from memory, is generally in a red and black one.

Q. Do you know what colour orange drinks are, what colour cans orange drinks are supplied in? A. Well, I am not real sure, but I think generally they are in an orange tin.

Q. What about lemon drinks, what colour cans are they generally in? A. The ones that I can recall are in a sort of a dirty yellow.

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Q. Have you bought Pub Squash on some occasions? A. I have.

Q. Have you also bought Solo lemon drink on some occasions?
A. I have.

Q. Are you familiar with both Solo lemon drink and Pub Squash?
A. In that I have bought both of them and drank both of them, yes.

Q. Have you ever been confused between Solo lemon drink and Pub Squash? A. No.

Q. Have you ever been confused between any form of packaging of Solo lemon drink or Pub Squash? A. No, I haven't.

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Q. Have you ever seen any television advertising for Solo lemon drink? A. I have.

Q. Do you recall any particular features of that advertising?
A. Yes, I recall a very fit looking gentleman in a canoe going down some rapids and then having a drink of Solo and dribbling it all down his chin and I seem to recall - I think it was the same chap - on a horse and cart sort of thing, flogging a horse, and drinking Solo.

Q. Do you recall any particular phrases used in the advertising of Solo lemon drink? A. Not really. He may have said something, "a man's drink" or something like that, but I can't honestly be sure.

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Q. Have you seen any television advertising for Pub Squash?
A. I recall one. It's something to do with an "uncola nut" or something and someone squeezes the juice out of the top of a lemon.

Q. Have you ever been confused between the advertising on television for Solo lemon drink and Pub Squash? A. No, I haven't.

Q. If you went into a supermarket or some other food store and asked for a squash like the pubs used to make, what would

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you expect to get? A. A lemon drink - with a sort of sodary or lemonadey taste, a sort of a heavier lemon cordial than lemonade.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. You said that as a matter of habit you prefer to drink only in Tooheys hotels? A. No, I didn't say that I had only drunk in a Tooheys hotel because when I was a young lad at Toongabbie it was the only hotel around.

Q. You remember saying something along the lines I used to drink it in a Tooheys hotel? A. I drank in a Tooheys hotel. 10

Q. When you were a lad was that the only one in the area where you lived? A. Within walking distance, yes, it was.

Q. In describing the Pub Squashes that you used to get in hotels, what other hotels have you in mind besides the Tooheys hotels at Toongabbie? A. Well, occasionally I used to go to the hotel at Wentworthville near the station. I think that was a Resch's hotel, but I haven't had a drink of alcohol for 12 years, my memory is a bit dim.

Q. Have you had a lemon squash in a hotel in the last 12 years? A. Yes. 20

Q. How many hotels can you recall having had lemon squashes in? A. I suppose three or four.

Q. There is the two you mentioned already. What are the other two? A. I occasionally have a squash at lunch time at the pub at Foveaux Street in Surry Hills and occasionally I pull into the Prospect Hotel on the Western Highway at Prospect and have a squash there if I am home early enough.

Q. You have told us now about four hotels where you have had lemon squashes over the years. Would that cover your lifetime experience of lemon squashes in hotels? A. No it wouldn't. 30

Q. Can you remember any other hotels besides those four where you have had a lemon squash? A. Yes, if you go back over the years I suppose - the Millers Hotel at Blacktown, the East Blacktown Hotel, the Robin Hood at Blacktown, the Namatjira at Rooty Hill, the Red Cow at Penrith, the Wagon Wheels at St. Marys, the Hotel at Wallacia - I can't remember the name of it. I frequently went swimming down at the reefs, so I used to go down there and have a squash at the hotel back from the beach and because my mates were drinkers we used to stop at every hotel between there and Blacktown on the way back and I used to have a squash and they used to have a beer, so I suppose it could be fifty or a hundred, I can't honestly say. 40

Q. Which hotel or hotels is it that you associated the Blue Bow lemonade that you have told us about? A. From memory, particularly, the Tooheys one at Toongabbie because I used to take lemonade home, it was good for the next morning.

Q. When you were describing in answer to Mr. Reeves what went into squashes that you asked for, I think you said you did not notice what sort of cordial or what brand cordial it was? A. No, it was just a bottle of cordial they used to have behind the bar, that's all.

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Q. Would that extend throughout the time you have been having lemon squashes in hotels, that you never particularly noticed what the brand name of the cordial was? A. Yes, I just wouldn't know.

Q. In the course of the years when you have had these drinks to drink has it been, in your experience, that the taste to you of the lemon squash in the various hotels that you have mentioned was much the same from time to time? A. No, it isn't the same now.

Q. Not the same now? A. No, previously it was. Occasionally, the barmaid would pour more or less lemon, depending, I suppose, whether she was trying to make a quid or not. Sometimes you would have soda instead of lemonade, but on average they tasted ---

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Q. Pretty much the same? A. Yes.

Q. When was it that they started to taste different? A. Well, about - I couldn't honestly say, but I have probably noticed it more in the last three or four years, more so than anything else I can recall, because I remember going crook in the Graphic Arts Club, of which I am a member, about the lemon squash tasting like water and she told me it came out of a dispenser. I went crook, I thought they still mixed it there.

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Q. This is a club, is it? A. The Graphic Arts Club, the Printers Union Club in Regent Street.

Q. I was only asking about hotels? A. I'm sorry.

Q. Have you noticed it different in hotels? A. Yes, it has been different. At the Excelsior Hotel I noticed it to be different in the last three or four years, to my memory.

Q. Where is the Excelsior? A. Up in Foveaux Street in Surry Hills.

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Q. You were asked some questions about the television ads for Solo? Are you a regular television watcher? A. No, I am not. In fact I am very irregular.

Q. Have you any idea when it was that you first saw the television ad with the man in the canoe? A. It would be a couple of years ago.

Q. You mentioned also a television ad for Pub Squash and you referred to the "uncola nut" being referred to in it. Do you remember whether the first time you saw the Solo advertisement with the man in the canoe was before or after the first time when you saw the Pub Squash advertisement which referred to the "uncola nut"? A. No, I can't honestly remember.

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Q. Did the man in the canoe make some sort of impression on you? A. He did on my daughter, but not on me.

Q. Your daughter is at an impressionable age? A. No, but she's eleven and I often go crook about her table manners and he was dribbling the stuff down his chin.

Q. Did you watch the ad with her at any stage? A. With my daughter?

Q. Yes? A. I may have, but I am one of those people, when the ads come on ----

Q. You are waiting till the next interesting part comes on the television, not particularly about the words on the ad? A. Some I notice, some I sort of don't.

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Q. I don't suppose you can recall any particular occasions when you saw any of these ads? A. By particular occasions --

Q. Whether you can recall the circumstances, what was on when the ad came along in the middle? A. What show?

Q. Yes? A. No.

Q. At all events, you have seen that television ad about the canoe? A. Yes.

Q. On more than one occasion, have you? A. Oh yes, a couple of occasions. As I said, I don't watch too much television.

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Q. When you did see it it would have come along in the middle of something that you were interested in watching? A. Yes.

Q. You would have sat there while the ad was on not paying particularly much attention to it? A. Not a lot of attention, no.

Q. Can you recall now whether you noticed at the time that

you saw that ad on your television at home that words were used in it including words of the kind "a great squash like the pubs used to make" or words to that effect? A. No, I can't honestly say I can remember.

Q. Would this be right that if those words were spoken on every occasion that particular ad was shown you would have heard them without particularly having paid any attention?

A. Yes, I suppose - yes, they could have said them a hundred times, I wouldn't have heard.

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Q. Can you remember when it was that you first bought some Solo, either in a can or a bottle? A. No, I can't remember.

Q. In your household, would you ever be the one to actually buy the cans or bottles of Solo if they were going to be kept in the house, or your wife or children? A. My wife normally buys them when she goes shopping, if she buys soft drink. She doesn't normally buy that sort of thing. She buys fresh fruit.

Q. Have you ever bought a can of Solo or bottle yourself when you were out of the house? A. Yes, on Saturday.

Q. Can you recall when you yourself first bought any Solo? A. No.

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Q. Do you remember whether you bought a can or a bottle the first time? A. No, I can't remember.

Q. Can you say whether you have ever bought a bottle of Solo? A. Yes, I must, because there are some bottles in the thing in the backyard to go round to the hospital and there is a Solo bottle there and a couple of cans.

Q. Can you remember while you were out of the house going into a shop and buying a can of Solo at any stage? A. Yes.

Q. What sort of a place is it that you buy a can of Solo, you yourself? A. I bought one on Saturday morning in a milk bar, in a big sort of glass cabinet where you take it out and go and pay for it - like a refrigerator.

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Q. Can you remember having bought a can of Solo in that fashion some time ago? A. I may have, but I can't honestly remember. I just go and get a can of drink.

Q. In regard to Pub Squash would you just buy a can of Pub Squash in the same way? A. Well, Pub Squash is very popular in our house at the moment because my daughter wants a motor car for her mother, so she is collecting the caps. I have bought Pub Squash in a refrigerator sort of thing with a glass front.

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Q. In the same way you bought the Solo? A. Yes, in the same way I buy other drinks as well.

Q. Can you remember now which drink first became available for purchase, to your observation? A. No, not honestly.

Q. Have you got any recollection of about when it was that you saw the Pub Squash ad with its reference to an uncola nut, an approximation? A. It would have been in the last two years that I can remember. I couldn't say for sure, though - I wouldn't like to say for sure.

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Q. If you were feeling like a lemon drink in a can would you be particularly concerned, say, two years ago, which brand you got? A. No.

Q. You were just wanting a lemon drink? A. I just buy a drink. I prefer a lemon drink because they don't seem to be as sugary as some of these other things.

Q. If you wanted a lemon drink you would take the one that was closest to hand, would you? A. Yes.

Q. Just a couple of more questions about your daughter's reaction to the advertisement of the man dribbling the drink down his chin. Can you remember about how long ago that was when she first made some remark like that? A. Yes, it was just before Christmas.

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Q. What, of last year? A. Yes, I just told her off for making a mess on the table.

Q. Do you remember that it has been a fair while now since that ad was shown on television? A. It would be at least two years, to my memory. As I say, I don't ---

Q. I didn't mean the first time, I meant the last time it was shown on television? A. The Solo one?

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Q. The one with the man in the canoe? A. That is the last time I can recall it, but I wouldn't have watched television hardly at all since Christmas. I haven't had time.

Q. I might have been misleading you. You mentioned two advertisements, one the man in the canoe, the other with him flogging a horse? A. Yes, a horse.

Q. In both of those the dribbling incident occurred, did it? A. No, I don't think so. I don't think it did in the horse thing, I just remember the horse and the flogging it was getting.

Q. You remember the dribbling in association with the man in the canoe? A. Yes.

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Q. Do you know whether it was that one your daughter was referring to? A. The man in the canoe?

Q. Yes? A. Yes, at that time she brought my attention to it.

Q. Do you recall a television advertisement which showed a man with a scar on his face running towards the camera and then leaping upwards and then the next shot has a piece of dead wood being broken across a man's back. Do you remember that one at all? A. No, I don't.

(Witness retired and excused.)

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DONALD JOHN MARTIN
Sworn and examined:

MR. REEVES: Q. Your full name is Donald John Martin and do you live at 21 Lett Street, Katoomba? A. That's correct.

Q. You are a book binder by profession? A. That's right.

Q. You are employed by the S. & M. Supply Company Pty. Limited? A. Yes.

Q. Are you familiar with lemon squashes which are served in hotels? A. Yes. (Objected to; rejected.)

Q. From time to time had you gone into hotels and asked for a lemon squash? A. Yes.

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Q. For how many years have you been doing that? A. Quite a number of years.

Q. Have you had on many occasions when you have been at a hotel a lemon squash? A. Yes.

Q. Can you tell us how such a lemon squash is made? A. In the hotel?

Q. In hotels? A. Mainly, these days, it is from a dispensing machine, but it used to be made by hand.

Q. Could you describe how it was made by hand? A. There used to be a brand, a particular brand called Blue Blow and it was mixed with a lemonade and a squash with lemons.

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Q. What is this Blue Bow that you say was mixed? A. I think the Blue Bow is a lemonade, a Blue Bow lemonade that was mixed with lemon to form the lemon squash, but they don't seem to use that way any more and it mainly comes from a dispensing machine.

Q. Can you tell us some of the places where you bought such lemon squashes? A. Hotels?

Q. Yes. A. Not offhand, really, just in the city area.

Q. Do you associate the phrase "a squash like the pubs used to make" with any particular brand of lemon drink? A. No, not particularly.

Q. Have you ever gone into a hotel and asked for "a squash like the pubs used to make"? A. No.

Q. Have you ever asked for a man's drink? A. No. 10

Q. Have you ever asked for a drink like the one that the man in the canoe drinks? A. No.

Q. Do you know whether particular flavours of soft drinks are placed in particular coloured cans? A. Normally, they are. I think you find normally with an orange drink there would be a sort of an orange coloured can, or, I would say, a lemon drink would be in a sort of yellowy, ambery colour and so forth.

Q. Have you on some occasions purchased Solo lemon drink? A. Yes, I have. 20

Q. Have you on some occasions purchased Pub Squash or Pub Soda Squash? A. Yes, I have.

Q. Have you drunk both of those drinks on occasions? A. Yes, I have.

Q. You are familiar with both those drinks? A. Yes.

Q. Have you ever been confused between Solo and Pub Squash? A. No, not at all.

Q. Have you ever been confused between the packaging of Solo lemon drink and Pub Squash? A. No.

Q. Have you ever seen any television advertising for Solo lemon drink? A. Yes. 30

Q. Do you recall any of the features of that television advertising? A. Mainly the man consuming the drink and it running down his chin onto his chest.

Q. Do you recall any of the phrases used on those television commercials? A. I think one that comes to mind most recently is one called "the drink crusher" or something. I think that is the most recent one I have seen and there is another one - I can't recall.

Q. Have you seen any television advertisements for Pub Squash?

A. I have seen one, but it is quite a while ago.

Q. Which one was that? A. I can only remember the picture of a man - it is a while ago since I have seen one. I haven't seen one recently at all.

Q. But for some time you have seen both television advertising for Pub Squash and also for Solo? A. I have seen both.

Q. Have you ever been confused between the television advertising for Pub Squash and the television advertising for Solo?

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A. No, not at all.

Q. Does the phrase "a squash like the pubs used to make" have any meaning or significance? A. Well, the only meaning it would have would be a similar drink to what you used to buy in the hotel or the pub.

Q. If you went into a supermarket or some other food store and asked for a squash like the pubs used to make, what would you expect? A. A can or a bottle of lemon drink either from a dispenser in a milk bar or the can or the bottle in the supermarket or food store.

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Q. Would you expect to get any particular drink? A. Not one in particular.

Q. Any drink? A. Just any lemon drink.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. Mr. Martin, you said that on the occasions when you had seen squash made up in an hotel you noticed that Blue Bow lemonade was used? A. That comes to mind.

Q. Do you mean by that that every time you asked for a squash in an hotel you noticed that Blue Bow lemonade was used?

A. No, not every time.

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Q. And it would not matter much to you, which lemonade was used as long as the taste of the squash was like what you were used to? A. That is right.

Q. And would you agree that there have been occasions when you have had a lemon squash made up in an hotel when some lemonade other than Blue Bow was the lemonade used? A. That could have been.

Q. Where have you been living in, say, the time from 1974 onwards? Katoomba all the time or Sydney some of the time?

A. Punchbowl, Sydney.

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Q. When was it you went to Katoomba? A. Be May, 1976.

Q. Do you recall which was the first advertisement, which was the first television commercial that you saw which brought Solo to your attention? A. The first one would be the one that I could remember, it would be the one in the kayak.

Q. And can you recall that you saw that some time before you went to live in Katoomba? A. Yes.

Q. Can you recall approximately how long it was that you noticed that before you went to Katoomba? A. No, not really, I am sorry. 10

Q. Would it be somewhere in the vicinity of 9 to 12 months? Would you be able to help us with that? I beg your pardon, somewhere in the vicinity of 18 months, 2 years? A. I am not really sure how long.

Q. You have told Mr. Reeves that you have got some recollection of television advertising for Pub Squash? A. Yes.

Q. And you have also told us about some of your recollection of advertisements for Solo on the television? A. That is right. 20

Q. To your recollection which advertising did you see the more of? Solo advertising or Pub Squash advertising?
A. I would probably have to say I saw more of the Solo.

Q. And you remember that you saw the Solo advertising before you saw the Pub Squash advertising? A. I would not be sure about that.

Q. And do you remember after seeing the Solo advertising that it put you in mind of lemon squash? A. Oh no, I would not say it had that effect on me.

Q. Well, what did you think was being advertised in that first Solo advertisement that you saw? The one with the man in the kayak? A. Just a new drink of the lemon variety, more or less. 30

Q. And do you remember whether after seeing the advertisement you thought there was something new about the drink? A. No, not really, no. I just thought "Another lemon drink".

Q. Did you buy some Solo after seeing the advertisement?
A. Probably not immediately afterward, but in the time between.

Q. You mean at some stage after you first saw the ad and while the ads were still going on you probably bought your first Solo drink? Is that right? A. I would have, yes. 40

Q. Was it a can you bought first or a bottle, or what sort of container? A. A can.

Q. When you drank it did it strike you as being a lemon squash type of drink? A. It struck me more as just a lemon drink.

Q. What difference do you see in a lemon squash drink and in a lemon drink? A. I think the lemon squash drink is more to do with a lemon soda type of drink with the soda taste.

Q. By "soda" do you mean fizzy? A fizzy drink? A. Fizzy, yes.

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Q. Solo was a fizzy sort of drink, was it not? A. It was, yes.

Q. Why then wouldn't you have thought to yourself "This is a lemon squash sort of drink" when you drank Solo? A. The other one seemed to have a more sort of lemon squash taste.

Q. Which other one? A. The Pub Squash one.

Q. Do you remember which one you drank first? A. I drank the Solo first.

Q. I am just asking you about the first time you drank Solo and what you thought then it was quite different from the lemonade? A. From the lemonade?

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Q. Yes. A. It was different from lemonade, yes.

Q. Did it strike you as being of the lemon squash variety of lemon drink? A. It struck me as just a lemon drink.

Q. What other difference did you have in mind, or in your view is there between a lemon drink and a lemon squash drink beyond the fact that, if I understood you correctly, you say that the lemon squash drink has got the lemon soda effect? A. More of a soda taste.

Q. And is that the only difference you see between a lemon drink and a lemon squash drink? A. Basically.

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Q. What is it that you mean by lemon soda and lemon soda taste? A. Similar to what I can remember buying at a hotel as a drink called lemon squash.

Q. That had some sort of cordial and lemonade mainly, did it not, in your experience? A. As far as I know, that is it basically.

Q. So it is a lemon-tasting drink which is a fizzy drink, to

use a shorthand way of describing it? A. Yes. Fizzy drink.

Q. Is that what Solo was when you first tasted it? A. They both had a fizzy taste but the one seemed to have more of a lemon sodary taste than the other one.

Q. Do you mean by that more fizzy? A. No, not exactly, more in taste.

Q. Or more lemon? A. Yes, I would say more lemon. More in the lemon.

Q. Do you watch - or in 1974/75 did you watch television fairly often? A. Quite regularly. 10

Q. Did your television set have one of those little things on it that enabled you to blank out the sound when the commercials come on? A. No.

Q. And when commercials came on what was your habit in relation to either listening or not listening, or going out of the room? A. I often go out of the room, or reading something that I had on my lap at the time.

Q. The sound would be going on in the room and you would not be taking much notice, quite often? A. Not all of the time, no. 20

Q. Were you aware at the time of a kayak ad which was being shown that contained words in the speaking part of it along the lines of "A great squash like the pubs used to make"? A. I think it had that term.

Q. And were you aware of that at the time? A. Yes, and another one called a man's drink, or something, I think.

Q. That was something you noticed right up from the time the ad was first shown? A. I may not have caught that immediately straight away. Probably over the space of seeing it a few times. 30

Q. Anyhow, it was something that you had vaguely in your mind after watching the ad a few times on television? A. Yes, same with other commercials.

Q. Did you used to buy Solo in the can when you first bought it? A. In the can, yes.

Q. What is your recollection of what the can looked like?
A. It would be sort of a, I think, mustardy-yellow colouring sort of, as far as I can remember, just a sort of scrolly, something with gold, and I think "Solo" across the top sort of half arc type of thing. 40

Q. And what sort of places would you buy cans of Solo at?
A. Mainly at milk bars or supermarket.

Q. And when you bought it would you handle the cans yourself or ask for them over the counter? A. Shops these days, I think you have got the refrigerator and get the can yourself.

Q. Did you ever ask for a can over the counter from somebody in a milk bar? A. Not off hand.

Q. I think I have asked you but I want you to see if you can get it clear for us, Mr. Martin, if you can. Which product you bought first? The Solo in its can or the Pub Squash in its can? A. Most likely the Solo in its can. 10

Q. Bearing in mind that you had heard the words used in the advertisement that it was a squash like the pubs used to make, did it occur to you when you first drank Solo that it was a lemon squash sort of drink? A. No, not really.

Q. Have you got any idea about how long it was after you first bought a Solo can of drink that you bought a Pub Squash can? A. It would not be a long period of time.

Q. Years or months or weeks? A. Matter of months, at the most. 20

Q. Do you recall the appearance of the Pub Squash can as it was the first time you saw it? A. I have got a good idea of it, yes.

Q. Would you describe that for us? A. Has bat-wing doors like an old Western Bar Room and big sort of half scrolled block letters in red, sort of reddy-maroon colour top and bottom, sort of.

Q. What size was it? A. Size?

Q. In comparison, say, to the Solo can? A. The printing? 30

Q. The can itself? A. Off hand, I would say roughly about the same size.

Q. What was the dominant colour? A. Sort of mustardy-yellow colour. I think the main feature that hits you is the red printing on it with the title.

Q. At the time when you saw the title "Pub Squash" did it cross your mind to recall the television advertisement that you had seen which used the phrase "Squash like the pubs used to make"? A. No, no.

Q. Did not raise any recollection of the advertisement at all?
A. No, not at the time.

Q. Did it strike you as being a lemon squash type of drink - Pub Squash? A. To me it did.

Q. Did you ever notice in any of these refrigerators the two sorts of drink, Solo and Pub Squash, stacked side by side?
A. Yes, I think so. Plus also, I think, a couple of other similar coloured cans.

Q. After you got used to Pub Squash or after you became aware of Pub Squash and tried it you came to prefer the Pub Squash to the Solo, did you? A. Yes, I did. 10

Q. I think you said you were a book binder by trade? A. That is right.

Q. Does that give you any particular interest in types of printing, for example? A. In a way - indirectly it does, yes.

Q. You became familiar with the various different kinds of type in that trade? A. Yes, to a certain extent. Not so much these days, mainly a few years ago.

Q. The words "Pub Squash" were lettered in a particular kind of type, were they not? A. They were sort of distinctive sized type that sort of stood out. 20

Q. Is there a technical term name for that sort of type or lettering? A. Not that I am aware of, there probably is, but.

Q. Incidentally, are you a member of the same union as Mr. Tolley? A. The P.K.I.U., yes.

RE-EXAMINATION:

MR. REEVES: Q. You mentioned to Mr. Priestley that the type on the Pub Squash can was a particular sort. Is that in any way similar to the writing on the Solo lemon can or is that the same as the Solo lemon can? A. No, there is no comparison in the type or size at all. 30

(Witness retired.)

ALBERT TREVOR SMITH
Sworn and examined:

MR. REEVES: Q. Your full name is Albert Trevor Smith, and do you live at 41 Freeman Avenue, Canley Vale? A. Yes.

Q. You are a printer by occupation? A. Yes.

Q. Are you in the employ of S. & M. Supply Co. Pty. Limited?

A. Yes.

Q. Have you from time to time had drinks in hotels? A. Yes.

Q. What sort of drinks did you have in the hotels? A. Well, I had a beer and squash.

Q. And are you familiar with the squash which is made in hotels? A. Yes.

Q. Could you describe the way in which such squash is made?

A. You want as now or in the past, too?

10

Q. Perhaps I should ask you for how long have you been going to hotels and asking for squashes? A. A number of years now. Be over ten years.

Q. And can you say which hotels you have gone into and ordered a squash? A. Kookaburra Hotel, Canley Vale, and in those days in the past they used to be mixed with Blue Bow lemonade and the Blue Bow squash, but now they don't use those, they use a dispenser.

Q. Does the phrase "A squash like the pubs used to make" mean anything in particular to you? A. Just the taste of the squash that I drank in the pub.

20

Q. Do you associate the phrase "A squash like the pubs used to make" with any particular brand of lemon drink? A. No.

Q. Have you ever gone into an hotel and asked for a squash like the pubs used to make? A. Never used that phrase.

Q. Have you ever gone into an hotel and asked for a man's drink? A. No.

Q. Or have you asked for a drink like the man in the canoe drinks? A. No.

Q. Do you know whether particular flavours of soft drink are placed in particular coloured cans? A. Yes.

30

Q. What colour would orange drinks come in? A. Well, the orange drink I have seen is the Fanta.

Q. The question I asked you was do orange drinks come in a particular coloured can? A. Well, the Fanta is the orangy and white can that I recollect.

Q. What about other cans of orange? A. Don't take much particular notice in orange drink.

Q. What about lemon drinks? A. Well, lemon drinks I have noticed are all in the yellow can.

Q. Have you ever bought Pub Squash? A. Yes.

Q. And have you ever bought Solo lemon drink? A. Yes.

Q. And are you familiar with both those products? A. Yes.

Q. In what form have you bought those drinks? A. Pub Squash in the can form and bottle form.

Q. And Solo? A. And Solo in the can form.

Q. Have you ever been confused between the packaging of Solo lemon drink and Pub Squash? A. No. 10

Q. Have you ever been confused in any way between Solo lemon drink and Pub Squash? A. No.

Q. Have you seen any advertising for Solo lemon drink?
A. Recently I have seen the one where the chap climbs the mast of a sailing yacht and cuts the rope and has a drink.

Q. Do you recall any particular features of the advertising of Solo lemon drink? A. No. Only the caption he used "the thirst quencher" or "the thirst crusher".

Q. Do you recall anything else about Solo television advertising? A. I beg your pardon? 20

Q. Do you recall any other phrases used in Solo lemon drink advertising on television? A. Early - I am going back a few years, couple of years ago, when they used the caption of "a squash like the pubs used to make". I think that was the one he used to drive a team of horses.

Q. Do you recall seeing any advertisements for Pub Squash on television? A. No, I haven't seen a Pub Squash.

Q. If you went into a supermarket or some other food store and asked for a squash like the pubs used to make what would you expect to get? A. Can of squash or glass of squash. 30

Q. Would you expect to get any particular type? A. No.

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. I am sorry, Mr. Smith, one thing I missed, I did not catch your occupation? A. Printer.

Q. Pardon my ignorance of printing, but what sort of things

have you been concerned with the printing of a whole range of particular - A. Mainly colour printing. That is what they call process work. Calendars and brochures and black and white printing.

Q. Do you become familiar in that sort of work with the various different kinds of type? A. Yes.

Q. I suppose you are interested because of your occupation in the different sorts of type that might appear on advertisements and design material which is used in advertising? 10

A. Yes.

Q. You said that you did remember early in the advertising of Solo the caption "Squash like the pubs used to make"?

A. Yes.

Q. About how long is it since you first became aware of that particular caption? A. Couple of years.

Q. I know it is hard to put dates on things, Mr. Smith; so far as you could recollect would you have become aware of that television advertising as soon as it came on to the television?

A. Well, I seen it a couple of times and noticed it but I wouldn't say exactly when. 20

Q. Are you a fairly regular television watcher? A. No, not regular.

Q. Would you watch it once a week or half an hour a night?

A. I might watch it an hour a night - nights I miss - there is a certain show on that I have noticed it is going to be on, I may watch it for the full show, a few hours, but some nights I just don't watch it at all.

Q. I am not trying to pry into your family life; I just want to find out about the length of time television is on in the house. Have you got children? A. Yes. 30

Q. Would the television be on every night after tea? A. Yes.

Q. Would that have been the case, say, since 1974 onwards?

A. Yes.

Q. You are home most nights, I suppose? A. No, a lot of nights I am out.

Q. How old is the eldest child now? A. 24.

Q. And has there been any discussion at any time amongst the family about the Solo ad when it first came on? A. No.

Q. Do you remember that some of those advertisements had concluding shots of the man drinking Solo and the Solo spilling out on his chin?

Q. Was there ever any comment about that amongst the family?
A. No, not that I know of.

Q. Have you got any girls amongst the kids? A. No.

Q. Would you remember whether Solo came on to the market before the Pub Squash? A. I can only say I think it did.

Q. Would you remember that it was the Solo that first used the particular colour yellow that appears on the Solo can in relation to lemon drinks? A. I would say no because all the cans I noticed with lemon drinks or in lemon drink was put out as yellow background on the can. 10

Q. Can you recall how long that has been going on? A. To my knowledge now, as I say, two years that I have noticed. (Objected to; objection withdrawn.)

Q. To be precise, I was asking you if you can remember how long you have been aware of lemon drinks being sold in a similar type yellow can? A. Two years. 20

Q. And before then what is your recollection? A. Before then I never used to drink it out of a can. As I said, I had it mixed in an hotel.

Q. About how many hotels over the last years would you have had a lemon squash in, going back to your childhood?
A. Numerous.

Q. Can you remember actually having a lemon squash in an hotel when you were a child with your parents? A. Yes.

Q. You would not have known then what particular brands of lemonade or cordial were going into the squash, would you? A. Yes, Blue Bow lemonade, Blue Bow cordial. 30

Q. Right back when you were a child? A. As far as I can remember back. I wouldn't say a child, I would say in my teens, 12, 13.

Q. Were these hotels mainly in the Canley Vale area? A. No, Newtown and the country area.

Q. You have got a distinct recollection of the Blue Bow lemonade? A. Yes.

Q. And I think you also said that it was Blue Bow -
A. Cordial. 40

Q. Cordial. And is there anything in particular that fixes in your mind the cordial side of it? A. That is how I used to buy it.

Q. You used to ask for it that way? A. For the home, yes.

Q. You used to buy Blue Bow lemon cordial to take home?
A. Yes.

Q. Have you got any recollection of being in hotels at times when you noticed lemonade other than Blue Bow was used for the making of a squash? A. No. 10

Q. Do you think you would have paid attention on every occasion that you got a lemon squash to just which brands of lemonade and lemon squash were going into it? A. I always noticed in the hotel I drank in that the Blue Bow cordial lemonade was always - the majority of times I would say was always Blue Bow.

Q. This is the particular hotel at Canley Vale? A. Up to, I just couldn't say, 12 months ago I asked for Blue Bow lemonade at one time and they said "We don't have it now". So that is a time when most squash, to my knowledge, then was mixed with dispensers. 20

Q. At the beginning of your evidence you mentioned a particular hotel at Canley Vale? A. Kookaburra.

Q. Would it be right to say that your observation of what has gone into lemon squashes you have asked for in hotels from time to time is based mainly on what you have seen at that particular hotel over the years? A. No. As I have said, when I ask for a lemon squash I would ask - or in the pub it would always be mixed with Blue Bow or cordial. But now when I go into a club or hotel it is always mixed but, to my knowledge, with the dispenser. 30

Q. We understand about the dispenser in the latest situation. Going back to the earlier days when you used to get the squashes actually made up, correct me if I am wrong, but do I understand you to say that usually you used to ask specifically for the Blue Bow lemonade? A. No, I just ask for a squash. It was mainly made on Blue Bow.

Q. And there were occasions when it was not made on Blue Bow?
A. Not that I have ever noticed.

Q. Mainly made on Blue Bow? A. I would say made on Blue Bow because I never noticed it made on anything else. 40

Q. Would this be right then that the only times that you

recall seeing what went into the squashes it was the Blue Bow lemonade and the Blue Bow lemon cordial? A. (Answer inaudible.)

Q. I think you were about to say "squash". Do "squash" and "lemon cordial" mean the same to you? A. They mean the same to me.

Q. Are you a beer drinker from time to time? A. Yes.

Q. Have you got any particular brand that you favour? A. Yes.

Q. Which is that? A. Reschs.

10

Q. Reschs? A. Yes.

Q. And in the hotel itself when you are drinking the draught beer across the counter have you a particular favourite?

A. The hotel I drink it at at home, Canley Vale, is a Reschs hotel. If I go into any hotel that has certain brands of beer I always ask for a Reschs if it is on tap.

(Witness retired.)

(Luncheon adjournment.)

KENNETH PATRICK FINN
Sworn and examined:

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MR. REEVES: Q. Your full name is Kenneth Patrick Finn?

A. Yes.

Q. Do you live at 1 Daintry Crescent, Randwick? A. -trey Crescent, Randwick, yes.

Q. Are you an architect and town planner by profession?

A. That is so.

Q. Are you a director of Finn and McKinlay Pty. Limited?

A. Yes.

Q. That is a company which provides architectural and town planning services? A. That is so.

30

Q. Was your father employed by Tooth & Company? A. Yes, he was.

Q. What position did he hold with that company? A. He was the manager of the delivery department.

Q. For how long did he hold that position? A. Well, I'm not too sure exactly, but it was a good many years, he had been

A.T. Smith, xx, ret'd.

452. K.P. Finn, x

with the company for about 35 years or more and in the latter part probably 15, 20 years, maybe.

Q. Do you recall whether Tooth & Company produced soft drinks?

A. Yes, they did under the name of Blue Bow.

Q. What sort of drink was this Blue Bow drink? A. They made various drinks, cordials of all types, lemonade, orangeade, Juiso was one and a number of syrups and squashes and things like that (shown m.f.i. 2).

Q. Is that a bottle of Blue Bow lemon squash? A. It is. 10
(Objected to.) If I could help the court in that respect, we used to have a number of these bottles, you might imagine, from the company which unfortunately weren't used in time, and this was a very familiar result.

Q. Does that appear to be a bottle of - A. Yes, it does.

Q. Is that labelled "Blue Bow Lemon Squash"? A. Yes, it is. That is what the label says.

(Bottle tendered; objected to.)

WITNESS: It also has the same gold top as I recall very clearly.

(Tender not pressed.) 20

Q. Did you often over the years purchase Blue Bow lemon squash and take it home for home consumption? A. Well, we very rarely ever purchased it. It was made available to us and then my father died and the general manager used to always make sure we had plenty of quantities of that particular product and a number of others as well.

Q. Did you use that particular lemon squash to make drinks?

A. Yes, we did.

Q. Do you recall how you made those drinks? A. Yes, it was very similar to the way his Honour just said. You added lemon- 30
ade or if you added something a little less sweet you added soda water. Or if you did not want anything of that nature you just added water.

Q. Over the years have you gone into hotels and had drinks in those hotels? A. Yes, indeed I have.

Q. What sort of drinks have you had in those hotels?

A. Exactly the same as I have just mentioned (objection to leading). I have asked for lemon squash and soda water or lemonade, depending on how I felt.

Q. What did you receive? A. Presumably I received - (Objected 40
to.)

HIS HONOUR: Q. Unless you actually saw it made up? A. I had, your Honour, yes.

Q. I think you can tell us of those occasions where you saw it made up, anyway? A. It was not on every occasion. That is why I said "presumably". On the occasions I did notice it was lemon squash - Blue Bow lemon squash - which is standard for most Tooths Hotels - and the Blue Bow lemonade or soda water which may not have been Blue Bow, but it usually was Blue Bow, and made with soda water as well, as I recall.

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MR. REEVES: Q. Have you over the years always received a drink in that form, made in that form? A. Whenever I have requested it, for the most part, yes.

Q. Have you ever received a lemon squash drink when you asked for a lemon squash which was a product dispensed from a dispenser? A. Yes, I have had that in recent years.

Q. Does the phrase "A squash like the pubs used to make" mean anything to you? A. Very much, yes. As I say, the connection was always very strong with the hotels that I used to - I do not ever drink much beer, and on occasions I very much prefer to have the squash and the lemonade, and that is the association I have always held with it.

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Q. Do you associate the phrase "A squash like the pub used to make" with any particular brand of lemon drink? A. No, I don't.

Q. Have you ever gone into an hotel and asked for a squash like the pubs used to make? A. In that form?

Q. By that phrase? A. Well, no, I don't think so.

Q. Have you ever asked for a man's drink? A. No, I haven't said that, either.

30

Q. Have you ever asked for a drink like the one which is drunk by the man in the canoe? A. No, I haven't.

Q. Do you know whether particular flavours of soft drink are packed in particular coloured cans? A. Well, yes. I usually associate orange drinks with orange cans. Lemon drinks come in numbers of coloured cans, as I can recall, probably ranging from blue, yellow to green. Cola comes in red cans or Coke cans I associate with the red or a brown.

Q. (Shown Exhibit "A" and Exhibit "B1" and 2.) You see the can which is marked Exhibit "A"? A. Yes.

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Q. You see the can which is marked Exhibit "B1"? A. "B1", yes.

Q. Having looked at those do you think that you would be likely to confuse those two cans? A. No, well, I don't think so, really. No, I wouldn't think so. The background colours are similar but the patterns are quite separate.

Q. Have you ever seen any television advertising for Solo lemon drink? A. I can recall advertisements for drink. I am afraid I can't really say I can recall it. I could not tell you anything about it. I have a feeling I have probably seen it somewhere on television but I could not tell you much about it, I am afraid. 10

Q. If you went into a supermarket or other food store and asked for a squash like the pubs used to make, what would you expect to get? A. You mean as a product or a type of drink? I wouldn't - in the first place I would not ask for something like that.

Q. If you did? A. If I did I would not have any idea of what I would be getting, frankly.

Q. Would you expect anything in particular? A. I would expect something like that which I used to get in the pub. 20

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. I notice that you, like myself, have reached the stage where you have got to use glasses in order to read? A. Not entirely. Makes it easier.

Q. Have you ever bought Solo or Pub Squash in one of those milk bars where they have the twin-fronted refrigerators where you serve yourself? A. No, I have not.

Q. Have you bought any soft drink from that sort of refrigerator? A. I don't think I ever have, frankly, no. I have bought milk out of those. 30

Q. May I take it from some of your answers that you yourself are not particularly wedded to either Solo or Pub Squash as a drink? A. That would be correct, yes.

Q. If you were intending to buy one of those cans rather than the other and went to a refrigerator in a milk bar without your glasses, would you not agree that you would be quite likely to pick up one for the other? A. I do not think my sight is that bad, really. If I want a thing in particular I could quite easily tell which one was which.

Q. But if you were not particularly familiar with which one is which to start with, would you not think it would be easy to make a mistake if you were in a hurry without your glasses? A. I can read this as it is, you know. My sight is not too bad. 40

Q. I am not being critical of your sight but you did find it distinctly easier when you wanted to look at those two things closely to use your glasses? A. To read the writing on it. No, I would not think I would have much difficulty if I were particularly wanting one as against the other. I think I could easily choose.

Q. We are having to enquire about people's television habits in this case. What are yours? What have they been over the last four or five years so far as watching television?

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A. Mainly news and public affairs, commentaries on the day's news. That sort of thing.

Q. Mainly the Channel 2 programmes? A. A lot of Channel 2 as distinct from the others. I must confess I use the advertisement time to do something else.

Q. Have you any recollection of Solo advertising at all on television? A. I am afraid I just haven't. I am aware of quite a number of things on television, ads - patently ridiculous or outstanding, maybe, but I can't say I have ever seen the Solo ad. I couldn't tell you the content of a Solo ad ---

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Q. Have you got a colour television set now? A. Yes.

Q. How long have you had that? A. Just over 12 months, I suppose.

Q. Have you any recollection of an advertisement featuring a rather husky looking male which concludes with him drinking Solo with some gusto out of a can and some of it spilling over onto his face? A. I think I have seen one with that man in it, yes. I wouldn't have known what it was until you told me, but I have seen some disgusting looking characters pouring stuff down their faces. I think there are some beer ads that do the same thing.

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Q. Now that I have reminded you of that one do you recall if it was in relation to a soft drink advertisement? A. Yes, I think I did.

Q. Can you recall whether there was accompanying that advertisement the audio content of the commercial including words like "A great squash like the pubs used to make"; do you remember that phrase? A. I think I have heard the expression.

Q. And with your particular background and interest that would have rung something of a bell with you? A. Yes, naturally.

40

Q. Have you ever bought a can of either Solo or Pub Squash yourself? A. No, not that I can ever recall. It could have been perhaps that I bought one unconsciously but I have never asked for one.

Q. So far as you are concerned the actual situation of possible confusion between the two has never arisen in a concrete situation? A. Never arisen as far as I am concerned. I usually ask for a bitter lemon or something of a lemon nature. I have not specifically asked for that. The only way that I would do it is if I didn't want something hard I would ask them to mix me up a drink I used to have the squash and the soda.

(Witness retired.)

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HIS HONOUR: I will note then that Mr. Priestley has indicated that he would object to the relevance of most of the television advertising from the advertisements shown for me to determine what may be their relevance to this issue and the more convenient course be that all advertisements now intended to be shown, be shown, so that we can determine the admissibility of those advertisements at the conclusion of the exhibition.

Television commercials shown to the court.

DEMONSTRATOR: The first film shown in the sequence of commercials for Pub Squash - Six million dollar man - and it relates to March, 1975.

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The second commercial is a promotional programme "Go for Gold". It is the second commercial. It may appear to be a Pepsi Cola commercial but the relevant part with Pub Squash is at the end. This relates to the January period of 1976 - Sorry, that commercial related to February and not January as I mentioned.

The next programme is Pub Squash and it is January, 1976. This is titled "Factory", sometimes called "Furnace" but the titling is "Factory" in our terminology. There are two commercials in front of it.

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The next commercial for Pub Squash is called "Uncola" and it went to air in January, 1977.

There are a series of two commercials in a promotion called "\$500,000 Promotion" with Pub Squash involved. That went to air January, 1977.

The next commercial is called "Knee Board" for Pub Squash and relates to scheduling from October, 1977.

Lastly, the most recent commercial is called "Sunbird Promotion" for Pub Squash and relates to scheduling from November, 1977 onwards.

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That concludes the main commercials.

MR. REEVES: There is also a Solo commercial, your Honour.

DEMONSTRATOR: This is a Solo commercial from December, 1977. We have lost the sound. I have another version and could perhaps play that. Sometimes when they are recorded on different machines the heads will not line up. No sound. I am sorry, I will have to acquire another machine that will do it.

MR. REEVES: We will be seeking a short adjournment in order to enable Mr. Bannon to argue those points.

HIS HONOUR: The first one is Six million dollar man, I take it there is no objection.

10

MR. PRIESTLEY: No objection.

HIS HONOUR: The next one was entitled "Go for Gold" in February, 1976. A number of cans with Pub Squash appeared in it.

MR. PRIESTLEY: There is an objection to the relevance of all except that first one to which we do not object. It is difficult to see to what issue the subsequent ones go.

(Short adjournment.)

(Mr. Bannon indicated he would not press the admission of audio number 3. Mr. Priestley withdrew objection "Factory Furnace" and No. 6. Objection to Nos. 4, 5, 7, and latest Solo ad maintained.)

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HIS HONOUR: I am disposed to think that the promotional advertisements which are No. 2 "Go for Gold", No. 5 "The half million dollar" promotion and No. 7, the Sunbird promotion are so distant from the real issues that they ought to be rejected. No. 1, I think is clearly relevant. No. 3, I think, bearing in mind the suggestion of the word "the local" being synonymous with "the pub" has a bearing. No. 4, again, may be a fact relevant to a fact in issue in the sense that it could be asserted that what is being pushed is the lemon flavour rather than the association with an hotel. No. 8 is relevant. No. 6, the knee board one with the romantic macho: that leaves in "Six million dollar man", "factory furnace", "uncola", "knee board" and the "thirst crusher".

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(Further hearing adjourned till 10 a.m. Tuesday 14th, February, 1978.)

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

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No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED
v.
PUB SQUASH PTY. LIMITED

SEVENTEENTH DAY: WEDNESDAY, 15TH FEBRUARY, 1978

(Corrections to transcript:

- *Page 443 second last question first line delete "range" and substitute "launch". 10
- *Page 445 last question in cross-examination add "Objected to" at the end of the question.
- *Page 451 "associated" should read "associate"
- *Page 451 third question delete "produce" and substitute "product"
- *Page 451 second last line of answer to third last question delete "interacts" and substitute "intercuts"
- *Page 452 second line delete "interacts" and substitute "intercuts".) 20

(Original replaced with photostat in Exhibit 34.)

LAURA MARIE WATERS
Sworn and examined:

MR. BANNON: Q. Is your name Laura Marie Waters? A. Yes, that is correct.

Q. You live at No. 14 Tryon Street, Chatswood? A. Yes, I do.

Q. Are you a university student? A. Yes, I am.

Q. Presently in 4th year Arts Law at Sydney University?
A. That is right. 30

*Not reproduced in this evidence.

Q. Do you also do casual work at the Sydney Hilton Hotel as a barmaid? A. Yes, that is true.

Q. You are presently doing that work, are you? A. Yes.

Q. Have you on occasions drunk Solo lemon drink and Pub Soda Squash? A. Yes, I have.

Q. Are you familiar with their respective packaging? A. Yes.

Q. Have you also seen the advertisements for Solo on the television in which the phrase "A squash like the pubs used to make" was used? A. I know of the advertisement you are referring to, I have seen it. 10

Q. Have you drunk lemon squash drinks at hotels yourself?
A. Yes, I have.

Q. At the Sydney Hilton Hotel do you mix lemon squash by way of mixing a cordial with soda or lemonade or how do you serve lemon squash at the Hilton Hotel? A. Well, actually, I work in a very busy bar so that we use a dispenser for the lemon squash.

Q. What they call a post-mix machine? A. A post-mix machine. 20

Q. (Witness shown Exhibits "A" and "B1".) Have you ever been in any way confused between the get-up or appearance of the cans Exhibit "A" and Exhibit "B1"? A. No, not at all.

Q. The phrase "a squash like the pubs used to make" do you associate that with any particular type of lemon squash?
A. No.

Q. What does that phrase "a squash like the pubs used to make" mean to you? A. Well, should I be asked to mix that drink I would put in the lemon cordial and lemonade or soda, or mix the drink something like that. 30

Q. Has any customer ever come to you while you have been working as a barmaid and asked for "a squash like the pubs used to make"? A. No, never.

Q. Has any customer ever complained to you that they were confused between Solo and Pub Squash? (Objected to; pressed; rejected.)

Q. In your duties as a barmaid do you serve customers with drinks? A. Yes.

Q. Amongst the products do you stock Pub Squash or Solo cans

of drink at the Hilton? A. No, not in our particular bar. I couldn't speak for the other bars.

Q. Has any customer ever come to you and said that they wanted a drink called "a man's drink"? A. No.

Q. If they did ask for "a man's drink", what would you give them? A. I would give them a beer.

Q. Has anyone ever asked you for a drink like the man in the canoe has? A. No.

Q. Any one asked you for the kind which the man with the drink 10 dribbling down his chin has? A. No.

Q. Have you seen Solo advertisements referring to Solo as "the thirst crusher"? A. No, I haven't seen that.

Q. Have you seen advertisements for Pub Squash on television?
A. No, I haven't.

Q. Do you ever remember seeing something called "the six million dollar man" advertisement? A. No, I haven't.

Q. If you walked into a supermarket and asked for a squash like the pubs used to make, what would you expect to get?
A. I really can't see myself doing that.

Q. Supposing you did, have you any idea of what you would get? 20
A. They would give me a squash.

Q. Would you expect to receive any particular brand of squash?
A. Well, I would say a Pub Squash.

CROSS-EXAMINATION:

MR. HORTON: Q. Why would you expect to receive that brand?
A. Because it is called Pub Squash.

Q. You are familiar, of course, with the phrase - I do not purport to put it precisely but something to this effect: "A great lemon squash like the pubs used to make"? A. Well, I have heard that phrase in connection with the Solo advertising. 30

Q. And, of course, as you told my learned friend, you have not heard it in connection with the Pub Squash advertisements?
A. I haven't seen any Pub Squash advertising.

Q. Yet if you went into a supermarket and asked for a lemon squash like the pubs used to make you would expect to get Pub Squash? A. Yes, because it is written on the can.

Q. Have you ever bought a can of either Solo or Pub Squash in a milk bar or supermarket? A. No, I haven't.

Q. I suppose you haven't bought bottles of either of those?
A. No, I haven't.

Q. I think you have perhaps tasted both of them, have you?
A. Yes, I have.

Q. Have you ever mixed a lemon squash for a customer in a hotel or, for that matter, even in your home? A. Yes, I have mixed lemon squash.

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Q. But out of a dispenser, post-mix machine? A. No, that is what I serve automatically when somebody asks me for a lemon squash behind a bar, but if you are referring to any occasion then I have mixed a lemon squash.

Q. May we take it, first of all, in hotels. Have you mixed a lemon squash at the Hilton or, for that matter, in any other hotel you might have been working at, apart from using a post-mix machine? A. Well, I have had occasions where people have asked me to mix a lemon squash.

Q. Have you done it? A. Yes, I have mixed cordial and a soda water.

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Q. Not cordial and lemonade? A. Sometimes cordial and lemonade. The customer usually says - if they say that they want a drink mixed for them you ask "how do you like it, soda water or lemonade?"

Q. Do you always use the same brand of cordial, can you recollect? A. Yes, we would always use the same.

Q. And the same brand lemonade? A. It comes from a post-mix machine, I don't know the brand because there is no label.

Q. I am sorry, I haven't made myself clear. I was really referring to the occasions when you mix the lemon squash yourself by taking a bottle of cordial from the shelf.

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HIS HONOUR: I think Miss Waters is saying the cordial comes from a bottle and the lemonade comes from a dispenser.

WITNESS: That is what I am saying, the cordial does not come from a dispenser.

MR. HORTON: Q. You have drunk lemon squash in hotels yourself, I understand? A. Yes, I have.

Q. Apart from ones that you might mix yourself during your work? A. Yes.

40

Q. How long ago did you, as a matter of some regularity, start drinking lemon squash in a hotel? A. There has never been any regularity.

Q. Can you remember the first one you had, how many years ago that would be approximately? A. To be honest, I really couldn't tell you when I had my first lemon squash. It would be impossible to say.

Q. Would it be putting too great a strain on your memory to ask you if you can recall when you first saw the Solo advertisement which was probably of a canoeist going down the rapids? 10
A. Possibly three years ago.

Q. Have you seen the other Solo advertisements? A. No, I haven't, because at present I don't have a television.

Q. Does any of what is called, I believe, the audio part of it, the speech in the commercial stick in your memory?
A. Well, what really is what impresses me is the actual figure of the man going down the rapids.

Q. That is what, I think, was the video part of it, but the speaking part? A. Well, I associate that with Solo, yes. 20

Q. Can you remember any of the words, or words similar to the words that were used? A. Well, we have mentioned the words this morning. I recall the advertisement, you said "a great drink like the pubs used to make".

Q. I know I said it but do you recall that yourself or words to that effect from the advertisement? A. I would say "a drink like the pubs used to make".

Q. What idea is conveyed to you by the title of the can that was shown to you a little while ago by my learned friend "Pub Squash"? A. The sort of squash that you would ask for in a pub. 30

Q. What flavour would you expect the can to have when you opened it - generally, I mean? A. That of a lemon squash.

Q. Would you expect it to be a squash of a type that you were generally familiar with? A. Yes, I would say so, but there is no particular flavour for a squash because everybody mixes them differently.

Q. But do I understand you to be saying, when you gave me that answer, that while there undoubtedly would be variations between every glass, I suppose, of lemon squash, except those perhaps that are mixed automatically by the dispensing machine, you would, when you opened a can of Pub Squash, 40

expect to get a drink more or less similar to the type of lemon squash you would get in a pub if you asked for it to be mixed with lemonade? A. There there is the problem because sometimes it is with lemonade and sometimes it is with soda.

Q. That is why I said "if you asked for it to be mixed with lemonade"? A. I would expect a lemon squash.

Q. You would expect the contents of the Pub Squash can to taste pretty close to the type of drink you would get in a hotel if you went in and ask that they mix a lemon squash for you? A. When I go into a pub I have a general idea of what I expect of a lemon squash, but then they would have tasted - or as I have said they come in various ways, so that I would not associate it with any particular way of making squash, I would just associate it with lemon squash. 10

Q. I really meant to ask you whether you would expect it to be of the general nature of the lemon squash you would get in a pub? A. Yes, speaking generally, yes.

Q. I suppose when you are offered a drink of Solo you would expect exactly the same, that it would be of the general nature of a lemon squash you would get in a pub? A. I would expect a lemon squash. 20

Q. But of the general nature you get in a pub? A. Yes, I would.

Q. Why? A. Because I associate Solo as a lemon drink.

Q. That you get in a pub? A. Not necessarily that I get in a pub, but with a lemon squash.

Q. How did you come to be asked to give evidence, if you don't mind my asking? Did someone approach you in the Hilton, or what happened? A. No, I used to work for the company many years ago. 30

Q. Which company is that? A. It was Passiona Marketers.

Q. In what capacity were you working for them? A. As a cashier.

Q. Does that involve taking coin of the realm and putting it into a cash register? A. It meant banking money.

Q. That would have been some time after mid-1974, I suppose? A. No, it wouldn't. It was before that.

Q. It was before Mr. Brooks took the company over, was it? A. I had worked there before, yes, and when he took it over I was still there. 40

Q. Out at the Auburn premises, I suppose? A. At Auburn.

Q. Was it a five day a week task that you had? A. Yes, it was.

Q. I suppose you would be in the office section of the establishment? A. Yes, I guess so. It was an office that I had to myself.

Q. Did you know Mr. Newell at Auburn when you were working there, one of the chemists? A. No, that name doesn't ring a bell.

10

Q. And Mr. Allman? A. I have heard the name, but I couldn't associate it with anybody.

Q. Can you tell us what year you left? A. I was working there casually on my holidays and I have been at the Hilton now for three years and it was prior to that.

Q. Would it be late 1974? A. 1974 some time.

Q. Would you have been there over Christmas of 1974 and into 1975? A. Probably.

Q. If you are at university that would have been the long vacation, wouldn't it? A. Yes, I think I was there at the time, but I can't be sure.

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Q. At all events Mr. Brooks was in command at the time you were there? A. Yes, but I had very little to do with Mr. Brooks.

Q. Was the product Pub Squash being marketed by the company when you were there or were they still marketing some of the old products such as Passiona and so on? A. Pub Squash was being marketed, I know that, but I couldn't tell you about any other products. I know they had Pepsi as well, but I had nothing to do with the soft drinks. I was a cashier.

30

Q. I suppose you would go into the factory now and again and observe the manufacturing process, the bottling process?

A. I know what the bottling process is all about because I have been working there for many years prior to being cashier there.

Q. But you don't remember the name of any of the other products, apart from Pepsi? A. Well, if you really want me to stretch my memory, they had some sort of lemon drink. I don't remember what that was called. They had a couple of orange drinks, as far as I remember.

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Q. Do you remember the names of those at all? If you don't, it doesn't matter. A. Tango. Then there was another orange drink - I'm sorry, I can't remember the name.

Q. Obviously, some of these products and, in particular Pub Squash was launched on to the market during the period you were there? A. I knew nothing of products being launched.

Q. Wasn't there discussion in the company of the new product, Pub Squash? A. I wasn't involved in any of the discussion.

Q. You had, I think, during the period you were working for the Pub Squash company seen the canoeist advertisement on television - I think you told me it was about four years? A. No, I said it was three years ago. No, it was definitely after I left the company. 10

Q. You just had no occasion to discuss with any one of the staff or executives this new product Pub Squash while you were there? A. No, I didn't. I had nothing to do with anybody else there but my immediate officer in charge.

Q. Who was that? A. Mr. Mojsza.

Q. Did he ever discuss with you the new products at all? A. No. 20

Q. You left Pub Squash and then went on with your course, no doubt? A. Yes.

Q. And went to the Hilton? A. Yes.

Q. The first time that you saw the canoeist advertisement did it bring back to your mind the product that you had observed being sold by the Pub Squash company, Passiona Marketers as it then was, called Pub Squash? A. No - well, it was advertised as Solo.

Q. But the line that you recollected "squash like the pubs used to make" didn't strike a chord or cause you to think "ha-ha I remember the Pub Squash that Mr. Brooks' organisation put out". A. Well, just as much as it does any lemon squash, if you were talking about lemon squash, which is what I associate Solo with. 30

Q. But the words "Pub Squash" evoke much the same idea, don't they, in your mind as the words "a squash like the pubs used to make"? A. But I had no occasion to think of that.

Q. You just didn't think of it? A. No.

Q. Might I just ask who it was who discovered you as a witness in this case, if I can put it that way? A. Let me think. 40

Q. Mr. Brooks, perhaps? A. No, it was Mr. Mojsza.

Q. Had he been in occasional contact with you since you had left the company over the last few years? A. Yes, he had.

Q. In what circumstances, are you a family friend? A. Yes.

Q. Could I ask you how long ago it was that Mr. Mojsza approached you and asked you to give evidence? A. Possibly last June.

Q. A few moments ago you had a little hesitancy in recollecting the name of your immediate superior, who was Mr. Mojsza. 10

A. Well, because that was the superior, but there are other smaller people that I had to deal with as well and I couldn't remember the name of the particular woman who I was working in conjunction with.

Q. Have you ever worked for the Coca-Cola company? A. No.

(Witness retired and excused.)

ROY GEORGE WILLIAM WHITE

Sworn and examined:

MR. BANNON: Q. Is your name Roy George William White?

A. Yes. 20

Q. Do you live at No. 32 Beecroft Road, Beecroft? A. Yes.

Q. You are a barman by occupation? A. Yes.

Q. You are employed as a barman at the Palace Hotel at Mortlake? A. Yes.

Q. For about eight years between 1967 and 1975 were you the Publican at a hotel known as the Rose and Crown at Parramatta?

A. Yes.

Q. Before that, between 1965 and 1967, were you the publican at the Empress Hotel at Redfern? A. Yes.

Q. Are the Rose and Crown, the Empress and the Palace Hotels all Toths Hotels? A. Yes. 30

Q. Do customers at the hotel ask you for lemon squash from time to time? A. Yes, mainly squash.

Q. What did you do in the past when they asked you for a squash? A. This is going back, say, when the brewery used to make the lemon squash cordial, do you mean?

Q. Well, that may be the time - when Toths put out their

L.M. Waters, xx, ret'd.

cordial, what was it called? A. It was just called squash and we used to buy it in a bottle the same size as a lemonade bottle, a 26 ounce bottle.

Q. What were those bottles called, can you remember, did Toths have a brand name on it? A. Blue Bow.

Q. You bought it in a bottle and what did you do? A. We used to break it down into two bottles because it was very strong and for reasons it was - if you didn't break it down it made your glass dirty too, so that was one reason, because of the strength of it and they made the drink too strong. If you didn't break it down, so we always broke it down into two bottles. 10

Q. What did you do then? A. We used to - if anybody asked us for squash we used to get a schooner or middy, whichever they wanted, put about roughly about 10 percent of the cordial in the bottom, which had been broken down, quite a lot of ice, then fill it up with lemonade, mostly. Some people would ask for just cold water, but mainly lemonade.

Q. Some people ask for soda, I suppose? A. Yes, occasionally. It is not very often though. 20

Q. In recent times has there been a different method of giving people a lemon squash? A. Yes. Well, Blue Bow stopped making lemon squash about three to four years ago - I think it would be roughly four years ago - and then Schweppes took over their market and for a while there was - we used Schweppes cordial but it wasn't the same as the lemon squash, wasn't the same as the squash - like Schweppes lemon cordial wasn't the same as the squash, you couldn't break it down, you know, it was a different drink altogether, and we used that a bit for a while. Then, things changed, I think there was a little bit of Solo around, but that wasn't as popular as the squash. It was a different drink altogether to what the original squash was. 30

Q. What did you do then? A. Well, for a while, we just made them more or less out of the Schweppes lemon cordial, mainly.

Q. Then what did you do? A. Well, at present, where I am working?

Q. Yes. A. Well, we are using both - well, it isn't Solo. I think they call it a pre-mix, I am not real sure of that. They get it out of a machine. The syrup is in a container, it adds water and C02 for a mix and we also use the quantity of Pub Squash. 40

Q. In cans? A. In very large bottles - bigger than a lemonade bottle.

Q. This machine which you use, which you have Solo in?

A. No, it isn't actually Solo, but it is getting towards it, but it isn't Solo.

Q. Do you know whose product it is? A. It would be Schweppes.

Q. This machine, what happens, it mixes it automatically, does it, when you pull a lever? A. There is a little lever, as you put your glass on it it knocks the lever and it just pours until you move the glass away.

Q. You also stock the Pub Squash in bottles? A. Actually, 10
we are selling all Pub Squash mainly, because we have a good stock of it and we are not moving much of the other.

Q. The question I asked you about was "you are selling Pub Squash from bottles, is that right"? A. Yes, but the other is there, but we are using mainly Pub Squash.

Q. Is it customary for people to have a lemon squash before drinking beer? A. In very hot weather, yes, all depends, what you mean, customary. It isn't a real big percent because - but you get a very hot day, you sell quite a lot of squashes before they drink beer, as they come in, if they are, you know, 20
very dry, it quenches your thirst a bit better than beer.

Q. If somebody said to you "A squash like pubs used to make", what does that mean to you? A. Well, it means a couple of things, depends how they phrase it, of course. If they just say "a squash like the pubs used to make" it means that Pub Squash, because, I mean, it has been advertised that much that you naturally think of it straight away, but if they wanted "a squash like the pubs used to make" I just say we don't make them any more, we haven't got cordial.

Q. Have you ever seen any advertisement for Solo on television? 30
A. Yes, I don't watch television much lately, but I have seen them.

Q. Have you ever seen any Solo advertisements which refer to Solo as being "a squash like the pubs used to make"? A. No.

Q. Have you ever seen any Solo advertisement showing a man riding in a canoe? A. Yes, I saw that one.

Q. Do you remember him saying in that advertisement something about a man's drink? A. I wouldn't bet on that because I don't take much notice of television, especially the ads.

Q. What can you remember about that Solo advertisement? 40
A. That particular one or all of Solo advertisements?

Q. The Solo advertisement of the man in the canoe? A. Well, I remember him coming down the rapids in his canoe, very wild looking, and I think he drank his Solo just about as wild as what he come down the rapids, that's about all to it, I think.

Q. Do you remember any of the words that were used in the advertisement? A. Not really, not without a little bit of priming or anything like that, I wouldn't say I could say the words.

Q. Can you remember any other Solo advertisement? A. Yes, I 10
remember one where he drives a horse - I think it was a horse.
He drives, you know, madly and then he has a drink the same.

Q. Do you remember any words used in that advertisement?
A. Not really.

Q. Can you remember any Pub Squash advertisement? A. Yes, I
can remember that one.

Q. What one was that? A. "Squash like the pubs used to make".

Q. What was the video of the Pub Squash advertisement? A. I
couldn't tell you, I don't watch television that much, but that
part just rings a bell, like it is advertised that well, so 20
that's the main part I wouldn't remember.

Q. Has any customer ever come in to your hotel and asked you
for a squash like the pubs used to make? A. Yes.

Q. When was that? A. Well, there has been some in the last
few weeks. As a matter of fact, it was a bit unusual; I thought
it might have had something to do with this court case, because
it isn't very often that people do ask now.

Q. When they asked you in the last few weeks, what did you
say? A. I just told them that they don't make it any more
like they used to, like out of the cordial, like they used to 30
make it.

Q. Did the customers say anything else to you then? A. I
can't recall now, because I wouldn't have been taking any notice.

Q. Anyone ever go in to your hotel and ask you for a "man's
drink"? A. No.

CROSS-EXAMINATION:

MR. HORTON: Q. When that customer came in the other day and
asked you for squash like the pubs used to make and you explain-
ed to them it wasn't made in the old way any more, what did
you give them to drink? A. Well, I can't recall truly, but if 40
I give him a drink I would have given him a Pub Squash because
at the time that's all we are selling at the time.

Q. Anyhow, in your mind, Pub Squash is identified with the slogan "A squash like the pubs used to make"? A. Yes. Well, it rings a bell, there is a little bit of - in the slogan.

Q. So that you thought that that is what the customer wanted, at all events? A. No, I didn't think that. When he said that I thought he meant an old time squash, which is why I told him that they don't make them any more.

Q. But then, you having explained that to them, you then thought the next most appropriate drink to give him is from the bottle of Pub Squash? A. Yes. 10

Q. Not from the post-mix machine, but from the bottle?
A. Yes, but as I say there is a reason for that, we have more stock of the other.

Q. I suppose you used to drink lemon squashes yourself from the several hotels that you have had association with? A. At times, yes.

Q. Would you mix them for yourself or get someone else to do it? A. Mix them myself.

Q. Have you ever gone into some other hotel and ordered a lemon squash? A. No. 20

Q. You don't suggest, I suppose, that all other publicans break down or broke down, I should say, the Blue Bow ingredient into two bottles? A. I would say yes.

Q. How do you know that? A. Well, just talking, the publican where I work, he has broke it down, on conversation I know for sure that he is one.

Q. He is the only other one you know though? A. Yes.

Q. There has been a great deal of advertising for the drink called Pub Squash, you told us? A. Yes, there has been a lot of advertisements. 30

Q. Where have you seen most of it, television, newspapers or what? A. It would be all television because I have heard it more so than seen it because I am not a television watcher, but I hear it more than what I see it.

Q. Have you heard the advertising on the radio that has been going on? A. No.

Q. But at all events your impression is that there has been a very great deal over the last few years for this product on television? A. Yes. 40

Q. Do you remember a television advertisement featuring a foundry or steelworks with furnaces roaring and a man or men obviously affected by the heat? A. No.

Q. Have you ever seen the television show (an American production I believe) called The Six Million Dollar man? A. Yes.

Q. Have you ever seen a commercial based on that character?
A. No, not that I can recall.

Q. What sticks in your mind about the television that you heard rather than perhaps saw, or heard more often than you saw, would be more accurate? A. The main ad "squash like the pubs used to make", probably because I have been in pubs so much. 10

Q. Have you ever gone to a supermarket or milk bar and bought a can of Pub Squash or Solo, for that matter, yourself?
A. No.

Q. Nor a bottle of it, I suppose? A. No.

Q. When were you asked to come along and give evidence to his Honour, how long ago were you asked? A. That would be a very hard question for me to answer.

Q. It can't be years ago, can it? A. No, it isn't years, but it is in months, but just how many ---- 20

Q. Before Christmas? A. Yes, it was before Christmas.

Q. Who asked you? A. What, first?

Q. Yes. A. Well, I have got a cousin that is associated with Pub Squash in some way or other. I don't know what he does, but one day he rang me up and he asked me about how I used to make squash and all that and I told him. Then he told me what was happening and he asked me would I come along and I said yes.

Q. What is your cousin's name? A. Peter Brooks. 30

Q. You believe he is associated with Pub Squash in some way?
A. Some way, I don't know which way, something to do with the bottling, I think.

Q. He works in the plant, does he, do you understand it?
A. I don't know what he does, actually.

Q. Have you seen much of him over the last few years? A. No, I haven't seen Peter for, I'd say, at least three years, that I can think of, may be a bit longer.

Q. What was he doing in those days, do you know, working for Pub Squash? A. No, not the last time I saw him, he wasn't.

Q. What was he doing then, do you know? A. Well, last job I can remember him - I don't know if it was the last one he had - he did work for Cadbury's chocolates.

Q. This very large stock of Pub Squash that you have at the Palace Hotel, is that a recent acquisition or has it always carried very large stocks of Pub Squash? A. No, its been there for quite a while.

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Q. But it has not been selling too well? A. Yes, it has been selling all right because it is only a line that moves in the hot weather, you don't sell much in the winter time at all.

Q. Notwithstanding that you have such a large stock that you are, as it were, pushing it if I may put it that way? A. Yes.

Q. You have had stocks of that magnitude for quite a while, have you? A. Yes, they are getting very low now, but we have had a big stock of it.

Q. Who is the publican at the Palace Hotel? A. Kevin Forest.

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Q. Does he work in the hotel or is he as it were ---
A. No, he works, he is a good worker.

Q. Does he own the hotel? A. No, it is a Toths hotel.

Q. When Mr. Brooks spoke to you about the possibility of you giving evidence, did he do it over the telephone or did he come and see you? A. No, he done it over the telephone. I still haven't saw him for a long time.

Q. You haven't seen him even after the phone call? A. No.

Q. Did he arrange for you to go and see someone to tell them what you were going to be able to give in evidence? A. He told me they would give me a ring if they wanted me to come down.

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Q. He told you who would ring? A. He didn't actually tell me who, he just said they would get in touch with me.

Q. Somebody did get in touch with you? A. Yes.

Q. Who was that? A. Somebody from Pub Squash, but I didn't take a lot of notice because I didn't worry about it very much.

Q. What do you mean, you didn't take notice of your name, is that what you mean? A. Yes.

Q. Whoever it was asked you to go and see a solicitor, I suppose? A. Not straight away - they said - told me that they would get in touch with me later and asked me would I go. I said yes.

Q. Just going back for a moment to Mr. Brooks' discussion with you he told you, I suppose, that he had some connection or other with Pub Squash? A. No, but I knew he had some connection with some bottling plant. I think it was out at Silverwater, I still don't know exactly what it is.

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Q. You don't know who owns Pub Squash? A. No, I don't know who owns Pub Squash.

Q. There was a certain amount of publicity, wasn't there, to your knowledge about this case in August last in the newspapers. Did you notice that? A. No, I think it might have been after that that they got in touch with me, so it had nothing to do with this.

Q. Did Mr. Brooks discuss the advertising with you at all when he was speaking to you? A. No.

Q. You don't and haven't thought for any time that Mr. Brooks has a close connection with the Pub Squash company, in the sense of owning it or anything like that? A. No, I don't think he would own it, but I think he might have something to do with bottling. I don't know if it is right or not, but I think he has something to do with the bottling.

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(Witness retired and excused.)

BRIAN FRANCIS FORD
Sworn and examined:

MR. BANNON: Q. Your name is Brian Francis Ford, is it?

A. That is correct.

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Q. You live at No. 2 Unwin's Bridge Road, St. Peters?

A. Yes.

Q. You are a hotelkeeper? A. That is true.

Q. You are a publican of the Town and Country Hotel at St. Peters? A. That is right.

Q. You have had that hotel for what, seven or eight years, is it? A. Almost eight years, yes.

Q. That is a Tooths Hotel, is it? A. Yes.

Q. Before that were you at the Camden Inn Hotel? A. Yes, for about 15 months.

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Q. Is that a Tooheys hotel? A. That is true, yes.

Q. During your association with hotels have you served customers with a lemon squash drink? A. Yes, one I make myself.

Q. When you were down at the Camden Inn Hotel, for example, what did you do if customers asked for a lemon squash? A. I have always done this, I did it there and I do it at St. Peters; I use lemon juice cordial and mix it either with lemonade or soda water.

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Q. What lemon juice cordials did you use? A. Schweppes down there and I have used Schweppes at the Town and Country Hotel and I use now for the last few years Cawsey Menck.

Q. That is a company, is it? A. That is a company.

Q. Cawsey Menck Pty. Limited? A. Proprietary Limited, company, it is in May Street, not very far from the hotel.

Q. Have you ever sold Solo or Pub Squash lemon drinks from cans in your hotel? A. No.

Q. Do you belong to a golf club? A. Yes, I belong to St. Michael's Golf Club.

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Q. That is out at La Perouse? A. That is correct, Little Bay.

Q. Have you had a squash there in the bar? A. Yes, they make it the same way, they use Schweppes lemon juice cordial and mix it with soda or lemonade.

Q. Have you also had a squash from the can out there? A. Yes, I have.

Q. What sort of can was that, can you recall? A. Mainly Tresca.

Q. Have you ever seen any television advertising for Solo or Pub Squash that you can recall? A. I have seen Solo advertising on the TV.

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Q. If anyone asked you for a squash like the pubs used to make, would you associate that with any particular type of canned soft drink? A. No, I wouldn't. I think they are all - I think squash to my idea of squash, is the way pubs make it not. I think everything else is really an imitation of that, all other brands, really.

Q. Has anyone ever come to you in the hotel and asked you for "a squash like the pubs used to make"? A. No, they just ask for a squash.

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Q. You have never served canned drink yourself in the hotel, canned soft drink? A. No, I don't serve cans at all.

Q. Has anyone ever come into the hotel and asked for something called "a man's drink"? A. My idea of the man's drink is beer, really.

Q. Has anyone ever asked you for "a man's drink" under that title? A. Not in that context, no.

Q. In those words? A. No, I can't remember anyone ever saying "a man's drink", no.

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Q. Can you tell me when it was that you first saw any advertising for Solo or lemon drink lemon squash? A. I am not sure how long. I am not an avid TV watcher. The only one I can really recall was the chap in a canoe, I think.

Q. Have you any idea when it was that you first saw that?
A. I'd say it could be two, three years ago, perhaps.

CROSS-EXAMINATION:

MR. HORTON: Q. I think you said a moment ago that "they" imitate or try to imitate the way squash is made in hotels. By "they" do you mean the commercial manufacturers of canned or bottled soft drinks? A. I think all canned or bottled soft drink is probably made after the original idea, really.

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Q. Of course, we are both speaking about soft drink which is of the lemon squash type? A. Yes.

Q. You have tasted, I suppose, Solo? A. I think so. I mainly - I don't drink very much soft drink. I think the only one I can really recall is Tresca. I don't know if I have had Solo or not, I can't recall. I have had Tresca.

Q. How do you form the impression that Solo and, for that matter, Pub Squash, the other contestant here, imitates the squash that you are familiar with made from Schweppes or Cawsey Menck cordial, is it from what people have told you?
A. Because it is termed a lemon squash, really.

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Q. From your experience, do you associate the taste and colour and so on, at least of the Pub Squash product and the Solo product, with the home made, if I can put it that way, squash that you have been familiar with over the years? A. I suppose it is similar. I am prejudiced, I think, the way the pubs make it is probably the best squash.

Q. It is pretty close though, isn't it, the canned variety?
A. It has got to be similar. I think it is probably sweeter, if anything.

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Q. Have you ever over the years taken a bottle of cordial, whichever brand you happen to be using, and made two bottles out of it by diluting it with water before you then use it in the bar as a base for making lemon squash? A. Yes, I have, because some of it is too strong and it makes it - you get too much pulp in the glass.

Q. Would that be the Cawsey Menck or the Schweppes that you did that with? A. Both, I'd say.

Q. Always or only occasionally do you break it down? 10
A. Almost always, because I think it makes a better drink.

Q. I think you have never sold cans of drink; have you ever had occasion to buy a can of Solo or a can of Pub Squash in a supermarket or milk bar? A. No, I haven't.

Q. You have told us you recollect the canoe television advertisement? A. Yes.

Q. Can you remember any of the words that were used in the advertisement, more or less? We don't expect you to remember them precisely? A. Yes. Well, I think the advertising was built around the theme that it was a squash like the pubs used to make. 20

Q. Is that all you remember about that oral part of that? A. I remember it spilling down his chest. They are about the only words I can really remember.

Q. Perhaps you heard advertisements for Solo on the radio at some stage, did you? A. No, I can't recall any radio.

Q. Do you know, even if you can't remember the details of them at all, whether there were other ads also on television apart from the canoe ad? A. That is the only one I can recall.

Q. Have you ever noticed any advertisement on television for Pub Squash - that is the brand Pub Squash I mean? A. No, I haven't seen any advertisement for Pub Squash at all. 30

Q. The drink you mentioned, Tresca, is that a lemon squash type drink or is it a type of Cola? A. Yes, it is a lemon squash type drink, low calorie.

Q. Who puts that out, do you know? A. No, I don't know, I am sorry.

Q. I wonder if I might ask you when you were asked to come along and give evidence first? A. I'd say about four or five months ago. 40

Q. Who asked you? A. Mr. Baxter, who is with the Pub Squash company.

Q. Did he do it by telephoning you, calling on you or meeting you? A. He telephoned me.

Q. You knew him before? A. Yes, I did. I know him socially.

Q. I suppose you knew he was with the Pub Squash company?
A. Yes, I did.

Q. Do you know where he worked before he went to the Pub Squash company? A. I know he was with Shelleys a long time ago and I think he was with Canada Dry. I am not sure, he could have been with Cottees. I am not sure of those two. 10

Q. What about Pepsi Cola would he have been there, do you think? A. I think he may have been with Pepsi Cola.

Q. Do you know whether he ever had a soft drink business of his own up in the country? A. No, I don't know for sure. I had heard him mention it at one stage, but I don't know whether he went into it or not.

Q. You knew, I suppose, over the last few years that Mr. Baxter was with the Pub Squash company? A. Yes, I don't know how long, 20 but I know the last 12 months, anyway.

Q. I think you have made this clear, but I just want to make sure that I have got it accurately, that you have never sold or bought, so far as your recollection allows you to say, the products Pub Squash or Solo? A. No, I have never sold them from the hotel or bought them to drink.

(Witness retired and excused.)

JOHN JOSEPH SHELLEY
Sworn and examined:

MR. BANNON: Q. Is your name Jack Shelley? A. I am known as Jack Shelley, my name is John Joseph. 30

Q. Are you the hotelkeeper at the Royal Hotel, South Bowenfels?
A. That is right.

Q. Just near Lithgow, is it? A. That is right.

Q. Was your grandfather the founder of the well-known soft drink company, Shelleys Soft Drinks? A. He was the founder of the business in Broken Hill.

Q. Your father was in the company too, I take it, was he?
A. Yes.

B.F. Ford, xx, ret'd.

Q. You also were in the company? A. Yes.

Q. Finally, I think it was sold to British Tobacco? A. That is right.

Q. Or known as Amatil today. Did Shelleys have a soft drink which was a lemon drink called "Lemon Delite"? A. That is correct.

Q. What sort of drink was that? (Objected to; rejected.)

Q. Leaving that point, you say the company was sold in 1962 I am sorry, I led that to you - to British Tobacco. When did you acquire the hotel at South Bowenfels? A. 1971. 10

Q. At your hotel do you sell lemon squash? A. Yes, we sell lemon squash.

Q. For how long have you been selling lemon squash at the hotel? A. Whenever anybody comes in and asks for it, ever since I have been in the hotel.

Q. How is this made? A. It all depends how you want it. If you came in and asked for a lemon squash drink or a lemon drink, as most people come in and say, a lemon drink and say soda, if you don't want it sweet you get the lemon cordial with soda water and if you want it sweeter you get it with lemonade. 20

Q. You say cordial. What sort of cordial have you used in the past? A. Well, you can have a lemon flavoured cordial. It has got to contain so much fruit in it to call it a - it has got to contain so much fruit to call it a lemon drink, but then once you put it into a glass and break it down with either lemonade or soda water it is just an ordinary lemon drink.

Q. Which sort of lemon cordial did you use in the past, which brand? A. Whoever the local cordial maker is up in Lithgow.

Q. How do you mix the lemon squashes now, do you still do it the same way by mixing a cordial with the lemonade, or do you use one of those post-mix machines? A. Yes, if you have got a post-mixer in the hotel you would use it, either the way I said, you can have a dash of lemonade in it, a lemon syrup and the rest is filled up with soda water. 30

Q. Do you have a post-mix machine yourself? A. In the hotel, yes.

Q. When did you install that? A. Three years ago.

Q. Do you still provide people with squash the old way? A. Yes, you can have it in the bottle or in a can. 40

Q. Do you sell it from the can as well? A. Oh yes.

Q. What sort of products do you sell from the can whose products? A. It is - what do you call it, Pub Squash.

Q. Do you sell Solo? A. No.

Q. Do you sell Tresca? A. No.

Q. Do you sell Shelleys? A. No.

Q. What does the phrase "a squash like the pubs used to make" mean to you? A. Well, it is only just a lemon drink, it is an ordinary lemon drink when people come in and ask for a squash, 10 some of them don't drink beer at all, or anything, they just want - they might want a glass of lemonade. Some people might only want soda water, but we'll get back and come to what you have asked me. You asked me, you ask for the drink and let the publican put it out to you.

Q. Do you associate that phrase "a squash like pubs used to make" with any particular brand of canned soft drink? A. Well, it has never been called "a pub squash", not to my knowledge, it hasn't been called a pub squash.

Q. I don't think you understood my question. Do you associate the phrase, the words "a squash like pubs used to make" - you understand that? A. Yes. 20

Q. With any particular maker or brand of drink? A. No.

Q. What do those words mean to you? A. Well it is - you mean Pub Squash or Solo?

Q. That is what I am asking you, do you associate those words with any of those - (objected to.) A. It is only a name that you give a drink.

Q. What sort of drink? A. A squash.

Q. Have you ever seen any advertisement for Solo on the television? A. Yes. 30

Q. When did you first see those advertisements? A. A couple of years ago.

Q. Can you remember any of the words of the advertisement?
A. No, not really.

CROSS-EXAMINATION:

MR. HORTON: Q. What brand of cordial is made by the local

cordial maker in Lithgow? A. It would be his own brand.

Q. But what is the name? A. It is the Lithgow Soft Drink.

Q. That is what is written on the bottle, is it? A. I don't know.

Q. I take it you have never made a lemon squash yourself in the hotel? A. A lemon cordial drink?

Q. Yes. A. Yes, I did.

Q. But you don't remember what the cordial was called?

A. Just lemon cordial drink.

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Q. Have you ever seen any advertisement for Pub Squash?

A. Yes.

Q. You told my friend that you had seen advertisements for Solo? A. That is right.

Q. Can you remember the theme, the visual theme of any of the advertisements for Solo? A. When I seen - you see it and you don't take that much notice of it.

Q. You simply have no recollection? A. No.

Q. Have you heard the phrase "a squash like the pubs used to make" or "a lemon squash like the pubs used to make" on television? A. Yes.

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Q. In association with a commercial? A. That is right.

Q. Advertising of the product - A. Pub Squash.

Q. Do you remember any part of the visual display that went with the use of this phrase? A. No.

Q. Have you heard this advertising for Pub Squash using the phrase, "a squash like the pubs used to make" many times?

A. Yes.

Q. Is that the only phrase that sticks in your mind in relation to the Pub Squash advertisement? A. That is the only one that sticks in my mind.

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Q. I think I have already asked you, but you don't remember any phrase or visual display from the Solo advertisements?

A. Well, it is only what I see on television with the Solo is the way that the athlete goes around and drinks the Solo.

Q. That is your memory of the Solo advertisement? A. That is right.

Q. If someone came into your hotel and said, "I'd like a squash like the pubs used to make" it would ring a bell, I suppose, in your head, having watched the television advertisement, and what would you give them from your stock of products? A. Well, they don't generally come in and ask for anything like that, they just come in and ask for a drink.

Q. I want you to assume that somebody did come in and said, "I'd like a squash like the pubs used to make". What would you give them? A. You would give them the cordial out of the bottle with the lemonade. 10

Q. You wouldn't give them a can of Pub Squash? A. You could if they asked for it because that is the standard drink.

Q. But if all they asked for was "a squash like the pubs used to make", would you not give them a Pub Squash can? A. If they asked for it.

Q. By using the words I have just put to you? A. Other than that, they come in and ask - (objected to).

Q. I want you to assume that somebody comes into the bar of your hotel, you are standing behind it and the only thing he says to you, nothing else, is "I'd like you to give me a squash like the pubs used to make"? A. I have got to assume that they come in and ask for that? 20

Q. Yes. He doesn't call it by name, he just says that to you. Would you give him a can of Pub Squash? A. Yes, I would.

Q. Might I ask how long ago approximately you were asked to come along and give evidence here? A. It was last year.

Q. Who asked you? A. My son-in-law, John Baxter.

Q. What is his occupation? A. Well, he works for the Pub Squash people. 30

Q. Do you know in what capacity? A. No, that gentleman over there could tell you.

Q. I know, but he is not in the witness box. I can only ask you. You don't know? A. No.

Q. Has he been in the soft drink business for some years?
A. All my life.

Q. Has Mr. Baxter been in the soft drink business? A. Yes, he has been with me at Shelleys.

Q. After Shelleys was sold where did he go? A. He stayed on

with British Tobacco for several years, then he left there and went with the Pepsi people and Canada Dry and later on had his own business up Newcastle way and also now he is working with the Pub Squash people now.

Q. When you say "his own business", it was a soft drink business up round Newcastle way? A. Yes, the name of the firm was Watsons.

Q. What happened, did he sell out that firm or company?

A. No, it was taken over by the Pub Squash company.

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Q. Did you start to stock Pub Squash in cans and bottles after your son-in-law was taken over by the Pub Squash company?

A. No.

Q. You had stocked it before then, had you? A. That is right.

(Witness retired and excused.)

GREGORY JOHN MELIDES

Sworn and examined:

MR. BANNON: Q. Is your full name Gregory John Melides?

A. Yes.

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Q. Do you live at No. 40 Eighth Avenue, Seven Hills? A. Yes.

Q. Are you the proprietor of a drive-in restaurant? A. Yes.

Q. And is that the Big Chief drive-in restaurant at Granville?

A. Yes.

Q. Is that a pretty large business? A. Yes.

Q. Among the products that have been sold by you at that restaurant have you sold a quantity of soft drinks? A. Yes.

Q. Have you sold Pub Soda Squash? A. Yes.

Q. Have you sold Solo lemon drink? A. Yes.

Q. Over what period of time have you stocked Pub Soda Squash?

A. Since it came on the market.

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Q. Can you remember when that was? A. Eighteen months, I suppose, approximately.

Q. And Solo lemon drink, how long have you stocked that?

A. About the same, I guess.

Q. Have you ever heard the phrase "Squash like the pubs used to make"? A. Yes.

Q. What does that phrase mean to you? A. To me personally?

Q. Yes. A. To me personally, squash like the pubs make is Blue Bow with lemon squash? That's what the pubs used to make.

Q. Do you associate that phrase with any particular brand of canned soft drink? A. Would you re-phrase that?

Q. Do you associate that phrase with any particular brand of canned soft drink? A. Not really, only with the TV ad. that I see with the Solo where they say "Like the pub used to make".

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Q. Do you associate that phrase with Solo or do you regard it as a description? (Objected to.)

Q. How do you regard that phrase, "A squash like the pubs used to make"? A. Well, as I said, I regard it - if anyone asks me personally for a squash like the pubs used to make I would presume they were referring to like what the pubs used to make, which was a pure lemon made with Blue Bow.

Q. Have you ever seen it used in a Solo advertisement?

A. On the Solo ad.

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Q. Has any customer ever come into your restaurant and asked you for a squash like the pubs used to make? A. No.

Q. In serving soft drinks from cans - is your place a self-serve operation or do they ask for it? A. They come to the counter and ask for drinks or whatever they want.

Q. Have you ever considered whether there is any likelihood of confusion between Pub Soda Squash and Solo lemon drink - have you considered it, first of all? A. No. Well, I have approximately in excess of 30,000 unit sales in the place - (Objected to.)

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Q. How many sales do you have in your place? A. In excess of 30,000.

Q. Have you ever experienced any confusion between Solo and Pub Soda Squash? A. Never.

Q. Has anyone ever come into your place and asked for a man's drink? A. No.

Q. Has anyone ever asked you for a drink referred to in a television advertisement? A. No.

Q. Or for the one with the man in the canoe, or anything like that? A. No.

CROSS-EXAMINATION:

MR. HORTON: Q. Do I understand that your customers, when they are buying drinks, ask over the counter for the drink they want? A. Yes.

Q. But it is a drive-in restaurant? A. Drive-in.

Q. What does that mean? That one sits in one's car and gives an order to a person through the window? A. No. They get out of their car and they walk to the counter. 10

HIS HONOUR: Q. If one gives any credence to what one reads in the newspapers, there is a large concrete apron that the cars drive on to, is there not? A. That is right, yes.

Q. Is there a hamburger type bar and a milk bar? A. Yes.

Q. And also an area where people can sit down at tables? A. That is right, yes.

Q. And again correct me if I read the newspapers wrongly, your patrons, for the most part, are in their late teens and early twenties, are they not? A. That is right. 20

MR. HORTON: Q. Well now, you told us that you associate the phrase "Squash like the pubs used to make" with the Solo television advertisement? A. Yes.

Q. Which advertisement was that? The canoeist? Was it more than one? A. I am not sure. You know, it was one of them. I have heard the phrase on the TV a lot. I'm not sure which one it is.

Q. Do you remember any other feature of any of the Solo television advertisements apart from this phrase? A. Not really, no. 30

Q. And that was in your mind as being associated with the Solo television ads before my learned friend asked you about it this morning, of course? A. Oh yes. I have quoted it before.

Q. You have quoted it before? A. Do you want to know why?

Q. Not particularly, but you might as well tell us. A. I am a past member of the Bar Tenders Guild, and we used to mix drinks and we always mixed them with the pure lemon squash and the Blue Bow.

Q. But the phrase "Squash like the pubs used to make" you have always associated with the Solo advertisement, as I understand you? A. No, you have got me wrong. I associate it with the pub. You know, when someone says "Pub Squash", right, like the pubs used to make like Solo uses, I presume they copied it off the hotel.

Q. No doubt, but the phrase "A squash like the pubs used to make" does not refer to Blue Bow squash, it refers to the Solo advertisement, does it not, in your mind? A. In my mind it is false advertising. 10

Q. But you associate it with the television advertisement for Solo? A. Sure.

Q. Have you seen any advertisements for the product Pub Squash? A. Yeah, I can recall -

Q. Do you associate any particular phrase with those advertisements? A. No, not really.

Q. Now the words "Pub Squash" or "Pub Soda Squash" convey what to you, Mr. Melides? A. It is a lemon squash.

Q. Of any particular type? A. No. It is just a lemon squash. 20

Q. Does it have any association with hotels at all in your mind? A. No.

Q. And what makes you think it is a lemon squash in the words "Pub Squash"? A. It says "squash". That is enough. All the other drink says is "Squash".

Q. What about the word "pub" what does that convey to you in the name "Pub Squash"? A. "Pub" means hotel, I guess. It means nothing to me, you know, personally.

Q. Nothing? A. No, nothing at all. It is a squash, and that is all it is. 30

Q. Would you not agree with me that the name suggests, perhaps not to one of your experience, but generally, that the contents of the can are squash such as you would get in a pub, rightly or wrongly? A. No, I would not say that personally.

Q. When were you first asked to give evidence? A. I was asked I think maybe six months ago, four months ago.

Q. Who asked you? A. I think Mr. Dudley rang me.

Q. Mr? A. Dudley, is it?

HIS HONOUR: Q. Duffield. A. Duffield.

MR. HORTON: Q. Are you able to tell us how it was that Mr. Duffield happened to ring you, I suppose, at your business there at Granville? A. I sell Pepsi drinks for a start also and that is how he got my number and rang me.

Q. He got your number from where? From the Pub Squash people?
A. From the Pub Squash people.

Q. Do the Pub Squash people patronise your restaurant?
A. No.

Q. Are you acquainted personally with any of the executives or employees of the Pub Squash company? A. Only as a customer. 10

Q. That is to say you order goods? A. Yes.

Q. Buying Pepsi and Pub Squash, and no doubt other things from the Pub Squash company? A. Yes.

Q. I suppose you call there sometimes even to pick up orders, do you? A. Very rarely.

Q. The factory is not far away from where you operate?
A. But still it is very rarely that I call there.

Q. Who is your contact at the Pub Squash company? A. Mr. Norm Saad. 20

Q. Well, do you know anyone else in the company? A. That is the sales manager, and the representatives I know also.

Q. And I suppose you had discussed from time to time with Mr. Saad the Solo advertisements? A. No.

Q. No? A. No. I have - I might have cracked a few remarks in regards to it.

Q. Can you recall some of the remarks you cracked? A. In regards to Solo?

Q. Yes. A. That in regards to, you know, copying the Pub bit, but that would have been all. 30

Q. Can you be a little more expansive about that? You cannot remember the exact words, no doubt? A. No.

Q. But can you tell us just the effect of what you had to say to Mr. Saad? A. Just in matter of conversation. It was nothing to do against Solo or against Pepsi.

HIS HONOUR: Q. I think, Mr. Melides, what Mr. Horton wants you to do is to tell us what you had in mind by that rather cryptic phrase, "copying the pub bit"; what did you have in

mind? A. What I am trying to say is that I have worked in hotels, I am a past member of the Bar Tenders Guild. If someone said - forgetting about both products, and if someone said to me "Do you have a lemon squash like the pubs have - used to have or have" my answer would be No because we used to make it with pure lemon and Blue Bow.

MR. HORTON: Q. I understand that, but his Honour was just asking you whether you could expand a little on what you mentioned a moment ago that you said to Mr. Saad in passing, no doubt something about copying the Pub bit; can you tell us a little bit more? A. That's it. That's all. You know, it is just in passing.

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Q. But you would not have said, "Mr. Saad copying the Pub bit", that would not have made sense? A. No.

Q. Just expand a little, if you can, on what he told you.
A. Nothing to expand on it. You know, it is just in passing. You asked me what I said, that is what I said.

Q. Copying the Pub bit? A. Yes.

Q. What did Mr. Saad say? A. I can't remember.

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Q. Did he ask what you meant? A. No. What I said was about the Solo ad whether they say like the pubs make.

Q. A squash like the pubs make? A. My comment was I didn't think it was like the pubs make.

Q. What were they copying? Were you meaning - A. They were copying what the pubs make, which I have just said, pure lemon and Blue Bow.

Q. Do you regard Pub Squash as a copy of what the pubs make?
A. No. Both products are not equal to it.

Q. But you think that Solo is trying to copy what the pubs make? A. No, not really. I think they have just copied the phrase of the hotels.

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Q. And Pub Squash has not copied the phrase, as you understand it? A. I have never heard them say "like the pubs make". Maybe they have said it, I don't know.

Q. Maybe the very name of their product suggests copying the product which you are familiar with as being made in the hotels. The very name does, does it not? A. You might be able to confuse me but I have, as I quoted before, I have got 30,000-odd customers unit sales a week and I have never had one person say -

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Q. I am not concerned about that. I am just asking you the very phrase "Pub Squash" suggests copying the idea of a squash made in a hotel, does it not? A. If you want to look at it that way, but they don't say it. Solo does.

Q. But they infer it by the very use of the name "Pub Squash", do they not? A. If you want to sit down and think of it, I guess so.

Q. You do not have to sit down for long do you? It comes to you instantly? A. Not if you are a New Australian like me. 10

Q. You are not that new. Does it not come to you instantly?
A. No, not really.

Q. Well, it was Mr. Saad who asked you to give evidence?
A. Yes.

Q. And did anyone else in the Pub Squash company talk to you about this matter? A. No.

Q. And then Mr. Duffield later rang you up, I understand?
A. Yes.

Q. Mr. Saad having sounded you out, as it were, first?
A. No, he didn't sound me out. He just asked me would I speak to Mr. Duffield if Mr. Duffield rang, and just tell him the truth. 20

Q. And the only thing you mentioned to Mr. Saad, and this is many months ago, I suppose, was in relation to Solo copying the Pub bit? A. Yes.

Q. Nothing else at all? A. Not really, no.

HIS HONOUR: Q. I wonder if you would just help me with one thing. Your method of selling seems to be a little different from some of the other methods that we have heard about. May I take it that you store your cans of soft drink in the cabinet, refrigerated cabinet, near the milk bar? A. Yes. 30

Q. Is it under it or is it one of these freestanding glass cabinets? A. No, it is behind.

Q. Freestanding glass cabinet? A. No, walk-in coolroom.

Q. How do you keep your cans stored? Do you keep the flavours which are similar together or are they just scattered higgledy-piggledy? A. No, everything is kept separately.

Q. And you and your employees know exactly where everything is? A. Oh yes.

Q. And if somebody asks for Solo you know where Solo is and you just go and get it? A. Yes.

RE-EXAMINATION:

MR. BANNON: Q. Mr. Melides, in your shop are cans of Solo and Pub Squash displayed? A. No.

Q. Do you have any display material from either company?
A. No, I just got one small sign of Pepsi.

(Witness retired.)

KEVIN ANTHONY MOSMAN
Sworn and examined:

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MR. BANNON: Q. Mr. Mosman, is your full name Kevin Anthony Mosman? A. Yes.

Q. And are you a hotelkeeper at 381 Clovelly Road, Clovelly?
A. Yes.

Q. And are you the publican of the Clovelly Hotel? A. Yes.

Q. How long have you had that hotel? A. Over six years.

Q. Have you been associated with hotels for how long?
A. Since 1953.

Q. During your association with hotels you have served lemon squashes, I take it, to customers, have you? A. Very much so.

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Q. When customers asked for a lemon squash in the past what did you do? A. Lemon cordial or lemon flavouring in a glass with either lemonade or soda, according to their taste.

Q. Has that method changed at all in recent times? A. It has to an extent, mainly for convenience for myself, but there are so many people that do ask for a lemon squash. Otherwise, we give them a mixed drink that is quite convenient to handle, from a bottle.

Q. From a bottle? A. Mmm.

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Q. What is the other method that is used? There is some other method apart from the bottle? A. Well, if they asked for a squash particularly with soda or particularly with lemonade we have the lemon cordial and fill up the glass with the lemonade or the soda.

Q. If they do not ask for it particularly with those things, what do you do? A. I just give them out of the - the staff give them a drink out of the bottle.

Q. Out of the bottle? A. Yes.

HIS HONOUR: Q. You do not have a post mix machine, apparently?
A. No, I haven't.

MR. BANNON: Q. If you give it out of the bottle, does this bottle come in branded bottles? A. Oh yes, there are several brands.

Q. What brands do you stock? A. I deal mainly through Tooth & Company, and Schweppes is their distributor, so the brand I use mainly is Solo. 10

Q. Have you stocked any other brand? A. Not in the mixed drink.

Q. Do you have any other lemon squash, any other brand of lemon squash apart from Solo? A. No.

Q. You know the phrase "Squash like the pubs used to make"?
A. I have heard of it.

Q. What does that mean to you? A. As I have described before, a mixed drink.

Q. Have you seen that used in advertisements on television?
A. I possibly have, I can't ---- 20

Q. Heard it used, I should say? A. I possibly have heard it.

Q. Do you associate it with any particular brand of lemon squash? A. No, I don't think so, not really.

Q. Have you seen any advertisements for Solo on television?
A. Yes, I have.

Q. How far back do they go, would you know? A. Several years. I really can't recollect. I wasn't interested apart from the fact that I sold it in the hotel in the bars.

CROSS-EXAMINATION:

MR. HORTON: Q. Mr. Mosman, do you recollect any feature at all of the Solo television advertisements that you have seen over the years? A. Yes, I think one was a white water kayak. I think that may have been the one that I remember seeing. 30

Q. That you remember seeing? A. Mmm.

Q. You have an impression there have been others apart from that, do you? A. Yes, I think so.

Q. Apart from the kayak do you remember anything else of the

visual part of that advertisement? Obviously there would have been a man in the kayak? A. Truly, yes. Well, I suppose the part that they were advertising was when he finished his work in the kayak, coming up on to the shore and drinking a can of Solo.

Q. Do you remember any of the text, the language, that was used in association with the visual pictures? A. Something about a man's drink after a hard day's work. I can't really be specific on it because I don't really remember.

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Q. No other phrase comes to mind from that television advertising? A. Perhaps. I think it may be part of what I am doing here, I think it may have been that squash like the pubs used to make, or something like that.

Q. And you remember some such phrase from the television advertisement and the man's drink phrase, or a man's drink phrase? A. Yes, a man's drink. I remember that quite distinctly.

Q. So both of those phrases you would associate with the Solo television advertisements? A. Yes.

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Q. Have you ever seen any advertisements for the Pub Squash drink on television? A. No, only on posters that I can recollect.

Q. Were you conscious before you became interested in a peripheral sort of way in this case of the fact that there was a product on the market called Pub Squash? A. A good friend of mine, John Baxter, he was Australasian manager, I think, for Pepsi-Cola and then he went off into the Pub Squash and he asked me one day how would I make a Pub Squash or how would I make a squash in a hotel.

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Q. At that time you knew that he was associated with a company called Pub Squash company? A. Yes.

Q. Is that the only way in which you knew that there was a drink on the market called Pub Squash or had you seen it in shops, for example? A. No. That is the first I have heard of it when he mentioned he had gone into the Pub Squash Company.

Q. Do you know whether he went in at the outset of that company or some time after it had been going? A. I don't know.

Q. Has he ever discussed the Solo advertisements with you? A. No, the first instance, and I think it is the last time I spoke to him, was when he asked me how would I make a squash in a hotel.

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Q. I am not quite sure whether we have got to this situation

that apart from knowing that Mr. Baxter worked with a company called Pub Squash you were not only, no doubt, recently aware that a drink called Pub Squash was on the market, is that right?
A. That is correct.

Q. No doubt you became aware that a drink in cans and bottles called Pub Squash was on the market? A. Well, I knew that it was in cans. I didn't see any reason that I should stock Pub Squash because I was quite satisfied with what I was doing.

Q. The name, that is to say the brand name, "Pub Squash" conveys what to you, Mr. Mosman? A. Well, I suppose it is just the name would convey the message that it is or is supposed to be the squash similar that you would get in a hotel or a club. 10

(Witness retired.)

CHARLES HENDRY MARTIN
Sworn and examined:

MR. BANNON: Q. Mr. Martin, is your name Charles Hendry Martin?
A. It is.

Q. Do you live at No. 14 Raymond Street, Eastwood? A. I do.

Q. Are you a merchandise manager employed by Woolworths Limited? A. I am. 20

Q. What do your duties as merchandise manager involve?
A. Basically responsible for the food buying area in Woolworths New South Wales.

Q. Does that include responsibility for the purchase of soft drinks? A. It does.

Q. Has your company bought soft drinks from a number of different manufacturers including Cadbury-Schweppes? Have you bought them from Cadbury-Schweppes? A. Yes, I have.

Q. And Tarax? A. Yes. 30

Q. Have you bought them from the Pub Squash company?
A. Yes.

Q. And Shelleys? A. Yes.

Q. How long have you been employed by Woolworths? A. Twenty years.

Q. How long have you been in the position of merchandise manager? A. Approximately four years. Could be a little bit more, might be a little bit less.

Q. What position did you occupy before that? A. Prior to that I was Commonwealth Meat Manager.

Q. Commonwealth? A. Meat Manager.

MR. HORTON: Still at Woolworths, I take it?

WITNESS: Still at Woolworths, yes.

MR. BANNON: Q. Mr. Martin, does your company conduct a number of its stores throughout New South Wales on a checkout principle? A. They do.

Q. And does that involve the fact that goods are on display on counters inside the store where the customers serve themselves? A. It does. 10

Q. And then they take them to a checkout point where there is a cashier, and pay for the goods? A. That is correct.

Q. Does it also conduct other stores having assistants behind the counter to serve people? A. Yes, it does, although most of them have some form of cash checking operation attached to them now rather than the old behind-the-counter type of service.

Q. I think in recent years you have converted most of your stores to the checkout principle? A. Yes. 20

Q. And with regard to goods does your company have what are called printouts dealing with the goods that you purchased from different sources? A. Yes, they do.

Q. Are there any requirements regarding vendors of goods to Woolworths as regards the brand of any goods that are sent to you? (Objected to.)

Q. Mr. Martin, does your company keep records of goods purchased, on a computer? A. Yes, it does. (Objected to; pressed; allowed.)

Q. What do you say to that? Does your company keep computer records of goods purchased? A. Yes, they do. 30

Q. And with respect to orders you have placed with different companies do you place some under specific brand names?
A. For particular items of merchandise, yes, you would.

Q. And to accord with your computer system. Have you any requirement with your suppliers concerning the way goods are to be described or branded? A. Yes. We have a requirement that the supplier provide us with complete information in relation to the product, that is description, pallet sizes, quantities

per case, and that type of information. At the time the product is listed he would normally in all cases be asked to provide us with that information. It is a standard requirement of all suppliers.

Q. What do you mean by "listed", Mr. Martin? A. Well, when we have a range of merchandise or an individual line presented to us it is considered and then if we decide that that line should be part of our range it then becomes listed as part of the range, goes into the computer records, and is then treated as a permanent part of the range until such time as we discontinue it. 10

Q. If a product is described otherwise than in the way the manufacturer or supplier has described it to you, what happens to it if it is sent to your company? A. If the product is - I am not quite sure what you are saying?

Q. For example, if a supplier of Tooth's beer were asked to supply Tooth's beer and the beer arrived branded as Cascade Ale, what is your practice about it? A. It would not be accepted because in fact there would not be an order to cover it. In other words, when we place an order we order a particular product and the stock is normally supplied against that order. If someone supplied a product that was not the product that we ordered and described we just would not accept it. Normally it would be sent back to the supplier and he would be told to take it away or to rectify the error. 20

Q. In 1973 do you know if your company had orders for Tarax lemon drink? A. Do I know whether we had orders in 1973 for Tarax lemon drink?

Q. Yes. A. I would not know specifically. 30

Q. I show you some documents.

MR. HORTON: I imagine that they are printouts that he is about to show, in which case I object to him showing them to the witness.

MR. BANNON: Q. In your position in the company, Mr. Martin, do you see computer printouts that your company produces?

A. I see various types of computer printouts our company produces, and we produce a fairly large range of them.

Q. Do you see what computer printouts deal with the field in which you are the merchandise manager? A. I would at some time or other see them all, yes. 40

Q. Do you recognise the type of layout of those printouts as produced by your company? A. Yes, I would.

Q. If I show you some printouts would you be in a position to tell me whether they are the computer printouts of Woolworths? (Objected to.)

Q. Mr. Martin, can you tell me whether or not documents appear to be the computer printouts? (Objected to; pressed.)

(Mr. Bannon called for the documents produced under subpoena from Woolworths Limited containing reports in relation to soft drink products for the period 1st January, 1973 to 31st January 1975; produced.)

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(Mr. Bannon made an application that the present witness stand down in order to subpoena further witnesses in relation to the abovementioned documents; his Honour granted the application.)

(Access to abovementioned documents produced on subpoena granted to both parties.)

(Witness stood down.)

(Luncheon adjournment.)

ROBERT ESSEY
Sworn and examined:

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MR. BANNON: Q. Mr. Essey, is your full name Robert Essey?

A. That is right.

Q. Do you live at 140 Good Street, Granville? A. Yes.

Q. Are you the proprietor of a mixed business at North Parramatta? A. That is right.

Q. What is the address there? A. It is 19 Webb Street, North Parramatta.

Q. How long have you been running that business? A. Just on eight years.

Q. Do you stock soft drink products at that business?

A. Yes.

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Q. Have you sold Pub Soda Squash? A. Yes.

Q. And Solo lemon drink? A. That is right.

Q. And how do you keep your soft drink products? A. Well, in each part of the fridge we put different sections like - just explain - it is a three-door fridge and, like, say Pub Squash's drinks go in one section, Coke go in one section, Schweppes go in another section, Ecks go in

C.H. Martin, x, stood down

another section. All the cans are in one sort of part of the fridge, and as a customer comes in, if they ask you for a drink you direct them to the fridge there in front of them and they select the one they want.

Q. Do some customers ask you for products by name? A. They come and ask you for a Pub Squash or they might ask you for a Solo.

Q. If they do that, what do you do about it? A. Just direct them to the fridge, tell them it is over there, and take out what you want. 10

Q. Do some people simply select a drink for themselves from the freezer? A. Yes, many do.

Q. Bring you the money? A. That is right, bring the drink and the money.

Q. Has any customer at any time said anything to you about being confused between Solo lemon and Pub Soda Squash? A. No, not that I can remember, you know, just sort of come in and get their drink, put it on the counter and pay their money. You know, that is --- 20

Q. Do you know the phrase "Squash like the pubs used to make"? A. I haven't - you know, I don't - I don't associate that with the drink.

Q. What do you associate it with? A. Like a drink you get from the pub if someone came and asked you.

Q. Just a minute. Has anyone ever asked you for a drink being a squash like the pubs used to make? A. No, they haven't.

Q. Have you had squash at an hotel? A. Yes, I have.

Q. What does this phrase mean to you, "Squash like the pubs used to make"? A. You can only get it from a pub. That is what I associate it with. You know, someone comes - he wants a squash like pubs make, you would have to go to a pub to get it. 30

Q. Regarding Pub Soda Squash does that name suggest anything to you? A. It is a lemon drink, as far as I know.

Q. Has that any suggestion to you of squash like the pubs used to make? A. No, no, I couldn't.

Q. Have you seen Solo advertisements on television? A. Oh, the only one I have seen is the one with the man in the boat goes down the river.

Q. Can you remember any words used in that advertisement?

A. Oh well, I would associate it with a man's drink.

Q. Any other words that you can remember? A. No, not that I can remember.

Q. Have you seen any advertisement for Pub Squash? A. I have seen that latest one.

Q. What is that? A. I have heard of - you know - only sort of - it is the one about get a Pub Squash into you. Something like that. Something along those lines. 10

Q. Have you seen any picture associated with that on television? A. No. I don't get that much time to watch TV because we are open seven days a week and it is just about a 13-hour day almost.

Q. By the way, among the products you stock, I take it you have Cola drinks, do you? A. Yes.

Q. Can you tell us anything about the colour of the cans that Cola generally comes in? A. There is the Coke, that is in the red can, sort of reddy can, and then there is the Pepsi, that is in a sort of bluey - it is blue and red stripes. They have changed it a few times. 20

Q. Export Cola? A. Export Cola is in the gold can. They used to have it in the gold can, now they have got it with "Export" written around it, you know. We stopped stocking that one now because it is not a real good seller.

Q. What about orange drinks; can you tell us anything about the colour of the cans that orange drink comes in? A. There is the Tang, that is a really orangey. You know, the whole can is orange.

Q. Fanta? A. Fanta is white and orange, and there is the C-time orange - that is the Pub Squash one. 30

Q. What colour is that? A. That is orange and white. Sort of on the top it has a sort of emblem.

Q. What about lemon drink, lemon squash? A. Lemon squash. The Solo one is all-out yellow with an emblem.

Q. The colour of the can? A. Yellow.

Q. What about other brands of lemon squash? A. There is the Pub Squash one that is yellow and black and there is the one Coke brought out that was also yellow with a black emblem, and Ecks changed their cans a few times. 40

Q. Golden Circle; do you keep Golden Circle? A. No, we don't keep Golden Circle.

Q. Ecks, did you say? A. Yes, Ecks soft drinks.

Q. What colour can do they have? A. It is usually white and yellow. It all depends on the (unfinished).

CROSS-EXAMINATION:

MR. HORTON: Q. Mr. Essey, you said that you do not associate the phrase "A squash like the pubs used to make" with a drink?

A. No. Not a soft drink.

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Q. You told my learned friend that you, when you heard that phrase, thought it conveyed a drink that you could get at an hotel? A. Yes.

Q. It is a phrase that you have heard from time to time?

A. I have heard it. I don't sort of associate it.

Q. Never mind about association; you have heard it from time to time in advertisements? A. In advertisements.

Q. Television advertisements? A. Well, we have got the radio on all the time.

Q. Television advertisements? A. Could have been television. 20

Q. Do you think perhaps radio as well? A. Yes, probably on radio.

Q. And what product was being advertised when this phrase was used on the occasions you heard it? A. Well, a squash is a lemon ----

Q. What was the product? A. What was the product?

Q. That was being advertised? A. It was probably Pub Squash, I am not too sure.

Q. That is your feeling, anyhow, it was Pub Squash? A. It could have been. Look, I couldn't tell you, to tell you the truth, it is just that ---

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Q. The product which was being advertised was not motor cars or washing powder? A. No.

Q. What was the type of product being advertised? A. A lemon drink.

Q. And you said a moment ago you thought it was Pub Squash? A. Could have been Solo.

Q. It could have been either, I suppose? A. It could have been either.

Q. Have you got a preference perhaps for one now? A. When I think of that straightaway, you know, no company sort of makes a drink like the pubs do. If it is associated with a pub you have to get it from a pub.

Q. But you associate it with an advertisement, do you not?
A. Yes.

Q. Have you got a preference for the brand with the advertising for which that phrase that you remember is used? It is either Pub Squash or Solo, you think? A. I tend to associate it with Pub Squash. 10

Q. It is more natural, is it not, because it fits with the name? A. Yes.

Q. You take the brand name "Pub Squash" which you see on the cans? A. Pub Soda Squash.

Q. It used to be called Pub Squash, as you remember, when it first came out? A. Yes.

Q. We have been calling it that for short here until recently my friend inserted "Soda". Let us call it "Pub Squash", if you do not mind. What impression do you get as to the type of drink inside the can from the brand name "Pub Squash"? 20
A. You mean the flavour?

Q. Yes, and the type generally. A. Well, it's not as - oh, it has not got as much tang.

Q. I am sorry, you misunderstood me; what impression do you get just looking at the words "Pub Squash" as to the type of product that is inside the container? A. A lemon drink.

Q. Any particular sort of lemon drink? A. Just a mild lemon drink. 30

Q. Lemon drink like any other particular type of lemon drink?
A. They had - before they got out the Pub Squash they had it in the ordinary lemon drink, and to me it's the same drink.

Q. You told us that you are familiar with lemon squashes in the hotels? A. Yes, I am.

Q. Is it not right to say that the name "Pub Squash" calls to mind - whether it is accurate or not does not matter - lemon squashes in hotels? A. I couldn't associate it with, you know, not Pub Squash, with the lemon squash you get from the hotel. 40

HIS HONOUR: Q. I think perhaps you misunderstood what Mr. Horton is putting to you. Mr. Horton is not asking you to compare the actual type of thing you used to get in the hotel with what is in fact inside the can. What he is suggesting to you is that the mere words "Pub Squash" would cause you to think "That must be something like the stuff they used to sell in the pub". (Words "used to" objected to by Mr. Bannon.) I am merely saying that is what Mr. Horton is suggesting. A. I do not think I associate it with the thing you get in the pub. 10

MR. HORTON: Q. The word "squash" carries some idea to your mind when you read it on the can, does it not? A. Yes, squash.

Q. What idea does it carry to your mind, Mr. Essey? A. Well, squash, lemon, you know.

Q. Lemon squash? A. Yes.

Q. And the word "pub" carries some idea to your mind when you read it on the can? A. That is right.

Q. What idea does that carry to your mind? A. Beer.

Q. Come now. Do you think that when you see a can of Pub Squash you think "Beer Squash"? A. No. To me, if I looked at a can of Pub Squash I would definitely say I would not associate that squash with the one you got in the pub. 20

Q. Why not? A. Because I have tried both.

Q. I am not asking you about the taste; forget the taste. Perhaps we can make the question a little easier. Assume that I am an hotelier and I make up two glasses of lemon squash. A. Right.

Q. Lemon squash which is exactly the sort of lemon squash that everybody expects to get when they walk into an hotel, and I leave one in a glass and I take the other glass and put it in a can and seal it up and label it "Pub Squash". If you saw the can with the words "Pub Squash" on it what idea about the contents would it carry to your mind? A. In that case it would have to be from a pub. 30

Q. You would think, would you not, that inside was the sort of drink that you used to get in a pub? (Words "used to get" objected to; allowed.) A. Yes, I suppose so.

Q. It is not supposed, it is certain, is it not? A. I just - if I seen that pub squash I would find it pretty hard for someone to sort of to put a pub drink in a can. 40

Q. I only put that to you so that you did not confuse yourself, or us for that matter, with the taste. It really does not matter if it is cold tea inside it. What I am asking you is the

impression in your mind of the words "pub squash"? A. It is just a lemon drink as far as (answer unfinished).

Q. You get the same impression if instead of "pub squash" it had the words "lemon squash" on the label, would you? A. Yes, it would.

MR. HORTON: Q. And you adhere to that answer notwithstanding the fact that you have a plain recollection of the television and radio advertising put out by Pub Squash as you think carrying the slogan "Squash like the pubs used to make". (Objected to.) 10

Q. Notwithstanding that you have a recollection of the slogan used by Pub Squash in its advertisements, as you understand it, "Squash like the pubs used to make" you still adhere to your answer the Pub Squash on the can carries nothing to your mind except a lemon drink? A. That is right, a lemon drink. Excuse me, could I say something. I do not get that much time to watch advertisements and that sort of thing and if someone came into my shop and said "Can we have, you know, a squash like you get in a pub, squash or something like that, a drink like you get in a pub", I would have to come straight out and tell him "You would have to go to a pub and get that". 20

HIS HONOUR: Q. If someone came in and said "I have forgotten the name but what is that soft drink like they make in the pubs"? A. I would have to say "I could not tell you". I would not associate it with the name.

MR. HORTON: Q. You told us a few moments ago you associate that slogan put out by - A. I am not sure Pub Squash or Solo.

Q. Or Solo? A. Pub Squash or Solo.

Q. It is one or the other? A. It is one or the other.

Q. If someone said, "I want a drink, I have forgotten the name of it, the advertisements carry a slogan 'It is a squash like the pubs used to make'" you would send them to a hotel? A. If they asked for a squash, I would say "There's the fridge, pick it out". 30

Q. You would not give them a hand at all if they cannot remember the brand? A. I couldn't tell them.

Q. You would know if it is Pub Squash or Solo? A. I would show them the fridge. They know the can, that is where we keep the drinks, the lemon drinks, you take your choice. I would not suggest if someone came in and asked me for a Coke and I had a Pepsi there, I would not suggest Pepsi instead of a Coke. I would say "There are the two drinks, take your choice". 40

Q. If they asked for a Coke, you would say "There's a Coke"?
A. I would have the two drinks.

Q. If someone comes in and wants to do business with you and says "I want a particular drink, I can't remember the name of it. It is in the can I have seen on advertisements. The words I remember from the advertisement are 'A squash like the pubs used to make'" could you tell him which one of the dozens of the cans in the fridge is that. You would tell him just to take his pick? A. Take your pick out of those two.

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Q. You would tell them either Solo or Pub Squash? A. That is right.

Q. You would know immediately that it was the one that was being advertised that they wanted if they used that phrase to you? A. Yes.

Q. And the only reason why you would tell them to take their choice between the two is that your memory doesn't allow you to be certain whether it was Pub Squash or Solo which had that slogan? A. That is right.

Q. I think the Coca-Cola yellow lemon drink was taken off the market? A. It was taken back a while.

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HIS HONOUR: Q. I am not sure I understood how your display cabinet is organised. You say you took all those drinks of a particular maker together or all the flavours of a similar type together? A. What does? It has three doors. It is an upright display fridge. On the top shelf you have say Pub Squash, orange, Pepsi, you know that sort of thing and on the next shelf directly underneath more or less the same and under that going down it all depends on the room in the fridge, I would never put two oranges together or like Coke near Pepsi or anything like that.

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Q. That is what I did not understand so you could have a jumble of yellow cans together? A. No because if someone walks in you have to have something to attract their eye to the fridge, assorted colours sort of thing.

MR. HORTON: Q. The reason that you never put Pepsi next to Coke or two orange drinks together or two lemon drinks together is to make it easier for people to pick out the brand they want? A. That is right.

Q. So that there will not be confusion between the two cans?
A. That and also a display cabinet.

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Q. It makes distinct the different products? A. That is right.

RE-EXAMINATION:

MR. BANNON: Q. My friend put it to you if someone comes in and says "I have seen a product advertised as a squash like the pubs used to make", what would you tell them to do? A. I would tell them to go to a pub and get a drink.

Q. Do you remember you were asked that question? A. I would say "There is the fridge, make a selection".

Q. Has anybody ever done that? A. No never in those circumstances. (Objected to.) He said "If" but it has not happened to me. No one has come in and asked me for that in those terms. 10

(Witness retired and excused.)

COLIN ALEXANDER
Sworn and examined:

MR. BANNON: Q. Is your name Colin Alexander? A. That is correct.

Q. Do you live at 132 Kingsgrove Road, Kingsgrove?

A. Correct.

Q. Are you a grocery buyer with Flemings Food Stores group?

A. That is correct, yes, 20

Q. Are you acquainted with the product Solo lemon drink and Pub Soda Squash? A. I am.

Q. Are both those products marketed by Flemings? A. Correct, yes.

Q. At any time has any employee or agent of Pub Squash company the marketers of Pub Squash, do you know them? A. Yes.

Q. Has anyone from that company ever represented to you that there was any association between Pub Squash (objected to; disallowed.)

Q. Have you ever been yourself confused between the two products, Pub Squash or Pub Soda Squash and Solo lemon drink? 30

A. Not really. Once we put a line in, it is in reference and it is more in reference we relate it so far as buying than product.

Q. Have you ever heard of any complaint from any customer of Flemings regarding confusion between the two products Solo and Pub Soda Squash? A. That would not come in my field of work, it would come in from the trade side.

Q. But have you ever heard it? A. No I would not, not at this stage. 40

R. Essey, re-x, ret'd.

504. C. Alexander, x

Q. Have you ever heard the phrase "Squash like the pubs used to make"? A. Yes I have in advertising.

Q. Do you associate that with any particular product?
A. From advertisements, yes I do.

Q. What do you associate it with? A. I think that was used and I am only going on memory, on the early part, this is only memory and I am not one hundred per cent. but I think it was used in the early part by Solo in their advertising.

Q. Have you ever had a squash yourself in a hotel? A. Yes 10
I have.

Q. Do you regard that phrase that I quoted to you "A squash like the pubs used to make" as being descriptive or as the name of a product? (Objected to; pressed; disallowed.)

Q. Do you regard Solo as being a squash like the pubs used to make? A. I would not say that, no. The squashes I have had have been cordial base plus an additive of lemonade or soda, that is the one I have experienced in a hotel.

Q. Do you regard Pub Squash as a squash like the pubs used to make? A. No, I would not say that at all. 20

CROSS-EXAMINATION:

MR. HORTON: Q. The catch phrase, if I could so describe it "Squash like the pubs used to make" you associate with the Solo advertising as I understand it? A. On memory, I would say yes.

Q. Can you bring to mind what medium of advertising was used when you first occasionally heard this slogan? A. I think it was mainly television medium and I think it was a commercial using a canoe and a man showing his expertise in rapids.

Q. Can you remember any other phrases used in that advertisement other than "Squash like the pubs used to make" or words to that effect? A. Not really, only that advertisement. There are only points. They are repulsive to you or you remember them for some reason or other. 30

Q. That is the thing you remember? A. This is it, we communicate with the public with advertising and that is what we hope they will remember.

Q. I do not suppose you remember anything about the man?
A. Yes, the way he drank the can.

Q. What do you remember about that? A. Running down the side of his face. 40

Q. Do you remember any other ads for Solo apart from the canoe ad? A. I remember seeing some but I cannot recall them at this stage.

Q. Do you recollect the slogan you mentioned of the dribbling of the can was repeated in other ads apart from the canoe ads? A. No, I could not remember that.

Q. Is that the only slogan you remember from Solo advertisements? A. I see a lot of them. I see them on presentation of products and television. You notice them but unless you are really interested ---

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Q. I am not suggesting you should remember that but I just wondered if you remembered anything else? A. No.

Q. Incidentally the word "Pub" squash which is the brand name of a drink that your company markets or buys and sells? A. Right.

Q. Leaving aside this question of whether or not the contents of the can are close to or far from the taste of a pub made lemon squash, leaving that aside altogether, what impression does the squash type of contents of the can, does the brand name Pub Squash carry to your mind? A. Could you rephrase that?

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Q. Leaving aside altogether the question of whether or not the contents of Pub Squash or Solo can are exactly the same as a hotel lemon squash or not? A. Right.

Q. I think you can assume they are for the purposes of the question - A. Right.

Q. I was wondering what impression the brand name Pub Squash when you see it on the cans carries to your mind of the quality and type of the contents? A. I think you can notice this that there are other soda squashes like Shelleys have got. It does not register anything to me.

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Q. What about the word "Pub" does it carry anything to your mind about what the manufacturer is asserting about his product? A. Not really. At this stage he is registered as the Pub Squash Company and I think he is using his own name. At that time it was Passiona Pty. Limited.

Q. When you saw the brand name "Pub Squash" for the first few times what was your impression of what the manufacturer was saying about the contents, what did those words carry to your mind? (Objected to.)

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Q. If your mind was a blank about it, when you saw the name

Pub Squash did it carry anything to your mind about what the manufacturer is seeking to get across? A. I follow that.

Q. Back in those early days, did you have an impression and if so what was it? A. Not really, products come in with descriptions. We see a multitude of products and to try and relate Pub Squash to pubs, it does not enter your head. It does not in my case, it might another buyer. No, their descriptions are very vague whatever the case may be.

Q. There is nothing vague about Pub Squash? A. There is nothing vague about Pub but other products. 10

Q. Looking at it now, would you not say the natural reaction you would get when you see this brand name is that the manufacturer is asserting that the contents are like the squash you get in pubs, rightly or wrongly? A. I would say wrongly because I had the occasion in hotels to drink it and not every hotel produces the same pub squash.

Q. You have said it is wrong to say it is identical to a hotel squash but what I am really asking you is what idea you get to the message the manufacturer is trying to put across - maybe it is a false message. 20

HIS HONOUR: Q. You said not everybody in a hotel makes the same kind of pub squash? A. That is correct, that is my experience.

Q. That is an easy way to describe the product - a pub squash? A. It is to everyone's taste.

Q. And the way you thought of describing is the sort of thing you wanted, is it not? A. That is right.

MR. HORTON: Q. Who asked you to give evidence in this case? A. Who asked me - I was subpoenaed here by the legal side of Pub Squash. 30

Q. Had anyone from Pub Squash company got in touch with you? A. Yes there is someone there I had been associated with for 20 years, Gordon Finlay, an employee of Pub Squash.

Q. Before that 20 years, you knew him when he was employed by some other company? A. Coca-Cola, yes.

Q. He talked to you about the advertisements for Solo or Pub Squash? A. All he asked me, if I would sign an affidavit because there was a legal case coming up and I did not sign anything. 40

HIS HONOUR: Q. You are basically a buyer and not a marketer,

is that correct? A. I have been buying for Flemings for two years. I have been associated with the division for seventeen years and for about eight years I was their advertising manager.

HIS HONOUR: Q. I do not mean marketer in the advertising sense. Is there to your knowledge any particular policy in the Fleming group as to how products are displayed in supermarkets?

A. So far as the display outside of shelf display - this is set out by trade personnel, we check the lineal footage for soft drink or whatever the case may be and it is up to the store manager and trade personnel to set their stores out according to that lineal footage. Whether they give Pub Squash three footings or four, it is purely back to the trade side. 10

Q. In the units of management in each particular store, it is policy for example that all soft drinks come in the same general area of display? A. That is correct.

Q. And within each soft drink display, drinks of the same flavour are displayed together which I understand was something of a marketing theory at one stage? A. No, mainly here we would display size together more so than flavours. What we do here, if it is a can they would be grouped together and bottles and so forth. 20

Q. Let us take cans purely because they are convenient, would you have for example cans of Solo alongside cans of Pub Squash and any other related flavours together? A. No we would have all the one brand from the one company because of ordering. When the manager goes along he orders in a reference number, he orders from that and we would not put Pub Squash with Solo. It could happen in some stores, we could have Pub Squash and Schweppes would run on, it could happen but it would not be a common practice. 30

RE-EXAMINATION:

MR. BANNON; Q. In these linear footages of for example soft drinks you would have all soft drinks displayed together in the one section? A. Yes that is correct.

Q. Would you have advertising material connected with them displayed with them? A. No advertising material is used in the stores, that is ninety-nine per cent. correct, only our own material is used.

Q. These soft drinks, would they be in close proximity to each other even if they are brand by brand? A. They could be close, yes. 40

Q. Within a few feet? A. That is right, yes.

C. Alexander, re-x

Q. That would be the normal practice? A. Normal practice in our type of store.

Q. What is the position of soft drinks, do you carry all types? A. Today because of costs of doing business, we limit our range. We do not do business with all manufacturers of soft drinks.

Q. You would carry a large range of lemonade? A. A large range of lemonade, yes.

Q. A large range of lemon squashes? A. Not so much as the lemonade. We take it on rate of sale and of course G.P. which is gross profit. We are in there for that reason and basically a said section has to pay us back and this relates to the selection of our goods that go in there and it limits trading terms, it limits the supplier at times.

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Q. I take it from what you are saying lemonade is a far bigger seller than lemon squash? A. Yes much bigger.

Q. You would also carry Cola drinks? A. Yes.

Q. You have a range of those? A. Yes.

Q. And lime drinks? A. To a minimum with a lime, we would have one in the range.

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Q. Is lemonade the biggest seller? A. Cola would be one of the biggest closely followed by lemonade.

Q. What would be the next one? A. Dry ginger ale, orange is big.

Q. Lemon squash is pretty well down the list? A. Don't quote me on this as being one hundred per cent. but I would say would run a poor fifth or sixth.

Q. With these products you are stocking, you are on the buying side? A. Correct.

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Q. You order them by brand name? (Objected to.)

Q. Is this arrangement you have told us typical of all Flemings stores? A. Yes, a policy set by head office for all stores, it is controlled by head office.

(Witness retired and excused.)

THOMAS JOHN BARDEN
Sworn and examined:

MR. BANNON: Q. Is your name Thomas John Barden? A. Correct.

Q. You live at 911 Barrenjoey Road, Palm Beach? A. Correct.

Q. Are you a soft drink manufacturer? A. Correct.

Q. You are a proprietor of the business Long and Barden?
A. Manager.

Q. Some relative of yours is associated with the foundation of that company? A. Quite so.

Q. Has that company for many years supplied cordial and aerated waters to hotels and clubs? A. Yes for quite a long period. 10

Q. And I understand to school tuck shops? A. Quite so.

Q. Does your company manufacture a lemon cordial? A. Yes.

Q. How long has that been manufactured? A. A possible change in recipe about ten years ago but a lemon cordial has been produced to my knowledge for the last 25 years.

Q. Is this cordial sold to hotels? A. Yes.

Q. Is it used for preparation of lemon squash drinks in hotels, do you know that? A. That is right. 20

Q. Have you ordered lemon squashes in hotels yourself?
A. Possibly, yes I would think so.

Q. When you have done that, what sort of drink have you received, how is it prepared? A. Basically from the time that I used to frequent hotels but not very often, any squashes were generally made up on the spot by either the bar attendant or the barmaid. At the time it was made up from a cordial out of a bottle or an aerated water added to it, soda or lemonade, ice thrown in and a straw and that's about it.

Q. What does the phrase "Squash like the pubs used to make" mean to you? A. Just about what I said, a prepared squash made at the bar, a hotel squash or pub squash, if we must terminology that. It means to me a product prepared at the bar although the market place has changed since the time I used to frequent there. We do ourselves make a product which is already carbonated. 30

Q. Is that a canned product? A. No, all bottled products.

Q. The phrase I put to you about "A squash like the pubs

used to make", have you ever heard any other manufacturer using that in its advertising? A. Frankly no, I have not myself.

Q. You know the product Pub Squash, the lemon drink? A. I am aware of it. I have never tasted it but I have seen the package.

Q. How did it come about that you came to court to give evidence? A. How did it come about - I was requested to come in and give evidence on subpoena.

Q. Who first asked you about it? A. I was first approached by Pub Squash. 10

Q. Who was it at Pub Squash? A. Mr. Max Allman.

Q. Did you later contact a solicitor or did he contact you?
A. He contacted me.

Q. Mr. Duffield? A. That is right.

CROSS-EXAMINATION:

MR. HORTON: Q. The brand name "Pub Squash", I suppose conveys to you the idea that according to the manufacturer's assertion at all events the contents of the can are similar to a hotel squash or as you called it a moment ago, a pub squash? 20
A. Would you repeat that?

Q. The brand "Pub Squash" conveys to you when you read it on the can the impression that the manufacturer is asserting the contents of the can are similar to a hotel made squash or as you called it a moment ago, a pub squash? A. I think I would have to assume that.

Q. The very words suggest it, do they not? A. Yes.

Q. Various cordials by different manufacturers have been used in your experience in hotels in making up squash on the spot, I suppose, all being lemon cordials of one sort or another? 30
A. That is correct.

Q. And obviously more or less different in taste between different cordials? A. Yes there would be a difference.

MR. HORTON: Q. You have not heard the phrase my friend put to you, "squash like the pubs used to make" in any advertising as you have told us. Have you seen any television advertisements for lemon squash drinks over the last, say, four years or so?
A. Yes, I have observed some of them.

Q. Do you remember what brands have been advertised in these

commercials? A. Most probably the one that I recall more so would be the Solo one, which is the advertisement with either the Hoby-Cat boat or the kayak or something like that. In regard to any terminology, I tend to turn down the sound on some of the ads, being closely involved in the industry.

Q. Do you have some automatic gadget which allows you to do that? A. No, I shut down.

Q. When Mr. Allman approached you, I suppose he told you this case was on between Cadbury-Schweppes and the Pub Squash company and it was alleged it was a passing off by their product for ours? A. There wasn't very much explained to me outside I was requested to attend to see their solicitor. At the time, being a very small business and running my own show, I haven't had the opportunity or the time to do that, so I was virtually subpoenaed directly to here. Since speaking and hearing more and knowing I was coming here, I have picked up a few of the points of what is going on, yes.

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Q. Has Mr. Allman or any of the other Pub Squash people discussed with you Solo advertisements, or for that matter, Pub Squash advertisements? A. No, no.

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Q. Are you acquainted with Mr. Brooks who is the managing director of the Pub Squash company? A. I have met him but once.

Q. Leaving aside your understandable desire to tune out of commercials, not only soft drink commercials but commercials generally, do you keep an eye on the market to see what your competitors are doing in relation to products or in relation to advertising? A. In some instances where it directly concerns opposition to my own part of the industry. There are various facets in the soft drink industry, like the supermarket trade, which I am not interested in. The only way that I virtually watch anything that the other companies may be doing is if it directly concerns something we are doing ourselves.

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Q. In respect to the product you are marketing yourself or the market -- A. In the market, what part of the market place the product is going out to. As I mentioned a while ago, I haven't tasted Pub Squash, nor have I tasted Solo.

Q. Do I understand you correctly, you sell mainly to end users not to retailers, that is to say, clubs, hotels, schools and institutions? A. That is correct.

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Q. That being so, you are not concerned to spend your money in promoting impulse buying on the part of the housewife or the schoolchild? A. Correct.

HIS HONOUR: Q. If I noted it correctly, you now market a made-up bottled lemon squash? A. That is right.

T.J. Barden, xx

Q. When did you start doing that? A. We commenced that - I stand corrected here to the exact year - I feel 1971. Approximately 1971 I think that product was brought onto the market. At that time we called it Krinkly Lemon, because some other product we got from there did have that name on it, which is one of the trade houses' registered name. We have since altered that name, which was some two years ago, to Cabaret Lemon, but it is the same product. Cabaret is used in my sort of small industry, where we call it Cabaret Cola against Coca-Cola and Cabaret Lemon against whatever the other lemon might be.

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(Witness retired.)

(Further hearing adjourned to 10 a.m. on Thursday, 16th February, 1978.)