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 SCHWEPPES 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 III

SOLICITORS FOR THE APPELLANTS

Sly & Russell,
68 Pitt Street,
SYDNEY.

By their Agents:

Stephenson and Harwood,
Saddlers' Hall,
Gutter Lane,
LONDON. DC 2V 6BS U.K.

SOLICITORS FOR THE RESPONDENT

Duffield & Duffield,
75 Miller Street,
NORTH SYDNEY.

By their Agents:

Slaughter & May,
35 Bassinghall Street,
LONDON. EC2V 5DB U.K.

Prepared by Young & Cooke, 78-78a Castlereagh St., Sydney

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 SCHWEPPES 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 III

SOLICITORS FOR THE APPELLANTS

Sly & Russell,
68 Pitt Street,
SYDNEY.

By their Agents:

Stephenson and Harwood,
Saddlers' Hall,
Gutter Lane,
LONDON. DC 2V 6BS U.K.

SOLICITORS FOR THE RESPONDENT

Duffield & Duffield,
75 Miller Street,
NORTH SYDNEY.

By their Agents:

Slaughter & May,
35 Bassinghall Street,
LONDON. EC2V 5DB U.K.

IN THE PRIVY COUNCIL No. of

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

EQUITY DIVISION IN PROCEEDINGS NO. 1682 OF 1977

CADBURY SCHWEPPES 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

INDEX OF REFERENCE

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

PUB SQUASH PTY. LIMITED

EIGHTEENTH DAY: THURSDAY, 16TH FEBRUARY, 1978

(Corrections to transcript:

*Page 419, 10th question change "one" to "on".

*Page 420, 7th question change "and" at the end of the second line to "an".

**Page 436, last line before cross-examination change "first crusher" to "thirst crusher".

***Page 503, first question in cross-examination insert the word "of" between "manufacturers" and "canned". First line of answer change "for" to "or".

***Page 504, 4th question, second line word "branch" should read "brand".

***Page 510, 4th question in cross-examination change "large concrete turn" to "large concrete apron".)

REGINALD HACK
Sworn and examined:

MR. BANNON: Q. Is your name Reginald Hack? A. That's correct.

Q. Where do you live? A. 6 Verona Street, Strathfield.

Q. Are you the Promotions Manager of Franklin's Limited? A. Yes, that's correct, but it is Franklin's Stores Pty. Limited.

Q. Do they operate a large group of chain stores? A. Yes.

* See now pages 436 and 438 respectively.
** Not reproduced in this evidence.
*** See now pages 476, 477 and 485 respectively.

Q. Did you hold that office in 1973? A. Not in 1973, in 1974.

Q. What were you in 1973? A. I wasn't with Franklin's in 1973.

Q. When did you start with Franklin's? A. In September 1974.

Q. Did Franklin's have a warehouse at Lidcombe at that time? A. Yes, Hill Road, Lidcombe.

Q. That is before they built the big new place at Chullora? A. Yes, that's correct.

Q. Was that where their office was as well? A. Office and warehouse combined, yes.

Q. Were you stationed at that place? A. Yes.

Q. In your position as Promotions Manager did you go through the warehouse? A. That is part of my job, through the warehouse, right through the whole establishment.

Q. Can you say from your own knowledge whether or not there was any Solo drink in the warehouse in September 1974? (Objected to: rejected.)

Q. Were you familiar with the details of the stock in the soft drinks' area? A. I am familiar with all stock in the warehouse.

Q. Were you then familiar? A. Yes.

Q. Can you say from your own knowledge whether or not there was any Solo soft drink in the warehouse in September 1974? A. Definitely not.

Q. Do you remember when Solo was introduced? A. Yes.

Q. Into your warehouse? A. Yes.

Q. When was that? A. It was October 1974 - as for date in October, I couldn't give you the actual date.

Q. Is there an event that fixed that in your memory? A. Yes, whether it be a soft drink or any other product in the grocery field, once a line is introduced the manufacturer's representative comes to Franklin's or Woolworths or Coles, whoever it might be, and they introduce the line and, by introducing, I mean they bring up the product, they show it, they ask us to buy it, giving us costings all the relevant detail of that particular product.

Q. Do you remember any such thing happening with regard to Solo? A. Yes, in October 1974 they would have done exactly the same thing, come up -

Q. I am not asking you what they would have done, do you remember it? A. Yes.

Q. Following that, did you stock Solo lemon drink or Lemon squash? A. Yes, we did.

CROSS-EXAMINATION

MR. PRIESTLEY: Q. You began as Promotions Manager in September of 1974 at Franklin's, I think you said? A. That's right.

Q. What had been your occupation prior to that? A. I was sales manager for Peek Frean's Biscuits.

Q. When you began with Franklin's did you immediately make it your business to become familiar with all the stock handled by Franklin's? A. Well, I was in the buying department, so you have no alternative but to become familiar with all products.

Q. There is quite a large range of products bought by Franklin's, isn't there? A. That's correct.

Q. Would it run into thousands of different types of product? A. About 6,000.

Q. It probably would have taken you some time to become familiar with all of those 6,000, would it not? A. Not really, when you have been in grocery field virtually all your life.

Q. But to correlate your knowledge of the grocery field with the particular items stocked by Franklin's would take some little time, wouldn't it? A. Well, possibly, I may be able to explain that a little more clearly -

Q. If you just answer the question would you not agree it would take you some little time to correlate your knowledge of grocery lines generally with the 6,000 odd lines which Franklin's stocked? A. Yes.

Q. It would probably take a couple of months, at least, to become thoroughly familiar with their 6,000 lines? A. Not really, as long as that.

Q. When Solo came to your attention in October 1974 which company was it that was marketing it? A. Which company that was marketing Solo?

Q. Yes. A. Schweppes.

Q. Can you recall what the situation was when you began at Franklin's concerning Tarax Products? A. Can I recall?

Q. Yes. A. Yes, we carried a range of Tarax products.

Q. What were the Tarax products that you carried when you began in September 1974 at Franklin's? A. There would be 370 ml. lemonade, Cola, Lime. They would be approximately the three that we would carry in the 370 ml. Then you would have 750 ml. - then you would have no 1250 ml. at that particular stage.

Q. Do you remember the names of any of these products, the lemonade, the lime and the orange brand names? A. They are all under the Tarax name, not individual names.

Q. It was just Tarax lime, Tarax lemonade, Tarax orange? A. Yes, at that particular time, whether it be Shelleys soft drinks, Tarax soft drinks, they would be called Shelleys lemonade, lime, whatever the case may be. Solo was one of the first - how can I say it? - away from the normal sort of thing.

Q. Do you recall whether there was a Tarax lemon at the time when you began with Franklin's? A. Yes.

Q. There was a Tarax lemon? A. Yes.

Q. Would you have a recollection of the cartons in which the Tarax lemon cans came. I am going to ask you about the marks on the outside of the cartons. A. It would be a brown cardboard with Tarax 370 ml. in the bottom corner lemon.

Q. You are quite clear, are you, that there were cartons of that in the warehouse in September of 1974? A. Yes.

Q. Was it within your duties to actually open up the cartons and inspect what was inside? A. No.

Q. Or do you simply look over the closed cartons? When you were working for Peek Freans did you have anything to do with the soft drink business or were you mainly biscuits? A. Mainly biscuits.

Q. As the Promotions Manager for Peek Freans did you have anything to do with the soft drink industry? A. Only being familiar with most of the soft drink people.

Q. Were you aware that as from December 1973 the Tarax organisation was phasing out the lemon drink that it had previously had and was phasing in Solo as its Tarax lemon? A. I could not answer that, I don't know.

Q. Is there anything in particular that enables you to fix October of 1974 as the time when you first became aware of Solo? A. Yes, for the simple reason that when Solo was introduced to the market it is customary for most companies to "bally-hoo" a product, for want of a better term, and having introduced the Solo to us and being on the promotions side of things, naturally they wanted Franklin's to promote Solo and sell it at a cheaper price when we put it on our weekly specials, so they came over and presented the Solo to me and naturally gave a few cans to take home and try and told about the T.V. programme, their advertising programme and booked several promotions dates for - when those promotions were, I couldn't answer. I could look up records and tell you, but offhand I can't.

Q. When you say they booked several promotions, what actually happens? A. Well, it is customary for a supplier to come in and if he wants to promote his product he comes and sees me and arranges a date to our mutual agreement as to when he would like to promote that soft drink or biscuits, or cheese, or whatever it might be.

Q. What do the promotions actually consist of when they did do the promotions? A. Well, normally, when we promote a line, irrespective of what the product might be, we give each supplier a window poster which goes on all stores' windows, we give them a basket in every store, a basket ticket, a shelf ticket and a reduction in price.

Q. And you permit them to put whatever advertising material - A. No, we do not.

Q. What sort of advertising material? A. No, our own material, Franklins material, simply with Franklin's on it, the price, the reduction, shows our normal shelf price. That is it really is promoting any supplier's material in our stores.

Q. When you say part of the promotion consisted of allowing the supplier to have part of a window? A. A window poster.

Q. Does that mean a poster on the window? A. On the window, that's correct.

Q. Would that be a poster on the window at each of the Franklin's stores? A. That's right.

Q. How many of those were there in 1974? A. In 1974 we would have had roughly 72, 73 stores.

Q. All in the metropolitan area? A. All in the metropolitan area. We are not in any other but the metropolitan area.

Q. Can you recall what was written on those window posters?
A. Yes, I can recall what is written on any window poster because I organise them and it would simply have "Franklin's, 370 ml. Solo soft drink", the price, ticket price in the middle. It would have at the top "Save Two Cents", whatever it might be and our normal shelf price down the bottom.

Q. Do you recall who it was from the Cadbury-Schweppes organisation who dealt with you in organising the promotions?
A. Yes. May I have time, his name will come to me.

Q. What else do you recall of the advertising campaign or the "bally-hoo" campaign that you remember from about that time? A. Well, the whole advertising campaign consisted around the time that it was "a man's drink", you know, rugged - rugged drink that in every way was similar to a lemon squash that you would buy at a pub and the guy opens the can, he slurps it and dribbles all down the front and he-man appearance and so forth and so fifth.

Q. What is your recollection of the various ways in which that general thing was projected? A. There is a guy in a -

Q. I mean the various media, first of all. How many methods of communication of that particular image do you remember?
A. Mainly on T.V. As a matter of fact, they came up with, you know, portable T.V. and gave us a run through of what the T.V. commercials would be like - up to Chullora at the time. John Dellapetra.

Q. Do you remember in the course of the explanation by Mr. Dellapetra of the advertising campaign that was going to be launched in regard to Solo whether he left any material dodgers or sales presenters with you? A. From memory, I think it was a cardboard carton done up with the Solo can image in the front with both a can and a bottle of solo in it. There were screeds used of what the T.V. schedule would be, how many slots per week would be on what channels, but I can't recall the numbers or anything like that. There would have been material on it, yes.

Q. I suppose you have seen many suppliers launch advertising campaigns? A. Yes.

Q. From your experience and your recollection of the quantity of advertising that was scheduled, as shown to you by Mr. Dellapetra, did it appear to you that this was an advertising campaign on a large scale that was being embarked upon? A. It would have been on a large scale, yes.

Q. Would you just look at this document, which is a photostat of something which I am told is called a sales presenter

(witness shown Exhibit AA.) First of all do you recognise it as a sales presenter? A. Yes.

Q. Do you recall whether an original sales presenter, of which this was a copy, was either left with you or seen by you around about the time of the Solo launch? A. It would have been, yes.

Q. How many people can you recall were present at the preview of the commercials shown on the television set? A. There would have been four.

Q. Who were they, can you remember? A. Yes, Mr. Bender, Mr. Aitken, Mr. Matusik and myself.

Q. What about Mr. Dellapetra? A. Yes.

Q. Four from Franklin's and the man from Cadbury-Schweppes? A. That's right, yes.

Q. What was the business of the other three men, what was their occupation in Franklin's? A. Mr. Bender is head buyer, Mr. Aitken is buyer, Mr. Matusik is buyer, non-foods - and by non-foods, that is frozen, dairy.

Q. Can you recall what happened in regard to sales of Solo after you began to sell it in October 1974? A. Yes, it was a big seller.

Q. You mentioned earlier that you thought Solo was the first drink to be - I forget exactly what your words were, but marketed in a particular way? A. That's right, yes.

Q. Would you just tell us what it was that struck you as being novel about the way Solo was being marketed? I just want you to expand on your earlier answer about how this was the first time you had noticed a drink being sold in a particular fashion? A. I think I might be able to explain it better - going back to that stage at that particular time you got Big Boy lemonade, Solo, Coca-Cola has always been by itself - you get Coca-Cola, Fanta, Leed, Tab and Tresca. Then from that period on we seemed - or I should say the manufacturers seemed to get away from their Shelleys soft drinks making it in lemonade and lime and orange and so forth and so fifth. In came the slim Colas, the C-time orange, all this type of drink, different names apart from the Shelleys or the Schweppes or the Tarax. It was something different.

Q. So you are describing a development where the emphasis was on the name of the particular flavour rather than the manufacturer's name? A. The particular product more so than the manufacturer's product.

Q. As far as you are aware was Solo the first drink of a lemon squash type to be marketed in the 370 ml. can? A. Yes.

Q. You have told us it was a big seller. Did that go right through the summer of 1974/75, those big sales? A. Do you want actual figures?

Q. If you can remember them, certainly? A. (Witness referred to document) Well, from October 1974 - this is only on 370 ml. cans. October 1974 when it was introduced we sold 279 dozen, that is for the month of October. November, 1,941 dozen; December, 2,904 dozen; and in January 1975 3,508 dozen.

Q. Have you got February there? A. No.

Q. You recall, do you, the coming onto the market of a product Pub Squash? A. Yes.

Q. From memory, are you able to say when it was that that came onto the market? A. November 1975.

Q. Is November 1975 the time when you recall it being sold to Franklin's? A. November 1975 was when Pub Squash was introduced to Franklin's, yes.

Q. Did you have visits from representatives of Passiona marketers company before you began to sell Pub Squash in the same way as you had had from the Cadbury-Schweppes people? A. Yes.

Q. Who was it that came to see you, if you can remember, to promote Pub Squash before it was sold through Franklin's? A. We used to have two guys call on us, one by the name of Gordon Cameron and the other one Gordon Finlay.

Q. Did they turn up with the same kind of promotional material ? A. Yes.

Q. Can you recall what they said to you as to the theme that would be adopted as the theme for the promotion of Pub Squash? A. That they were going to "bally-hoo" the same way as any other normal person would be doing.

Q. What did they tell you they were going to do? A. They had brochures exactly the same way they would be spending money on T.V., there would be radio campaign, there would be kids competitions, it would be backed up by Wilma The Witch and she's a T.V. identity and they would form a Wilma the Witch Kids Club and anybody would be eligible to join it.

Q. Was anything said about the name they were going to use for the product Pub Squash? A. Well, that was the name on the can when they introduced it to us.

Q. Do you remember any discussion with them about the name? Did you raise or make any comment about the name, that you can recall? A. I would never make a comment about a name because a manufacturer, if he has brought out a product, his only aim is getting us to sell it and if we think we can sell it we will put the line in irrespective of what it is.

Q. You have told us about the advertising campaign for Solo and you mentioned that it was built around various things? A. Yes.

Q. One of which you said was the idea that it was a squash like you used to be able to get in the pubs? A. Yes.

Q. Had you noticed that that theme had been continued through 1975 on the television? A. Yes.

Q. Do you remember whether there was one television commercial only or more than one for Solo? A. No, there were several T.V. commercials for Solo.

Q. During 1975, do you remember? A. Yes, and they are still televising them to this day.

Q. Had you noticed during 1975 that in the successive commercials this line about "Squash like the pubs used to make" was carried on all the time? A. Yes, I think the main punch line or theme would be more along the lines that it is "A man's drink".

Q. But the other line was continued as well through the year, wasn't it? A. Yes.

Q. When you saw the name Pub Squash for the Passiona Marketers products, what did the words "Pub Squash" bring to your mind? A. The same Pub Squash that you buy from a pub.

Q. Until the name Pub Squash came to your attention, brought to your attention by the suppliers from Passiona Marketers, had you associated in your mind the idea of squash like the pubs used to make with Solo's advertising campaign? A. Not really, because, you know, you have so many soft drink manufacturers, they make a lemonade, they make a cola and sooner or later some company is going to come out with a similar line, whether it be a soft drink or whether it be in any other line and this happens right through the grocery industry.

Q. Had you noticed any other lemon squash packaged in the same way as the Solo drink prior to the introduction of Pub Squash? A. No, there was none.

Q. So until the introduction of the Pub Squash line Solo

was the only drink of its particular kind on the market?
A. That's correct, yes.

Q. You were aware that there had been an extensive advertising campaign in which that product had been promoted in association with Mr. Ace the television commercial man, in a canoe or in some other active occupation? A. Yes.

Q. Drinking Solo with lines like "It's a man's drink" and "It's a squash like the pubs used to make"? A. Yes.

Q. Wouldn't you agree that prior to your becoming aware of Pub Squash the only product that you associated with the line "Squash like the pubs used to make" was the Solo Product? (Objected to: allowed.) Did you follow the question?
A. Yes.

Q. I think you agreed with me, didn't you? A. Would you repeat it?

Q. Until Pub Squash came on the market Solo was the only lemon squash product of its type packaged in the 370 ml.?
A. That we sold?

Q. The only one you knew of yourself? A. Yes.

Q. You knew of the advertising campaign that I just summarised with you? A. Yes.

Q. I asked you don't you agree that the only product that you associated with the line "Squash like the pubs used to make" before Pub Squash came onto the market was the Solo product? A. Solo, yes.

Q. Can you recall when the two promotional men from Passiona Marketers came to see you before Pub Squash began to be sold through Franklin's, whether there was any reference either by you or by them to the Solo advertising that had been going on through the year? A. No.

RE-EXAMINATION

MR. BANNON: Q. When you said to my friend that the men from Schweppes came to your place with a portable television receiver and gave you a run-through what the television programmes would be like, can you tell me when that was? A. It would have been also October.

Q. Of 1970....? A. 4. It is quite customary for a supplier, if they have an advertising campaign on any product whatsoever, they will quite frequently ring up and give us a run-through before it actually goes to air.

Q. Have you had a squash yourself in a hotel? A. A long time ago.

Q. Did Solo appear to you - (objected to as not being re-examination)

FURTHER EXAMINATION (By leave)

MR. BANNON: Q. Did the Solo drink appear to you to be of the same kind as the drinks you had had in a hotel? A. Not as good. I don't think anything can match the old-fashioned lemon squash that you get in a pub.

RE-EXAMINATION

Q. This phrase "a squash such as you would get in a hotel", "like you used to get in a hotel", how did you regard that in relation to Solo? A. The only thing - and this is my own personal opinion, I don't think there is any drink more refreshing than the lemon squash you buy in a hotel.

Q. Did you regard this phrase as describing Solo, or how did you regard it? A. No, I really thought, "Gee, they have gotten onto a good gimmick".

Q. A gimmick? A. Well, you need a gimmick when you sell anything.

Q. The squash that you obtained in a hotel, I take it, was a lemon drink was it? A. Lemon flavour, yes.

Q. Was the Solo a lemon flavoured drink? A. Yes, you would have to describe it as a lemon flavoured drink, yes.

Q. And carbonated? A. Yes.

Q. My friend asked you had you noticed any other drinks packaged the same way as Solo. Do you remember he asked you that? A. Yes.

Q. Had you seen Golden Circle lemon drink? A. I can't recall it.

Q. Do you know of a Golden Circle lemon drink? A. Yes, they do make one.

FURTHER CROSS-EXAMINATION
(By leave)

MR. PRIESTLEY: Q. You said, I think, that you didn't like

Solo as much as you liked the old lemon squash you used to get in the pubs? A. Yes.

Q. Would you agree that Solo tastes similar, although you might not like it as much, to the lemon squashes you used to get in the pubs? A. I would have to agree with that, yes.

(Witness retired and excused.)

(Further hearing adjourned to Monday, 27th February, 1978 at 10 a.m.)

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

PUB SQUASH PTY. LIMITED

NINETEENTH DAY: MONDAY, 27TH FEBRUARY, 1978

(CORRECTIONS TO TRANSCRIPT)

*(P. 536, third question, third line change "dodges" to "dodgers".

* P. 536, sixth line, third question, "in it" changed to "on it".

* P. 536, fifth question, "Ex. 00" changed to "Ex. AA"

** P. 543, third last question, second line interpolate word "at" between word "discussions" and "which".

** P. 548, first paragraph, second line after the words "whether or not" interpolate "they are rejected because of lack of proof of publication of the relevant newspapers or because of lack of proof that".

** P. 562, third sentence of answer to first full question change "believe" into "believed".

** P.563 last question, change "Cola" to "Cadburys".

** P. 567 fourth last question answer to commence after the dash.)

GRAHAM WALTER PENN
Sworn and examined

MR. BANNON: Q. What is your full name please? A. Graham Walter Penn.

Q. Where do you live? A. 1 Cottentin Road, Belrose.

Q. You are employed by Woolworths Limited? A. I am.

* See now page 519
** Not reproduced in this evidence.

Q. What is your position there? A. Corporate Planning Manager.

Q. Does your company prepare computer print outs concerning products that it sells? A. We do prepare such print outs. We make them available to suppliers at four-weekly intervals.

Q. When you say "make them available to suppliers", who do you send copies of them to? A. We produce them from the computer. Normally, three copies are produced but often that is insufficient. In that case, we make a photocopy of it and send the photocopy.

Q. For some years have you been supplying these computer print outs? A. We commenced in November 1973 and we have made them available to many of our suppliers since that time, some on a regular basis and some on an intermittent basis.

Q. Is one of the companies you have been supplying now known as The Pub Squash Company? A. Yes.

Q. Formerly known as Passiona Marketers? A. Yes.

Q. Is this the position, that the computer print outs for 1974 have now been destroyed? A. They have all been destroyed now, yes.

Q. I show you this bundle of documents, m.f.i. 10. Do these appear to be copies of your computer print outs? A. They, in fact, would be originals produced by the computer rather than a photocopy, although we do distribute them in both forms.

Q. Are you yourself in charge of the computer? A. No. I, in fact, am a user of the computer information in so far as I request the computer to produce those reports once every month, receive them monthly after they are produced and then distribute them to the suppliers.

Q. Do you know who it is in your company who is in charge of the computer? A. In New South Wales?

Q. Yes, in New South Wales. A. Well, the actual operator of the computer is Albert Schouten. He is the New South Wales Data Processing Manager.

Q. How do you spell his name? A. S-c-h-o-u-t-e-n I think. It might be o-n but I think it is e-n.

MR. PRIESTLEY: No questions, your Honour.

(Witness retired and excused.)

WARREN FREDERICK WICKHAM
Sworn and examined

MR. BANNON: Q. Is your name Warren Frederick Wickham?
A. It is.

Q. You live at No. 17 Hamer Street, Kogarah Bay?
A. Correct.

Q. Are you the New South Wales Sales Manager for Golden Circle Products Co-Operative? A. That is correct.

Q. Is that the New South Wales associate or subsidiary of Golden Circle Cannery which is a Queensland organisation? A. That is correct.

Q. Is that the New South Wales associate or subsidiary of Golden Circle Cannery which is a Queensland organisation?
A. That is correct.

Q. Have you been employed by Golden Circle for the last twenty-nine years? A. That is also correct.

Q. How long have you been the New South Wales Sales Manager?
A. Nine years.

Q. And before that you were stationed in Queensland, were you? A. No. I was stationed in the metropolitan area of Sydney and then I was transferred to Perth for a period of three years prior to being made State Manager in 1969.

Q. Does your company market a lemon drink? A. They do.

Q. Would you have a look at this can that I show you. Do you recognise that can? A. I do.

Q. Could you describe it to me? A. Yes, it is a can with an embossed label depicting the brand of Golden Circle and the variety of the drink.

Q. How long has that can been marketed in New South Wales to your knowledge? A. It has been marketed in New South Wales since January 1972.

Q. When you say it has been marketed in New South Wales, has it been marketed in the City of Sydney? A. Yes.

Q. Since that time? A. Since January 1972.

Q. Does your company maintain a warehouse in New South Wales?
A. Not at this time. Previously in 1972 they did.

Q. Where did they have their warehouse in 1972? A. The

warehouse complex was the Thomas Nationwide Transport warehouse at 10 Brunker Road, Chullora.

Q. When you say this was distributed in Sydney in 1972, through what outlets was it distributed? A. The product became available for this market in 1972 and it was sold ostensibly throughout the metropolitan area through numerous beach kiosk outlets plus it was also stocked by a chain called Franklins Food Stores at that time - 1972.

(Golden Circle Can formerly m.f.i. 12 tendered and admitted as Exhibit 35)

CROSS-EXAMINATION

MR. PRIESTLEY: Q. What was the name of the company for which you were working in Sydney in 1972? A. Golden Circle Cannery.

Q. Pty. Limited? A. No, sir. It is a co-operative farming organisation.

Q. Golden Circle Cannery Limited? A. Queensland.

Q. Do you know the full title? A. Golden Circle Cannery. In New South Wales the company was registered as Golden Circle Products.

Q. When you say "registered"? A. That is the trade name.

Q. Could you tell us whether that was the firm name under which the Queensland Co-operative company was operating in New South Wales? A. That is correct.

Q. You were the New South Wales Manager in 1972, were you? A. In 1972, yes.

Q. In 1972 did the business that you were managing have any connection with Passiona Bottlers? A. Any connection?

Q. Yes. A. They were stockists or distributing a range of our products, I recall, at that time.

Q. Are you aware of any arrangement whereby any company other than the Queensland Golden Circle Co-operative Company was marketing a brand under the name Golden Circle in New South Wales in 1972? A. Any other company?

Q. Yes. A. I can't understand the question.

HIS HONOUR: You mean other than the co-operative, Mr. Priestley?

MR. PRIESTLEY: Yes.

Q. What I am asking, Mr. Wickham, is whether you know of some company other than the company for which you were working using Golden Circle as a brand name in New South Wales for the year 1972? A. No.

Q. Golden Circle has as its main product, does it not, pineapple juice and pineapple drinks of various kinds? A. That is correct.

Q. You said that marketing began in New South Wales in January 1972 of Golden Circle Lemon in the can that has been tendered. A. That is right.

Q. Have you available any records of the quantities in which that can was sold in January 1972? A. Records would be available I would think.

Q. Have you any recollection at all at this stage of the quantities in which the drink in that can was marketed when it first came on the market? A. An estimate of?

Q. Well, have you any recollection, first of all, of the quantities in which the can was marketed? A. It was quite a substantial market.

Q. But can you recall without the aid of your documents what the quantities were? A. It would not be a fair estimation if I gave a quantity figure.

Q. How long was that particular can manufactured and sold? Can you remember? A. Well, it was manufactured in 1971. It was on sale here as I say in January 1972 and it is still currently being sold on this market.

Q. The same can, is it? A. The same can, yes.

Q. You said that at some stage it was sold through the Franklins chain. A. Franklins Food Stores.

Q. Are you able to say when that was - the commencement? A. January 1972.

Q. You got it into their stores immediately, did you? A. Yes. It was a line which was accepted when it was presented to this market.

Q. And, again, have you any recollection, without looking at your documents, of the quantities in which it was sold through Franklins? A. Franklins would be in the vicinity of at least 300 cartons a month because of our buying rates at that time. They would have included it in a parcel buy so

my estimate would be in the vicinity of 300 cartons a month but it is only a guess.

Q. What was the method by which Franklins bought at that stage that leads you to that guess? A. Well, it is an estimate of requirements. We have a minimum order requirement of 300 cartons.

Q. How many in a carton? A. Two dozen.

Q. That was the quantity, as you estimate it, in recollection for the Franklins Food Stores as a whole? A. That is right.

Q. Then, have you any recollection of the number of beach kiosks to which the product was distributed in 1972? A. From 1972 it was rather extensively sold throughout the beach kiosk trade stretching from Cronulla to Palm Beach and a minimum of at least twenty outlets would have been involved there.

Q. Again, I am asking you whether you can recollect accurately without your documents? A. I would say about 20 outlets.

Q. By "twenty outlets" you mean beach kiosks, being shops or stores run by individual storekeepers? A. Independently owned, yes.

Q. And from 1972 through till now, is Franklins the only chain store which has taken the product? A. A.G. Campbell currently stock the product.

Q. A.G. Campbells? A. A.G. Campbell's Wholesale Self-Service Pty. Limited currently are stockists.

Q. When did they commence to stock it? A. 1975.

Q. About when - do you know? A. January.

Q. What is the set up with A.G. Campbell Wholesale? A. They have branch warehouses throughout the metropolitan area that order independently their monthly - they order their fortnightly requirements I should say, and they order as required for the various branches.

Q. You have accurate records, do you, of just how much is sold to each of these people you have mentioned from time to time? A. Yes. The actual sales are made in Sydney and the invoicing and charging is done from our head office in Brisbane.

Q. But does the Sydney office have records of the quantities involved? A. Yes.

Q. And where is the Sydney office at this stage? A. 10 Brunker Road, Chullora.

Q. That is B-r-u-n-k-e-r-, is it? A. That is correct.

Q. Throughout the period that you have been working for Golden Circle, have you been connected with the soft drink industry? A. In what --

Q. I am sorry. Let me put it this way. Has the Golden Circle company for which you have been working for the last twenty-nine years always been engaged in selling soft drink? A. Yes.

Q. Have you yourself been acquainted with the soft drink market during that period of twenty-nine years? A. Yes.

Q. And interested, I suppose, in seeing what rival products and what are the various products that are sold in the soft drink market area? A. Watching the market.

Q. Have you any recollection of when a lemon squash drink first became available on a large scale in a can? A. A squash drink?

Q. A lemon squash drink? A. 1975.

Q. And what is the drink that you remember as being the first one that became available? A. Solo.

Q. How did you become aware of that being on the market - you yourself? A. Well, it was, I think, if anything an impression of it. It was its commercial on T.V., the commercial.

Q. You were in Sydney in 1975, weren't you? A. Yes.

Q. What is your recollection of the first commercial that you have any memory of now advertising Solo? A. A pretty muscular type of outdoor man with a can to his mouth and running down over his chin. That was the highlight of the advertisement as far as I was concerned.

Q. Did you notice that advertisement more than once on television? A. I did.

Q. Were you able to form an opinion whether it was being shown as part of a heavy advertising campaign? A. I did not think that it was that extensively used. I have seen other ads that seem to spend more time on television. I did not think it was so extensive but it was an impressive advertisement, more than anything, which attracted my attention.

Q. Do you recall any of the audio part of the advertising as distinct from the visual part of the advertising? A. I can't say that any audio section meant anything to me.

Q. You saw the advertisement, I suppose, at home when you were watching television in the course of your own recreation? A. That is correct, yes.

Q. If I understand you correctly, your recollection now is that you saw it on a number of occasions? A. Yes.

Q. Did you yourself try the Solo product at any time? A. I have tasted the product, yes.

Q. Did you taste it at a time fairly soon or fairly close to when you first noticed the advertisement? A. I can't recall that.

Q. When you tasted it, what sort of taste did it appear to be to you? A. It gave me the impression that it was a lemon drink.

Q. A lemon drink? A. Yes.

Q. Any particular type of lemon drink? A. It had a tangy flavour; no special flavour.

Q. Did you notice at any stage any drinks coming onto the market after Solo came onto the market which appeared to be drinks of the same general kind as Solo? A. 1975?

Q. Yes? A. Not that I can recall at that time.

Q. Is the New South Wales side of the Golden Circle Co-Operative a large organisation or a comparatively small one or how would you describe it? A. We are the largest sales force of the organisation. The New South Wales Sales Division is the largest State operating for the cannery.

Q. How many people were working for the New South Wales Branch in 1972? A. Thirteen.

Q. Approximately? A. Thirteen.

Q. Do you recall having any discussions with any of them about the Solo advertisement? A. Only in comparison, comparing the advertisement, again coming back to the man who was drinking out of the can - the type of advertisement, not so much the product really. It was the way the product was put over on television. That ad would have been discussed most certainly, yes.

Q. Was it discussed in relation to your own company's product which was already on the market? A. Not at any time.

Q. When you came to taste the Solo, did it strike you as being a product in the same market area as the Golden Circle Lemon? A. I just felt that it was another lemon soft drink.

Q. Did you associate Solo at all with any kind of lemon drink that had been obtainable in other places at earlier times? A. Not particularly.

Q. When you say "not particularly" have you got anything in mind there about drinks like that which have been obtainable elsewhere earlier? A. Well, as I said, when I tasted the drink it just reminded me of another lemon soft drink.

Q. Did you taste it with any particular purpose in mind or was it just as a thirst quencher somewhere one day? A. Being interested in the industry, we would have purchased it for myself to compare the flavour or just what quality it had.

Q. So, is this your recollection, that the Solo you tasted was a can or was from a can that had been bought in the course of business one day so that you could taste it to see how it compared with your own product? A. Yes, I would have to accept that.

Q. I suppose you would agree that at the time when you saw the commercial on television that you have described already you would have heard what was being said as the audio part of the commercial at the same time as you saw the visual part - would that be right - that you did hear it, although you may not remember it now? A. Certainly, yes.

Q. Doing the best you can, can you recall any part of that audio side of the commercial now? A. I can't really. I can't recall any wording at all coming through it. I just remember the background of the music more than anything. I can't recall any words used in the audio part.

Q. Do you remember the slogan "A man's drink" being used? A. Yes.

Q. Now that I mention it to you, do you remember that? A. Yes.

Q. And does mentioning that recall anything else to your mind? A. No.

Q. Just passing on to the product called Pub Squash for the moment, are you aware of that product being on the market? A. I am.

Q. Have you tasted that one? A. I have.

Q. Was that also something you did in the way of business to make a comparison? A. In the course of my duties, yes.

Q. What was your impression upon tasting that one? A. It was the same impression as the other product. It was another lemon soft drink in the field that I had tasted previously.

Q. How did it strike you in comparison to Solo? Did you notice any difference or any similarity? A. Not particularly. It is just, as I say, from the comparisons of Golden Circle and Solo and Pub Squash - as I say, my interpretation was that it was just another lemon soft drink.

Q. Did the name Pub Squash suggest anything to you at the time when you first became aware of that product being on the market? A. The name Pub Squash?

Q. Yes? What did that name convey to you? A. It did not really convey anything in particular.

Q. What did you think the word "Pub" in the name Pub Squash conveyed? A. Oh, well, it recalled the hotels had a squash - you could have a squash in a hotel.

Q. Had you yourself had experience of having squashes in hotels in past times or seeing other people have them? A. Yes.

Q. What is your recollection of that matter, if I may ask you? I know some of these questions may seem strange to you but if you would not mind, tell us your own recollections of the past in relation to being in hotels and seeing lemon squash? A. I just seem to recall that there was a quantity of fluid put into a glass and either a soda or a lemonade and ice was added to it.

Q. Can you recall any of the hotels where you saw that happen? Was it all city or all country or a mixture of both or what? A. Both country and metropolitan hotels I have seen them drink it.

Q. Was it that sort of recollection that the name Pub Squash brought to your mind? A. Not particularly. I suppose when you are talking about the two types of things like the Pub Squash name and then the Pub Squash I just felt that it was a soft drink you got made up in a hotel.

Q. What is your recollection of when Pub Squash came onto the market in relation to the time when you first became aware of Solo coming onto the market? I think you have already told

us it came on after but have you any recollection how long after? A. Late '76; 1976.

Q. Do you recall that the Solo advertisement used a number of commercials on television starting off with the one you have mentioned and then changing the activities of the muscular man in the first one from time to time? Have you any recollection of a series of commercials along those lines? A. No.

Q. Do you remember seeing any Pub Squash commercials on television? A. No.

Q. Do you remember becoming aware at any time of any slogan associated with Pub Squash, whether by radio or television or other commercials? A. No.

Q. Have you any recollection of the phrase "A squash like the pubs used to make"? Does that ring any bells with you? A. Yes, I have heard that somewhere.

Q. What is your recollection of where you heard it? A. It would have to be on T.V. I think.

Q. Have you any recollection of associating that phrase with any particular product? A. No.

Q. I realise it is difficult, Mr. Wickham. Is this the position, that you have some recollection of the phrase and you think you heard it on television? Is that right? A. What was the phrase again?

Q. The phrase "Squash like the pubs used to make"? Or similar words to that? A. Yes. Well, I would associate that with T.V. or radio.

Q. Can you call to mind now when it was that you first had that phrase in your mind? Do I make myself clear? A. I would say 1976.

Q. Have you any recollection of just anything at all on the television that you now relate with that phrase that you can now bring back? A. Not really.

Q. Over the years, cans have been used for soft drinks of various kinds, have they not? A. That is correct.

Q. And different colours used for different brands? A. That would be correct.

Q. Would you agree that there is quite a variety of colours that have been used over the years on soft drink cans? A. A variety of colours?

Q. Yes. Different products use different colours with quite widely differing characteristics from time to time. Would you agree? A. Yes.

Q. I just want to show you some cans and ask you whether you recognise them. I show you one which is called "Royal Crown Cola". Do you recognise that one? Have you seen that one before? A. Yes.

Q. What is your recollection of the marketer of that particular drink? A. My only observations of that can would be through store inspections in the course of my duties. I don't know anything about the manufacturer or the supplier at all.

Q. But have you seen that on sale in retail stores from time to time? A. I have.

Q. That is a Cola drink apparently from the name of it? A. Yes.

Q. And the principal colour of that particular Cola drink is a type of Royal blue colour. Would you agree? A. I would agree.

Q. And then would you agree that Cola cans come in different colours? A. I would agree.

Q. I show you another tin and ask you whether you recognise that one as a Cola brand. Do you see that one? A. Yes.

Q. Do you recognise the manufacturer of that one upon seeing the can? A. Yes.

Q. Who is it? A. Schweppes.

Q. Do you recognise that as a Schweppes brand called Export Cola on the outside? A. That is correct.

Q. Have you seen that for sale in retail stores? A. I have.

Q. That is a current seller in retail stores, isn't it? A. To the best of my knowledge.

Q. Would you agree the principal colour on that can is a gold colour? A. I would.

Q. Now I show you a can called Dixie Cola. Is that a can that you recognise having seen in retail stores for sale from time to time? A. I have.

Q. Would you agree that the principal colours on that, not surprisingly in view of the name, are red white and blue? A. I would.

Q. Then would you agree also that lemon drink cans have different colours from time to time in the trade? A. I am influenced by my own company's policy on that. Ours have not changed. We have an orange in an orange coloured can and lemon in another coloured can but - sorry, orange in one and lemon in the other - Yes, that would be correct. There would be colour variation.

Q. Different companies use different colours from time to time? A. Yes.

Q. I show you a can called Schweppes Lemon Drink? A. Yes.

Q. Have you seen that product in that can for sale in retail stores? A. I have.

Q. Would you agree that the background colour on that can is black and that it has two medallions on it in a different colour? Do you agree with that? A. Yes.

Q. How would you describe the colour of the medallions? A. Lemon colour.

Q. I show you a Tarax leaflet. First of all, I ask you whether you have ever happened to have sighted that leaflet in the course of your business? A. No.

Q. Just looking at the cans represented on the leaflet, there is one entitled Tarax Black Label Lemonade. Have you seen that can at any time for sale in retail stores? A. I can't recall it.

Q. Most of your time has been spent in New South Wales, hasn't it? A. That's right.

Q. What is your understanding of where the principal place of distribution of Tarax products was? Have you any thoughts about that? A. I don't know. I suppose I would have to say here.

Q. There are, I think, fifteen cans some of which may be duplicates - I am not sure - represented on this leaflet. Would you indicate which of those you have seen for sale in retail stores starting from the top left of the sheet with 12 cans on it. A. That is one.

Q. Indicating the Dixie Cola can in the 370 millilitre size? A. Two.

Q. Indicating Tarax Ginger Beer can in the 300 millilitre size? A. Oh, they are different sizes?

Q. Yes, they are different sizes, on different rows I think. A. Yes. I would say that would be the can.

Q. Indicating still the Tarax 300 millilitre can? A. Yes. And then the R.C. -- this one here.

Q. The Royal Crown can on the bottom right of the lowest row. You don't recall any of the others? A. I have not got any memory of the others in any quantity.

Q. Is there any particular colour associated with Ginger Beer in the industry so far as you know? A. Ginger Beer?

Q. I am not suggesting there is; I am just asking you whether you know of any? A. I do not associate it with any particular colour.

Q. On the front sheet with the three cans shown do you recognise any of those as ones you have seen on sale in retail stores? A. The lime.

Q. You are indicating the middle one, being the lime can? A. Yes.

(Leaflet recently shown by Mr. Priestley to Mr. Wickham, tendered and admitted as Exhibit BB. Noted that the tender is limited to so much of the leaflet as depicts the four cans identified by Mr. Wickham)

RE-EXAMINATION

MR. BANNON: Q. Mr. Wickham, you were asked about colours of cans and whether or not they are identified by any colour code. You said your company packs orange drink in an orange can.

MR. PRIESTLEY: I would ask my friend not to lead.

MR. BANNON: Q. Do you know about the orange drink from any other company? A. How do you mean, sir?

Q. Well, firstly, have you seen orange drink from other companies in cans? A. Yes.

Q. And can you tell me about the colours of the cans in which that is packed? A. Not from memory, only from sight. I could possibly say I saw a can in a store such as the ones that were shown to me this morning, but other brand colours do not come easy to mind.

Q. What about lemon drinks? Have you seen any other company's lemon drinks in cans? A. Yes. I would say that in the case of the can that was submitted this morning there is

always an indication of a colour of the drink inside the can which is tried to be depicted.

Q. You were asked some questions regarding Pub Squash and Solo and you said they were of the same general kind of lemon drink? A. That is the impression they gave me.

Q. What about Golden Circle - how does that compare with them? A. I put them in the same class of drink, a tangy lemon drink, flavoured drink.

Q. Regarding the product Royal Crown, do you know if that is still on the market, the can that my friend showed you? - Royal Crown Cola? A. I could not answer honestly at the moment. I can't recollect it being in stores of the last couple of weeks that I have surveyed the scene.

Q. You were shown a can of Export Cola which is in a Golden can. Do you remember seeing that? A. Yes.

Q. Have you also seen Export Cola in the red can that I am going to show you? A. I have.

Q. When did that appear on the market? Which one appeared first - the golden can or the red can? A. The golden can.

Q. And then the red can came later? A. That is my interpretation.

Q. And Coca-Cola - have you seen that? A. I have.

Q. Does that appear in a can which is substantially red with -- (Objected to)

Q. Well, would you describe the Coca-Cola can? A. It is predominantly red with a white stripe.

HIS HONOUR: Q. Mr. Wickham, I wonder if you could just clear my mind on one thing as a result of some of the evidence we have had. It seems to have been the practice in the trade previously to describe a drink by its maker's name and its flavour - for example, Shelleys Lemonade, or something like that. The evidence suggests, and I would ask you to confirm or correct whether you agree that this is so, that of recent times there appears to have been a development towards giving a drink a product name which does not necessarily describe the flavour and Solo is one such. Is that new or is that a particular development? A. I would agree that it is something that has developed in the past eighteen months or so, your Honour.

Q. The reason why I asked, I must say, is that I saw

something which I am told is a Cola drink and it is called Stud. Is that right? A. That is right, sir.

Q. And it is in a blue denim coloured tin? A. That's right.

Q. That is the sort of thing that is coming in the trade? A. I would agree.

(Witness retired and excused.)

(Luncheon adjournment)

ROBERT MICHAEL MEAGHER
Sworn and examined:

MR. BANNON: Q. Is your name Robert Michael Meagher? A. Yes.

Q. Do you live at No. 59 Eastern Road, Turramurra? A. Yes.

Q. Are you a buyer with Woolworths Limited? A. Yes.

Q. From the beginning of 1974 until November 1976 were you the buyer in charge of soft drinks for the company? A. Yes.

Q. Can you tell me what the practice was then with Woolworths when ordering a new product? A. The manufacturer would present the new product to myself as the buyer and I would consider it in terms of our company's requirements. If it was then decided we should stock the line, I would authorise its stocking by signing a new lines form which would then go through our e.d.p. section, and on to the computer.

Q. If a new brand name was introduced by an existing supplier, would you require a new line form to be filled out in respect of it? A. Yes.

Q. And these new line forms, were they all signed by yourself? A. Yes.

Q. After the forms were signed, was the warehouse given any authorisation with regard to the new product? A. Once I have signed the form, it goes to the records clerk who raises the computer record. That then goes to the warehouse on a daily warehouse advice and from that the person responsible for ordering stock into the warehouse receives the authorisation to do so.

Q. Is anyone in the company authorised to order stock before this new line form authorisation is given? A. No.

Q. You say the new line forms are then sent from you to the electronic data processing section. Is that right? A. Yes.

Q. Is that under the control of a Mr. Schouten? A. Yes.

Q. In Mr. Schouten's department are computer print-outs prepared of the information received from you? A. Yes.

Q. In respect of the year 1974, have you made any search for these new line forms? A. Yes. We have looked for records.

Q. And there are no existing records to be found? A. Not that we can find.

Q. With regard to the computer print-outs for that year, have you made any search for those? A. Yes.

Q. What have you discovered there? A. The ones which would give me the information that I would require I have not been able to find.

Q. What has happened to them? A. They would have been destroyed.

Q. Would there be any room under the system operated by your company for an existing supplier, say, with an order for a product under one name to start supplying your company with a product having a different brand name without of these new line order forms being authorised by you? A. It is possible for a line to be sent to us which is different to that which we order, but certainly not without our authority and, once we discover that line, we have the supply taken back.

Q. If any supplier was short of quantities of an existing order and wanted to make it up with some other product temporarily, would there be any practice regarding that situation? A. The supplier would have to notify us that he was short of the product we required and advise us that he wanted to substitute something. Then, in the event of wanting to make the substitution, he would have to have our authority to do so.

Q. (Approach) I will show you these documents which are marked for identification 10. Look at the form of them. Do they appear to you to be --- (Objected to)

Q. Can you say anything about them? (Objected to).

CROSS-EXAMINATION

MR. PRIESTLEY: Q. Are you able to recollect whether at any time while you have been in charge of the buying of soft drinks for Woolworths whether Woolworths has bought any Tarax products? A. Yes. We do business with Tarax.

Q. How long have you been in charge of the buying for

Woolworths of the soft drinks? A. I was or since November last year I have no longer been in charge of soft drinks, but I was in charge of them I think from early 1973.

Q. When you first took up the position in which you were in charge of the buying of the soft drinks, do you recall that Woolworths was then buying a range of products from the Tarax supplier? A. Tarax were manufacturing a canned drink under the Woolworths label on our behalf. They were manufacturing a bottle of Zing drink on our behalf under our private house labels. They supplied us with a very small range of Tarax products. The Tarax brand did not have very much market share at that stage.

Q. What is your recollection of which products under the Tarax brand were supplied when you came into the job in 1973? A. At best, I can recall I think some low calorie products which were not available from other sources. I would only been surmising on the others, I am sorry.

Q. Have you any recollection about Tarax lemon as that being a brand that was bought? A. I can't specifically remember that, I am sorry.

Q. Can you tell us whether there are amongst the records of Woolworths records which will show whether Tarax lemon has ever been bought by Woolworths and, if so, when such purchases took place? A. I don't know that we have those records available to us. We do not retain invoices, computer print-outs, for as long back as you are asking, to my memory.

Q. What about 1974? Does Woolworths now have records indicating what, if any, Tarax products were bought in 1974? A. I wouldn't really be in a position to answer that question because the people responsible for retaining those records - there are other people responsible for that, and I do not really know how long we keep those records.

Q. If Woolworths was buying Tarax lemon from the manufacturer at the end of 1973 beinning of 1974, would you yourself have actually seen at any stage the kind of carton in which the Tarax lemon product came? A. Only if I went into the warehouse or into the store and saw the product either in the warehouse or in the store in a full carton.

MR. PRIESTLEY: Q. If Tarax lemon drink were being sold in a particular kind of can and was then ordered from Woolworths and then Tarax lemon was supplied in a different style of can, would that be something that would necessarily come to your attention? A. I think when you asked me the question, you said, "Ordered from Woolworths".

Q. Ordered by Woolworths? A. Yes. Yes, if there was an alteration to a can by a manufacturers, under normal circumstances.

Q. On assumption that Tarax lemon or a drink described as Tarax lemon was so ordered by Woolworths and supplied by the manufacturer in the same kind of carton but with a different kind of can, would that be something that would necessarily come to your attention at the time? A. It is normal practice in the industry for a manufacturer, if he changes his label on any package, it is normal practice for him to show it to us.

Q. Usually, you would expect it to be drawn to your attention by the manufacturer itself? A. It is common practice.

Q. If the manufacturer for some reason or other did not draw it to your attention, then it might escape your notice for some time, might it? A. Yes.

Q. What records are they that you have looked for in order to see whether you have documents you were asked by Mr. Bannon, whether some documents had been lost or destroyed; what document was it that you looked for or asked for in response to a query coming from Mr. Bannon's solicitors? A. Mr. Bannon made that request to Mr. Martin who is my immediate superior so I do not necessarily know; I did not make any request myself.

Q. What was the request that came to you concerning searching for documents, if any? A. I do not think there was any specific request to myself for documents as such. I can only say it was the request which was made to Mr. Martin. He asked me did I have any records myself of that time. I just do not.

Q. You looked around amongst documents within your own immediate reach? A. Yes.

Q. To see whether you had any of the documents Mr. Martin was looking for? A. Yes.

Q. That was all the search you conducted? A. Yes.

Q. Are you aware just what other enquiries Mr. Martin made for documents? A. No.

Q. In regard to that new line form authorisation that you have spoken of, are you able to say of your own knowledge what has happened in regard to those which were brought into existence in, say, 1974? A. Do you mean the new line forms which were completed by our clerical people?

Q. Yes? A. And established the record of new lines at that time, or just the piece of paper of the form itself?

Q. First of all, the piece of paper, the form itself, I assume is filled in, is that right? A. Yes.

Q. What happens if you go to this original piece of paper? A. That is the one filled in and submitted on those lines.

Q. Yes. A. I would think they have been destroyed. We could not possibly keep those, all the records of that time; we have not got space to do it.

Q. What is it from those documents that in your understanding is transmitted to the person in charge of the computer recording? A. A description of the product, the cost of the product, the selling price of the product, packaging details, the number to a carton, the number to a pallet and the source of supply.

Q. It was under your supervision, was it, that those new line form authorisations were despatched from time to time from your department to the computer department? A. The completed form comes to me for my signature and that authorises the product to be stocked by the company. The form then moves onto the records department which established a card record and the form continues on into the E.D.P. where it becomes part of the computer record.

Q. Do you have any recollection of when it was that Solo came onto the market? A. I can recall the name of the person who presented the product to me.

Q. Who was that? A. Warren Taylor.

Q. Yes. A. I can recollect the trade night where the product was launched to the trade. It was at Siebel Town House, I recall.

Q. Was that a big occasion, were there a number of people there? A. I had my photo taken, I recall that; that is a pretty big occasion.

Q. On your own or with a number of other people? A. With people from the trade. For us to be friendly with each other, I remember that. My wife was not with me, I remember that as well, but I remember that the television commercial which was screened was of poor quality, the film itself was of poor quality I can recall.

Q. You saw the television commercial on other occasions, did you? A. Yes, since then.

Q. On television, for example? A. Yes, I have seen it.

Q. Did it come out on the television much better than on this trade night? A. It was just bad equipment, I think.

Q. Can you recall who it was as a class that was invited to this launch? A. The people invited would have been the representatives of each company in the grocery trade who would be responsible for soft drinks, if you like, combined with groceries.

Q. There is an organisation, the precise name of which I have forgotten, which is a soft drink manufacturers' association. Do you know the organisation I am speaking of? A. I know the organisation.

Q. Do you recall the proper name of it? A. I do not, no.

Q. Do you know whether there were people from that organisation or association at this launch? A. Well, I think the Soft Drink Manufacturers' Association is made up of competitive soft drink manufacturers', so, I presume, people from the Schweppes Tarax Group would have been there, but I doubt whether people from any other manufacturers.

Q. Coca-Cola need not apply on that night, is that your understanding? A. Yes.

Q. You have given us a number of items that you recall as to the occasion, have you any way of placing the occasion as to month or year? A. I tried to do that, I tried to look back at the diary, I have some other diaries at home which I would have to go to for this, but I cannot recall it exactly.

Q. Have you any recollection of the commercial itself, bad reproduction and all, as it was on that night? A. Well, there was a fellow, I think he was a canoeist if I remember correctly, he paddled his canoe and drank the product and spilt it down his face.

Q. Do you recall any of the audio part of the commercial as distinct from the visual part of it? A. Not specifically, no.

Q. Do you remember seeing that commercial on a number of occasions subsequently on television at home? A. Yes.

Q. Do you remember whether you saw other commercials featuring the same actor as the man doing something in the course of the commercials? A. Yes.

Q. Have you any recollection of anything said in the course

of those commercials by way of slogan or advertising material? A. "It's a man's drink", I think that was the dominant theme, a masculine sort of thing.

Q. What is your recollection of Pub Squash coming onto the market in point of time as compared to Solo? A. As I recollect it, Pub Squash came after Solo; specifically when, I cannot remember, but it was afterwards to my recollection.

Q. Do you remember whether you had seen the Solo commercials or some of them on television before the Pub Squash product became available? A. I am sure I would have, yes. I saw the commercial as I said. I cannot recall seeing those commercials on my own television. I recall seeing them on the trade night which I had spoken of.

Q. Have you any recollection of any Pub Squash advertising? A. Not specifically that I can recall.

Q. Can you recall any slogans associated with Pub Squash or advertising lines or catch words? A. Not really.

Q. Can you recall when Pub Squash first came onto the market whether you then associated the name Pub Squash with anything? A. At that time did I associate Pub Squash with anything?

Q. Yes, when you first saw the name as a product name on the market, what did it convey to you as a name? A. A lemon drink.

Q. What about the "Pub" part of it, what did that bring to your mind, if anything? A. Well, from the can itself when it was presented to me, it was obviously swinging doors on the front, it was the Pub connotation there.

Q. Did you have anything in mind then or now that associated Pub Squash with squash in a pub, did that bring any particular associations to your mind? A. I do not particularly like lemon squash because of an experience I had one evening with my father and a group of his friends in a hotel in Barmedman when I was about 13. I was drinking lemon squash and they were drinking other liquids and I drank a lot of lemon squash, so I do not particularly like lemon squash.

Q. You have got a memory from your earlier years of drinking lemon squash in country hotels? A. Yes.

Q. Was that something you noticed happened from time to time when you were a child or a young adolescent that children or young adolescents would be taken by their parents to country hotels and the adults would drink hard liquor and the youngsters would be left to the softer stuff; is that something you have

personal recollections of? A. I have that one personal recollection which I have mentioned, but I cannot say my family frequented hotels and took us along.

Q. Did the name Pub Squash bring back that recollection to you at the time when you first saw it? A. Not necessarily.

Q. I suppose it is a bit hard to remember now, but you said "Not necessarily", can you remember? A. I do not think it did.

Q. Have you heard at any stage in the last few years the advertising line, "Squash like the pubs used to make" or words to that effect? A. Yes.

Q. Have you any recollection where you first heard that line or in what connection? A. I could have heard it during the presentation to me by the Pub Squash company when they or Passiona Marketers, as I recall they were in those days, presented the product to me. I think I would have, you know, in their presentation of the paraphernalia that goes with the presentation, but I really cannot say I do associate that term.

Q. You say you do? A. It was used by them to my recollection.

Q. In the course of the launch of the Solo product, had anything occurred in the way of salesmen trying to persuade you about Solo before the occasion at the Sebel Town House? A. Yes, I think we would have had the product presented to us before the trade night. That is normal procedure; they would present it that way.

Q. Are there documents which are shown to you by sales representatives on those occasions known as presenters or trade presenters? A. Yes.

Q. You know the document? A. I know what you mean.

Q. Would you look at this document which is Exhibit AA. Just look through it and see whether any sales representatives on behalf of Solo showed you a presenter such as that at the time when Solo was launched in Sydney. That is a photostat, of course? A. I really cannot recall receiving or seeing anything like this. In my position as buyer with Woolworths, I would look at hundreds of these every year, so it is very hard for me to specifically say. You would expect this sort of thing to accompany the presentation and I know at the time I was querying the need for a lemon drink because the lemon segment of the market was, in fact, a decreasing segment of the soft drink market. At that time the thought occurred to

me that we did not really need the product. It is normal for this type of thing to come in with a trade presentation. I know the presentation of this came in with the presentation of Solo to me by Warren Taylor.

Q. Mr. Taylor who was dealing with you from the sales organisation promoting Solo? A. The sales representative of Schweppes.

Q. You were raising with him the question of whether it was a good idea for the introduction of another lemon drink in the lemon segment on the market at that stage? A. Yes.

Q. Do you recall what his response was to that, his line of argument in answer to that query? A. Not really. I could not recall what he said; he would have backed it up with argument of television weight and what have you that they were putting behind the product.

Q. Was he emphasising there would be a heavy television advertising campaign? A. Yes.

Q. In fact, from what you saw on television, would you agree that it was a heavy television advertising campaign in regard to Solo? A. Yes.

Q. Would you agree also that Solo did a lot better than you originally expected as a seller on the market? A. Yes.

Q. In fact, it enlarged the lemon segment of the market, did it not? A. Yes.

RE-EXAMINATION

MR. BANNON: Q. You were asked about the Pub Squash advertising, whether you remembered seeing it; did you ever see an advertisement about the Six Million Dollar man? Do you remember that? A. Yes.

Q. Do you remember whose advertisement that was? A. I think in that commercial there was a tree trunk or something involved. I think it was Pub Squash, if I recall. The reason I can say that, I think the Pub Squash people told me about it when it was being made.

Q. When Pub Squash was presented to you, do you remember who it was who presented it to you? A. Gordon Cameron.

Q. When he presented it to you, did he say anything about the quality of Pub Squash as a drink? A. I am sure he did.

Q. Do you recollect now what he said? A. I could not remember what he said to me, I am sorry.

Q. Your recollection of it is hazy, is that the position? A. I recall him telling me how they were going to promote it, but I cannot recall the occasion.

Q. Or the substance of what he said? A. Not specifically, I am sorry.

(Witness retired and excused.)

CHARLES HENDRY MARTIN
Recalled, resworn and examined

MR. BANNON: Q. Is your full name Charles Hendry Martin? A. Yes.

*Q. You have given evidence previously at pp. 516 to 518 of the transcript. Mr. Martin, you are merchandise manager of Woolworths Ltd. and you are Mr. Meagher's superior, is that right? A. That is correct.

Q. You know about these new line products forms that Mr. Meagher fills out? A. Yes.

Q. And signs. With respect to Solo, have you caused a search to be made for any new line forms during the year 1973/1974? A. Yes. When we were first - I think the company was subpoenaed originally to produce documents relating to sales in that period of time. We did have our own buying office records searched in New South Wales, and were unable to find any documents going back that far, in relation to either of the two products.

Q. Any new line product forms? A. No, we could not keep them that far back.

Q. What about computer record cards? A. No computer record cards.

Q. Any computer print-outs? A. Computer print-outs, I believe, which were supplied, not by me but by our administration people, which were relating to a period around then. That we did. That was the only record still in existence of those lines.

Q. They were supplied, supplied to whom? A. I understand to the Court.

Q. The ones produced on subpoena? A. Yes.

Q. They were the only ones that were now extant? A. They are the only records that were in existence at the time.

*See now pages 493-496

Q. What did your enquiries reveal as to what happened to those documents I asked you about? A. Basically, they would have been destroyed, that would be the normal practice because we just cannot keep them indefinitely.

CROSS-EXAMINATION

MR. PRIESTLEY: A. You were asked by Mr. Bannon on the previous occasion whether your company had bought soft drinks from a number of different manufacturers including Cadbury-Schweppes from time to time; you answered "yes" to that; do you recall that question? A. Yes, I do.

Q. Then you were asked a similar question in regard to Tarax products? A. Yes.

Q. You said "Yes" to that? A. That would be right. I thought the one question asked the whole lot.

Q. You have been in your present position for approximately how long? A. I would have to tell you working off the top of my head - from the end of 1973, but I would not like to be held to that date. It was around about that time.

Q. Before that, were you with Woolworths? A. I have been with Woolworths for 20 years.

Q. Before the occasion when you took up your present position with Woolworths, had you been connected with the buying, amongst other things of soft drinks for Woolworths? A. Prior to that.

Q. Yes. A. No.

Q. What had you been doing before you got your present position? A. Commonwealth meat manager for a period and, prior to that, I was engaged in the trading operations within the State.

Q. When you first took up your present position, I suppose you had to familiarise yourself with a large number of products that were being bought by Woolworths from time to time?
A. That is correct, yes.

Q. Amongst those, did you familiarise yourself with the soft drink area of the purchasing for Woolworths? A. As a major segment of the grocery range, yes, I would.

Q. What is your recollection now of the Cadbury-Schweppes products that were being bought by Woolworths at the time?
A. I could not honestly say.

Q. Soft drink products? A. I could say probably no more

than there was a range of soft drink products from Cadbury-Schweppes. What they were specifically at any particular point in time, I would have no hope of remembering.

Q. In regard to the Tarax products, have you any specific recollection as to what was then being bought? A. Not specifically, no. The products were in our range at some point of time and I believe was subsequently deleted from the range. I would only be guessing to put a date on it. It was a product we ran for a period of time and dispensed with.

Q. Do you recall when it was dispensed with, if anything took its place specifically? A. No. Normally the procedure is when one line comes in, one line goes out. It has to make room for another line. That is not always specifically the case. A line may well go out because it is not performing sales and it is not necessarily at that time replaced with anything. I could not specifically remember in relation to Tarax.

Q. Your duties as merchandise manager involve the supervision of the buying of all food by Woolworths in New South Wales? A. All food and perishable products.

Q. When you took up your present position, did you pay any greater attention than you had previously to such things as advertising campaigns conducted for various soft drinks? A. Yes, because it was part and parcel of the total responsibility, putting together the various promotional programmes that are associated with it.

Q. Mr. Meagher has given us some description of an occasion when there was a launch of the product Solo where a number of industry representatives were gathered together at the Sebel Town House. Have you any recollection of that occasion? A. Yes, I was present at that gathering, but that is about all I can say. I would not have the faintest idea when it was.

Q. Do you recall a television commercial being shown there? A. Vaguely, I do.

Q. Have you any recollection of seeing that commercial on television thereafter? A. I have not, because I do not watch very much television. I may have done, I do not know. I did see the commercial, I could well have seen it afterwards; I do not specifically remember.

Q. Have you any recollection of any of the subject matter or wording of that commercial now? A. I think the thing I recall most about the commercial was the drink running down the chap's chin that was portraying the advertisement. The actual wording that was in it, I have a vague idea I do, but I could not put the words to it. It related to - I would only be guessing, and it would not be a good guess.

Q. What is the idea it brings back to your mind? A. That it was a lemon drink aimed specifically probably at the male market. That was the impression I came away with. The major impression I would have had of it was that it was aimed at the male market.

Q. At a time there is a presentation of that sort, to the buyers generally for the various organisations that buy drinks of that sort, is it a matter of discussion within an organisation such as Woolworths whether that particular product will be stocked? A. Yes. Basically it is the responsibility of the buyer. The way we operate is the buyer has responsibility for sorting out the various products that are presented to him and, in fact, for placing the line in the range if it happens to fit in with the basic criteria that he has to make his judgment on. In a major launch, there would normally be discussions between probably the buyer and myself and, maybe, somebody from sales promotion relating to the total campaign that was going to surround that product, just what the actual manufacturer was going to do with it.

Q. To your recollection was this regarded as a major launch by Woolworths? A. It would have been regarded as a major new product launch, yes.

Q. As you understood it, what was the new product element in this launch? A. Basically, a new - probably, a new type of lemon drink. It was more than anything, I think, probably the emphasis that was being placed on the market it was aimed at. That might have been the thing that came across most strongly. It was probably a lemon drink launched with more emphasis perhaps than one would normally expect a lemon drink to be launched with. Therefore, we would regard it as a major launch.

Q. Do you recall any emphasis being placed on the squash side of this lemon flavoured drink? A. I cannot say that I do.

Q. Do you remember discussing with Mr. Meagher whether or not this drink would be taken up by Woolworths? A. Later, I know I would have discussed it with him, but I cannot remember specifically the discussion, no, because, you know, they happen all the time.

Q. In all events, do you recall in fact the drink was stocked by Woolworths subsequently? A. Oh, yes. Yes.

Q. It turned into a big seller? A. Yes, it has been a good seller.

Q. Are you acquainted also with the drink Pub Squash?
A. Yes.

Q. Can you tell us when it was you became acquainted with that in relation to the time when you became acquainted with the Solo drink? A. I cannot specifically remember a launch of Pub Squash in the same fashion as the Solo launch at Sebel Town House. There may have been one, I just cannot remember. Once again, it was another lemon drink aimed at a similar segment of the market, I guess.

Q. First of all, was it before or after you became aware of Solo that you became aware of Pub Squash? A. I could not be sure, but I would think after.

Q. In due course, Woolworths came to stock Pub Squash as well as Solo; is that what happened? A. That would be right.

Q. Can you recall any discussion between yourself and Mr. Meagher at the time when Woolworths decided to stock Pub Squash about whether that product should be taken into the range of Woolworths? A. I remember some sort of discussions that took place with the other one; I cannot specifically remember a discussion.

Q. Can you recall any discussion with any person from Pub Squash such as Mr. Gordon Cameron concerning Pub Squash? A. I would probably have had a discussion with Gordon Cameron. In the initial instance he would have seen Bob Meagher who would have had the range presented to him. As often happens in these situations, the manufacturer will also want to present the range either separately to me or to me in conjunction with Bob Meagher as part of their marketing programme. That could well have happened. I cannot remember specifically it happened, I imagine it probably would have.

Q. Is it possible now to ascertain from records within the possession of Woolworths which Tarax products were being marketed by Woolworths at the time when you became merchandise manager? A. I would think it extremely unlikely. I would say 100 per cent it would not be, but I know of no records that would be in existence, - unless there is any information on the records that were subpoenaed by the Court from Woolworths.

MR. PRIESTLEY: Q. One final question, Mr. Martin. Do you recall at any stage discussing the Solo ads with anybody, you were talking in relation to the man in the canoe and the drink down the chin? A. I don't remember the man in the canoe, but I do remember the drink down the chin. I have no doubt that we discussed it generally, certainly weeks after the production. We would have had some of the discussion in the days immediately following as to whether it was good or bad or whatever it was. But what the discussion was I could not recall.

Q. Do you recall at the time the discussion was going on concerning whether Pub Squash would be taken up by Woolworths, whether there was any discussion about Solo advertising?
A. No. I can't remember any particular discussion. The only discussion that would have been likely to take place was the fact that we would not want to promote one against the other at the same time, which is the normal, standard advertising that we take.

Q. Would you please amplify that, a little, Mr. Martin? I gather from what you have said that Woolworths takes a position about advertising certain kinds of products simultaneously or in the same set of advertising? A. Well, we would not set one product up, one against the other with the same type, because (a) there is no value in it for the product; there is no value for the market and we would be confusing the customers. We would want to be sure we were not advertising line A this week and line B that week; so we would not be.

Q. Was it your belief from discussing it with customers that it was possible to confuse customers if they were advertised together? A. No. I would not say that. I would say it was like two dog foods -- I don't mean dog foods -- I mean the same type of dog foods. It is more from a competitive thing than from the point of view of the customers, because the customer will know whether she buys one or the other. We do not know. But in terms of promotional effectiveness, we would not see any point in promoting lines that way, and we would expect to a great amount in promoting supplies to ensure that our promotional interests do not necessarily clash one with the other.

Q. It did occur to you that Solo and Pub Squash were exactly the same? A. I could not say whether they were both exactly the same. They were both lemon drinks.

Q. Did you taste them at any stage? A. I did taste them.

Q. Did they seem to be similar to you? A. Not really. I have a distinct preference for one against the other, but that is only a slightly bitter type of taste. But that is the only extent.

Q. Did they both strike you as being lemon squash type of drinks? A. Yes.

Q. Have you had any experience of seeing people drinking lemon squash type of drinks in hotels? A. Yes.

Q. Did these drinks strike you as being that type of drink?
A. Not really, with due respect to both manufacturers.

Q. When you firstly encountered the drink Pub Squash, what

did the name itself convey to you? A. Well, it was obviously an advertising approach, I would think, designed to achieve a particular result in relation to that drink.

Q. Well, what particular result did you get in view of the name? A. They were obviously, I would think, setting out to provide for a section of the market that they would have seen as a Pub Squash, I guess. I don't really know, but that would be the way I would have seen it.

Q. To provide for a section of the public a drink (I just want to get your words, not mine), what sort of segment of the public did it strike you that the words were aimed at? A. Those people, I guess, that would have had some knowledge of what it was that you can buy in a pub in the way of a lemon squash. I think that is the best way I could express it, but I think I have also had it said that it was aimed also at the children's market because of the grown-up connotation it might put on the child.

Q. The first impression was one that occurred immediately to your mind when you firstly became aware of the name, was it? A. Well, the similarity could not escape me.

Q. Have you heard of an advertising slogan that squash used to make use of over recent years? A. I have heard it, yes.

Q. Can you principally time it, when firstly you became aware of it or heard of it? A. Just it was about the time that Solo was launching.

Q. And have you associated that line with the launching of Solo? A. What, Pub Squash?

Q. How much were you associated to make --? A. With the launching of Solo?

Q. Yes. A. Honestly, I have not. I do not recall the date when because I don't know.

Q. You said you thought your knowledge dated back. I asked you why? A. You also asked whether I remembered the words used with that launch or in connection with that launch. To the best of my recollection that occurrence of that would probably be hard to -- it would have been in connection with the launching of the Solo.

Q. When you firstly knew the name Pub Squash in connection with the new product that was to be proposed, did you then add those words "Pub Squash" with this line, also the lines like squash that the pubs used to make with the lines that you were already aware of? A. I don't know I would have thought of

that in that context. I would have thought of it as a competing type of drink. In other words, you have about sixteen lemonades on the market, and another as a competitor. So you have X numbers on the market and another one coming on to the market as a competitor, so I would have thought of it with Solo along with other competitor squashes that happened to exist at the time.

Q. Would you agree both being aimed at the market to catch the description of people who recalled the type of lemon squash that could be obtained in an hotel? A. Yes. I suppose you could assume that.

Q. I have said this before but this is true this time. There is one final aspect of the matter I want to ask you about. You didn't use the name Pub Squash, that you thought it was an advertising approach. That was your reaction to the name Pub Squash. I want you to amplify what you meant when you said Pub Squash was part of the advertising approach? A. Well, any product that is produced has a kind of promotional concept behind it; it does not matter what it is; and I guess one would regard that part the promotional concept of that particular product.

RE-EXAMINATION

MR. BANNON: Q. My friend asked you, Mr. Martin, whether or not the reason why you did not advertise the two products at the same time, Solo and Pub Squash, was because they were so similar. Do you remember he asked you about that? A. Yes.

Q. Have you found any evidence of any confusion between the two products to your customers? A. I have never found any evidence of any confusion between the two products. It was purely promotional arrangements.

Q. You have told my friend you were present at the launching of Solo at the Sebel Town House. Can you tell me when that was? A. I honestly can't; I would be guessing.

Q. Can you say which year it was? A. I would think 1974. But I would not like to be hard too much for that.

Q. Have you any idea what part of the year? A. I would think towards the latter part, because in effect the launching of a product like that would be aimed at the summer market and it would be launched in time to catch that market. I could not say for sure.

(Witness retired)

ALBERT SCHOUTIN
Sworn and examined.

TO MR. BANNON: My full name is Albert Schoutin. I live at 17, Jacaranda Road, St. Marys. I am employed by Woolworths Limited.

Q. And are you the officer-in-charge of the Electronic Data Processing Department? A. Yes, I am.

Q. Have you been in charge of that department since 4th April, 1974? A. Yes.

Q. And is that department charged with the responsiblity of translating information from new line form cards or documents into the computer, into documents that were processed? A. Yes.

Q. And you know Mr. Robert Michael Meagher? A. I do.

Q. The supplier of the Soft Drinks Department? A. Yes.

Q. And did your department receive new line form documents from him in the normal practice of the company? A. Yes.

Q. When you received those documents what did you do with them? A. When I received them they got bunched up with the punch girl and then fed into the machine and then became part of the stock we carry.

Q. Do you know the computer print-outs. Might I show you a series of documents m.f.i. 10? Do they come out similarly to those of the documents I show you. (Shown) A. Yes, they do.

Q. Do those documents detail the products and quantities that are purchased from week to week? A. Yes.

Q. And you know that from in 1974 there are no copies now available in the company of the computer print-out cards, except a small bundle that was produced to the court? A. Yes.

Q. And do these documents I show you appear to be copies of the computer print-out cards produced by your company? (Shown) A. They are, yes.

(Mr. Bannon seeks to tender abovementioned cards. Mr. Priestley seeks leave to ask questions on the voir dire, intimating there appears to be a gap between January 1974 and June 1974. His Honour allows examination on the voir dire.)

EXAMINATION ON THE VOIR DIRE

MR. PRIESTLEY: Q. Mr. Schoutin, I do not know whether you are in a position to help us quickly from these documents. But starting from the back of the folder, one appears to find the earliest of the set of documents really; it seems to start some time in 1973, to run through to January 1974 and then there is a jump from January 1974 to June 1974. Would you be able to tell us whether there are any documents in there in the relevant period between January 1974 and June 1974? A. No. I would not, because we gave those documents to Mr. Penn at Head Office.

Q. When the subpoena firstly came in from the Pub Squash solicitors, looking for records, were you concerned in the search for records in answer to the subpoena? A. Not in supply or whatever, because we get so many lines going through the machine and we get a request from the Head Office; we are called to reproduce a report like that and we reproduce that report, and I do not ever look at it, and send it into Mr. Penn.

Q. So this is all that you had when you were asked to dig out whatever it was that you had? A. Yes. I was not asked.

Q. When were you asked to look for things you were not able to find anything else? A. Yes. I was not even asked. I was not able to find out even the paper work.

MR. PRIESTLEY: I might just have to keep on looking.

(Examination on Voir Dire concluded.)

(Mr. Priestley returns to bar table. Documents referred to by witness are examined by counsel.)

(Mr. Priestley states on a quick look that is what appears to be the situation for the moment certainly in view of that. His clients would object to the admission of these documents, on the ground, amongst others, that the ground has not been sufficiently laid before their admission. He refers to S. 14B and the new pt. 2C; also refers to S. 14C(d). Argument ensues, following which his Honour indicates there are some difficulties.)

MR. BANNON: Q. Are you employed by Woolworths Limited to prepare statements, prepare documents from these new line products forms? A. No, I am not. I am employed by Woolworths to run the E.D.P. department -- right?

Q. Yes. A. And that is one of the jobs you do, but you do not even know, normally a job like that comes through the machine. The request comes from somebody to run the report

and you do not know what it was. You run the job through the machine, take it off the machine, put it in an envelope and take it to whoever wants it.

Q. This information from the new line information forms which goes into the machine for punching up re-appears in these computer print-outs? A. Description of the line work.

Q. (Approaching) Does the description of the new line appear from the new line production order form? A. That is the point I can't see anything when he is taking down, so you would get to say yes or no whatever it is. So there is information also looking on the print-out of the quantity that is sold in the particular week or purchased of that particular problem.

Q. In that particular week? A. You mean this sheet?

Q. Yes. A. Yes.

Q. And is it part of your duties to have this particular sort of sheet to show you, prepare and prepare from information which you have had taken from the new line product forms? A. That is so.

Q. And are you a qualified person in charge of the E.D.P. processing? A. Yes, I am.

Q. And do these computer print-out sheets reproduce -- (Objected to as leading)

Q. Do these computer print-out sheets - the information upon them -- where is the information upon these sheets obtained from? A. It is stored away in the Memory, the desk files. The stores, all the stores do order; that is all the stores order, 100, 500 a week or whatever, that is sent all away, and this particular programme extracts that information and says you order so many one week and so many next week, and that information is extracted.

Q. That information is supplied to you from Mr. Meagher's department? A. Yes, it is.

(Abovementioned tender is pressed, counsel submitting s. 14C is complied with; Mr. Priestley presses his objection. Reference during argument is made to s. 14C(d) and 14CE (iv), (v) and (vi).)

FURTHER EXAMINATION ON VOIR DIRE

MR. PRIESTLEY: Q. You were asked some questions about the source of the information that is reproduced on this particular sheet at which this volume is open at the moment, which is

one headed by a date in the middle of the top of it, second December, 1976. You recall answering questions in relation to this sheet earlier from Mr. Bannon? A. Yes, I do.

Q. From the quick glance you have had through these sheets are they all sheets which have been printed out of the computer on the same principle? A. Yes.

Q. So that the sort of information in one is the same sort of information that is in the others? A. Yes, they will be.

Q. Reference has been made to the New Line Order Form Authorisations, in the course of the questions you have been asked. You understand what that document is? A. Yes, I do.

Q. When those documents come into your department, do you personally handle them? A. No.

Q. Do you see them? A. Not always.

Q. I think you called a girl the punch girl? A. Yes.

Q. She is the girl to whom the documents actually come, is she? A. They come to the supervisor of the punch room and the supervisor of the punch room divides the work as she thinks it should be done.

Q. Amongst how many girls? A. It was fifteen at that stage and four now, because we got less girls operating for us now than we had in, say 1974.

Q. How do you describe, in simple language for people who don't understand computers very well, what this sheet which is open here, the one dated 2nd December, 1976, actually is? A. It is an information of date for particular lines telling whoever is interested how much was sold of those particular lines.

Q. From what records of the company will the information which is printed out of the computer have been put into the computer? You have already told us one, the new line order form authorisation? A. Yes.

Q. What other documents are involved in the collection of information which goes into the computer which comes out on this sheet? A. That would be the way the branches order the stock. They do that on mark sense cards.

Q. What appears on those cards? A. Well, it is - the branches have order books and those order books are divided in page numbers and item numbers. Every page has got so many items and one of these items could be this particular line and if a

store wants to order on that particular line one hundred he would mark on that card what particular page number that particular item should be 100. That order would be processed through the computer and would be pulled in the warehouse and delivered to the store.

HIS HONOUR: Q. Is this because your branches are linked by computer to the main computer? A. Part of the branches are linked and part of the branches are still using those mark sense cards, but 60 branches now are linked by phone.

MR. PRIESTLEY: Q. In simple terms when you have the situation with the mark sense cards being used by the man in the branch, how does the information get from the mark sense card that he used to the computer? A. As soon as it leaves the store, you mean? Leaves the branch?

Q. He does something to a card? A. Yes, he marks the card.

Q. What happens then, what is the next thing in the sequence? A. He mails the card to state office, which is in Silverwater, and state office would give those cards to the computer department and we would process them.

Q. And they would come through to the punch girls? A. No, it is already ready as it is.

Q. What happens to the mark sense card, what is done with it when it gets into your department? A. It goes to a machine which reads all the information, and puts onto tape.

Q. Then what happens with the tape? A. The tape would come into the machine and gather all the information of say twenty or thirty, how many stores are on that particular one, and produce invoices and picking lists.

Q. At what stage is it that all the information is in the computer necessary to enable these sheets to be printed out of the computer? A. A report like that would be requested at intervals and whatever is available at that moment, say for a particular line, whether you sold 100 or 200 or 400 would be there, and would be picked up.

HIS HONOUR: Q. Does that mean that one of the programs that is built into the master program is the ability to retrieve sales of defined products over a defined period of time? A. It is, yes.

Q. So that if one wants to retrieve sales of soft drink one pushes the magic button that gets that program? A. Yes.

Q. If one wants to retrieve sales of something else, then one pushes another magic button? A. Yes.

Q. And the inputs are partly punch cards, which go into the memory bank? A. Yes.

Q. And partly either direct input now through your telephone link? A. Telephone line, yes.

Q. Or your sense cards? A. Yes.

Q. And they operate, I take it, rather like the thing down at the mail exchange is supposed to operate, it reads by magnetic impulse what is written down? A. I think similar to TAB, which is now operating with the races in the branches that are now computerised for the TAB, they use similar method.

MR. PRIESTLEY: Q. In regard to those mark sense cards, what happens in regard to those cards when there is a change of a name of product? Is an entire new book commenced? A. No. Say that certain line would be part of a department, if a name did change the line would be deleted or the name will be changed in the machine, and it will come from Mr. Meagher with the information.

Q. When that occurred would you have to issue new mark sense cards to each of the branches using it? A. No, we would not.

HIS HONOUR: Q. It puzzles me, I must confess, because the sort of order form that we have seen seemed to have, for example, bottles of various sizes with printed names, then cans of various sizes and the names repeated and cans of another size and the names repeated, and one assumes that one merely wrote "one hundred" alongside the printed name on the form. If, for example, the name that was printed on the form said "A" lemon drink and then "A" decided to call this lemon drink "B" lemon drink what would one do, because you would not be able to record that on the form. Do you send a message to the computer and say "for A lemon drink read B lemon drink"? A. Yes.

Q. And still use the form until that runs out? A. Yes, the branches will be informed by separate memo that description was changed of the line and they would enter that in their order book.

Q. While they were still using the old forms, would they fill it in against the old description until the old forms run out? A. Yes, they would.

Q. So the computer would have been told to, in effect, confuse itself until the old form has run out? A. As long as the reference number was not changed, and we were still talking about the same product, only a different name, yes.

(Examination on Voir Dire closed)

(Folder formerly m.f.i. 10 admitted and marked Exhibit 36)

MR. BANNON: Q. Do I understand from what you told his Honour that once the name of a product is changed, the branches are notified of this? A. Yes, they are.

Q. And this is then noted in the computer? A. Yes.

CROSS-EXAMINATION

MR. PRIESTLEY: Q. Taking up the example that his Honour was talking to you about, with drink A and drink B, and assuming that a print out was asked for at a time when name A had not yet been exchanged for name B in the market sense card, if that is correct to date? A. Yes.

Q. What would come out on the print out of the kind which is Exhibit 36 when a request was made at that stage? A. The old name, the old description.

Q. Have you ever had occasion to drink any of these lemon drinks? A. I hardly drink any soft drinks.

Q. Do you know anything about the drink Solo? A. I do.

Q. Do you know of its existence? A. Yes, I do.

Q. Do you know when it was approximately that you became aware of its existence? A. I couldn't really answer that, really.

Q. Do you know of the drink Pub Squash? A. I have heard of that, too.

Q. Which one did you become aware of first, so far as you can recall? A. I couldn't really give an answer on that because I couldn't remember.

Q. Have you noticed any television advertising about either of the drinks? A. I can remember Solo.

Q. What do you remember about Solo? A. A young man drinking the Solo, that came after a boat ride or something like that, and then it was pouring from his chin, that is all I remember.

Q. Do you remember any of the advertising lines used in that commercial, any of the spoken words? A. Not particularly.

Q. Did you see the advertisement on television a number of times? A. It would have been a number of times.

Q. When you first saw Pub Squash on the market, did the name Pub Squash bring anything in particular to your mind? A. I can't say that, no.

Q. Did the name Pub Squash convey to you what sort of a product it was that would be in the can? A. No, I couldn't say that.

Q. Did the word Pub in the name Pub Squash convey anything to you? A. Part of the general things, yes.

Q. What was that? A. As being a pub, a place where you go to drink.

Q. What did you think the name Pub Squash conveyed? A. Well, squash, that it is a lemon drink, Pub Squash a lemon drink prepared by the publican, I suppose.

Q. Have you any recollection of the line "Squash like a Pub Used to Make", or a phrase like that used in advertising in the last few years? A. Yes, I have.

Q. Can you tell us where you think you first heard that advertising line? A. I couldn't say that, I couldn't remember.

Q. Do you remember was it by newspaper, wireless, television? A. I would say television.

Q. Do you associate it, even vaguely, with any particular product? A. No, I wouldn't.

Q. When you first saw the name Pub Squash did that recall the slogan or line "Squash like the Pubs Used to Make", to your mind? A. No, I couldn't say that, really.

Q. Do you see any association between the name Pub Squash and the line "Squash Like the Pubs used to Make"? A. I can see association there, yes.

Q. Do you think that association would have crossed your mind at the time when you first saw the product Pub Squash for sale? A. Maybe not the first time, but maybe couple of times afterwards.

Q. To your recollection have you ever bought either Pub Squash or Soda? A. I may have, but I couldn't remember.

(Witness retired and excused.)

(Further hearing adjourned to 10 a.m. Tuesday, 28th February, 1978.)

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

PUB SQUASH COMPANY PTY. LIMITED

TWENTIETH DAY: TUESDAY, 28TH FEBRUARY, 1978.

(By consent affidavit of Ian Edward Duffield sworn 28.2.78 admitted into evidence.)

GEORGE ESSEY
Sworn and examined

MR. BANNON: Q. Is your name George Essey? A. That's right.

Q. Do you live at 140 Good Street, Granville? A. I have since moved into a new house.

Q. Where do you live now? A. 63 Alice Street, Rosehill.

Q. Are you a food buyer by occupation? A. That's right.

Q. And have you been a buyer with Davids Holdings Pty. Limited for the last four years? A. Just on, yes.

Q. Does that company purchase grocery items, soft drinks and the like, together with some associated companies? A. That's right, groceries and liquor.

Q. Does it wholesale the same to various retail outlets? A. That's right.

Q. Could you tell me the names of some of those retailer outlets? A. Grace Bros., David Jones, Red S, the Whole Young organisation in Canberra, all the Shoeys Food Barns in Newcastle, they are a chain of food barns in the Newcastle area. We also service close to 400 other stores which are in our own group, Super Value stores, cut price stores, Foodland stores, Minit Market stores. Besides on the liquor side we also have our Liquorland stores.

Q. As a buyer with Davids Holdings do you know all the various soft drink products available on the Sydney market? A. Yes.

Q. Are you familiar with Solo lemon drink? A. Yes.

Q. And Pub Soda Squash? A. Yes.

Q. Does your company handle both those products? A. Yes.

Q. Have you ever seen any advertising for Solo lemon drink on television? A. Yes.

Q. Have you seen the advertisement of the man in the canoe? A. That's right.

Q. And the drink dribbling down his chin? A. Down his chin and beard or moustache or whatever.

Q. Have you heard the audio about it being "a man's drink"? A. That's right.

Q. And "a squash like the pubs used to make"? A. Yes.

Q. Are you familiar with squash sold in hotels? A. That's right, very familiar.

Q. Have you ever associated the phrase "squash like the pubs used to make" with Solo lemon drink? A. No way.

Q. How do you regard that phrase? A. "Squash like the pubs used to make" would be a squash that, for a start, would not be in a can. It would have to be something made over a bar with a heavy base lemon cordial with a dash of lemonade and some ice and you could probably sit down and drink six or eight of those, if you were in the mood, whereas in the can, I know myself, I can probably drink one, either lemon drink, because of the gassiness of it.

Q. How do you regard that phrase in relation to Solo lemon drink? A. I don't regard it in relation at all.

Q. Have you ever had any instance in your company of any confusion between the products of Solo lemon drink, the Cadburys-Schweppes product, and Pub Soda Squash, the product of the Pub Squash Company? (Objected to) A. Never.

Q. Perhaps I should withdraw the words "your company". As a buyer with Davids, have you ever come across any incidents of confusion? A. Never.

Q. Apart from your work as a buyer with Davids Holdings Pty. Limited, are you interested in some retail food outlet? A. I am also in a family business with my two brothers.

Q. What is that? A. My older brother owns the store.

Q. What is his name? A. Harry.

Q. Where is the store at? A. Webb Street, Parramatta.

Q. Have you worked in that business? A. I work in the store every night and weekends also.

Q. Does that store stock soft drinks? A. Yes.

Q. Does it stock Solo? A. Yes.

Q. Pub Squash? A. Yes.

Q. Pub Soda Squash? A. Yes.

Q. How is it sold, is it sold in open display refrigerated -? A. Sold in a glass door four face fridge.

Q. Where the customer serves himself? A. They just open the door and take whatever can of drink they want, or bottle, or whatever.

Q. How are they arranged, are the lemon drinks arranged together or separately? A. They are not arranged in any set pattern, only that you try and keep your colours apart, so your colours don't clash, so you haven't got all dark colours in one corner and light in another. You might have a straight run of orange, a straight run of lime, a run of Solo, a run of Coke, or whatever, but you try and keep your cans apart. With the lemon drinks, well, there are four or five on the market at the moment, so you have to scatter them around your fridge. They might be in a double lane and other flavours separate them.

Q. Has anyone ever said anything to you about being confused between Pub Soda Squash and Solo in that business? A. Never.

Q. Have you also got some cousins named Essey in the soft drink business? A. That's right.

Q. I think some other gentlemen gave evidence here before named Essey? A. That is my brother.

Q. Is there a Lou Essey as well? A. Yes, he is my cousin. He owns a business also and we have other cousins that actually distribute soft drinks to stores.

CROSS-EXAMINATION

MR. PRIESTLEY: Q. What are your exact duties as a food buyer with Davids Holdings Pty. Limited? A. My exact duties are to

interview certain suppliers, they come along and show me new lines.

Q. In any particular area of groceries or in all areas? A. In general.

Q. How long have you had that particular job? A. I have had that for close to three years.

Q. Before that? A. Specifically that - now.

Q. Before that what was your job? A. I was a clerk.

Q. With Davids? A. With Davids Holdings.

Q. In what part of the firms's operations? A. I was in the debtors.

Q. How long have you been with Davids altogether? A. Four years and roughly one month.

Q. Were you a clerk for the whole period from when you first joined until you became a food buyer? A. That's right.

Q. Did you become a food buyer some time in 1975? A. Yes, but what it was, I was put on as a trainee food buyer and then actually I have only had my title in that sense as a food buyer, really, one month. But I have always been a food buyer, I have always conducted my own interviews.

Q. I am just trying to get the details clear. So you were in the debtors part working as a clerk until you became a trainee food buyer and then last month, or about a month ago you became officially a food buyer? A. Well, the circular went out to all the suppliers, that was official, yes.

Q. Was it in 1975 that you commenced as a trainee buyer, or whatever the proper title was? A. It would have been June 1975.

Q. What was your exact description then, from 1975 until last month? A. Well, in our own circles I was a food buyer, to us, to outside sources I was a trainee.

Q. Trainee what? A. Food buyer.

Q. How many food buyers of the kind that you are now are there for Davids? A. There is three.

Q. During the period you were a trainee, how many trainees were there? A. Just myself.

Q. The store or shop that you worked in at weekends and at nights, that is the family business in which your brother, who has also given evidence, also works? A. My older brother owns the business, I have put money into the business myself.

Q. We need not go into the details? A. My younger brother also works there, so this is how it is tied up by family, three brothers.

Q. Which is the one who has given evidence already? A. Robert.

Q. The older one? A. No, he is the younger one.

Q. He works in the same business as you work in at nights and the weekends? A. That's right.

Q. How long have you been working in that business approximately? A. Since the first day we bought it.

Q. Which was how long ago? A. Roughly, I think, six years. I am not too certain of that, maybe seven, going on seven.

Q. The soft drink side of that business would be reasonably important part of the business would it? A. Real - yes, that's right.

Q. Do you recall Solo when it first became available for sale? A. No, not really. I recall Solo but not the first - you know, set period when it actually come onto the market.

Q. Have you got any recollection of approximately when it came onto the market? A. I couldn't remember that - approximately, say, four years.

Q. You told Mr. Bannon that you remembered the Solo ad with the man in the canoe, I think you said? A. That's right.

Q. Do you remember any other Solo advertisement on the television? A. No.

Q. Would you just tell us what it is that you remember about Solo advertisements that you have seen on commercial television? A. A man in a canoe in a rough set up of, I'd say a river or whatever; he goes through this, gets out of the canoe and opens a can of Solo and decides to drink it; it sort of trickles around his mo and down onto his chin.

Q. What do you remember of the words that were used in the advertisement? A. "A man's drink".

Q. Do you remember anything else? A. There was a phrase which was used, I don't know that it is used that much now.

Q. What was the phrase? A. Squash, or something or other, like the pubs used to make.

Q. You have a recollection of that phrase being used in the commercial which showed the man in the canoe, do you? A. It come on after the commercial, it was more or less something that was said after the commercial was done.

Q. Is this what you mean, you recall the action part of the commercial and the man drinking the Solo and it spilling and so forth and then the words about "squash like the pubs used to make" coming right at the end? A. Well, yes.

Q. You mentioned just then you didn't think that the phrase is used so much now. What brings you to think that? A. It is just that I - see, I don't pay much attention, I don't get much time to watch T.V. at the moment and, to be truthful, I don't know if it was even being used now.

Q. Has anybody spoken to you about that particular advertising line? A. No.

Q. Told you about it? A. No.

Q. So you have the impression from such watching of television as you are able to do these days that that particular advertising line is not used much anymore? A. I'd say so.

Q. Have you noticed that there are different commercials used by Cadbury-Schweppes in regard to Solo in recent years? A. I say they have changed, but, like I said, I don't get much time to watch and the current ones I couldn't tell you what actually went on in a current commercial.

Q. Are you able to recollect from your operations in the shop whether or not Solo came onto the market before Pub Squash? A. No, I can't remember that, but - no, I can't.

Q. Are you able to tell us whether the business that you have described sold Solo as soon as it became available for distribution generally in Sydney? A. Yes, I would say we did.

Q. It became a good seller fairly quickly, didn't it? A. Yes, it did.

Q. Do you recall that the advertising on the television was to be seen at about the same time as it first became available for sale? A. That's right.

Q. There was a big advertising campaign going along with the actual introduction of that drink to the market? A. That's right.

Q. You yourself would have seen the advertisement with the man in the canoe, would you, around about the time that the drink came onto the market? A. That's right.

Q. And that the phrase "squash like the pubs used to make" was something known to you as being used in that advertisement at the time when Solo came onto the market? A. Yes.

Q. In regard to Pub Squash have you any recollection - you have already told us you don't know which came on first, but have you any recollection of approximately what difference in time there was between one coming onto the market and the other one coming onto the market? A. No, I can't recall that.

Q. You would recall - correct me if I am wrong, that they did come onto the market at different times? A. Definitely, yes.

Q. You were asked whether you had any association of the words "squash like the pubs used to make" with the product Solo. I think you said, "No way" and, amongst another things, you indicated that you did not consider yourself that Solo was a drink that you liked nearly as much as you liked ordinary squash in a hotel? A. That's right.

Q. To your taste, you prefer the kind of lemon squash that is made up in a hotel to the lemon squash that you get out of a Solo can or a Pub Squash can, for that matter? A. And others, that's right.

Q. When you said that there was no way you associated "squash like the pubs used to make" with Solo, you were meaning you didn't think Solo was like the squash like pubs used to make, in your opinion? A. That's right.

Q. You would agree, would you not, that after hearing the advertisement for Solo when the phrase "squash like the pubs used to make" came to your attention you associated the phrase with the product Solo? A. No.

Q. You have told us that you heard the line used -? A. I heard the line used, but that is just like hearing fifteen other - let's take, for example, soap powders, where you have got fifteen different lines of the same soap powders, use the same - "wash your clothes whiter than so and so", but you can't associate that phrase with any particular soap powder and they all do the same job.

Q. Would you agree that there wasn't any other lemon drink on the market which used an advertising line like "squash like the pubs used to make"? A. I can't recall that. Like I said before, I don't remember which one of the lemon drinks, whichever one they may be, actually come onto the market first. I know there was that phrase being used.

Q. I thought you said in answer to Mr. Bannon that you had heard the phrase "squash like the pubs used to make"?
A. That's right.

Q. .. used in the Solo advertising and you have told that to me, I think? A. Yes, that's right.

Q. What I am asking you is whether it was only the Solo advertising that used the phrase "squash like the pubs used to make", that is how you remember it, isn't it? A. They may have at the time, but I can't remember that - they may have been the only - they could have been ...

Q. There isn't any other advertising you remember, is there, for any other lemon product which used that line? A. I can't remember.

Q. Did you try Solo fairly soon after it came onto the market? A. Myself?

Q. Yes. A. Yes.

Q. And decided that for your part you didn't like it very much, would that be fair? A. Well, yes, you could say that, but I am not trying on my part, if a line will sell ...

Q. I am just asking about your own opinions at the moment. As a drinker of lemon squash from time to time? A. Whether it be Solo, Pub Squash or whatever, I didn't like canned lemon drinks.

Q. Would you agree with this, that after trying the Solo and forming the conclusion you didn't like it very much, being a canned lemon drink, from time to time you heard on television the line "squash like the pubs used to make" and you would think to yourself "that is advertising Solo, although I don't like it and I don't think it is like the pubs used to make", would that be the way your mind worked? A. No, after the initial period that Solo come onto the market I just never bothered - well, you know, I never heard the advertising all that much and as far as the line, it is just - could have been in another room and that it was some other drink being advertised, you know, it isn't a matter of it is definitely Solo that is squash like the pubs used to make, it was a phrase that was used, but not specifically for Solo drink. I can't - let's say anybody could use that phrase.

Q. What I am asking you for is this: isn't it right, to your own recollection, that nobody else did use that phrase but Solo? A. I only heard it used in the initial outburst of Solo, that's me, but it could have been used by other lemon drink

people, but could have been on the market at the time or come after Solo. Now, I don't know which was which at the time.

Q. But you do know from your experience in the shop and listening to the advertising that there was no other drink that used that phrase or that advertising line? A. I don't know. I remember Solo using it, but I don't know if any other drink company did use it.

Q. What about the name Pub Squash, when you first heard that what did the name Pub Squash mean to you? A. Nothing, really, it was a new drink. We had a look at the can and it looked like the name did suit the can, it had a picture of pub doors and whatever on the can.

Q. Did the name convey any meaning to you? A. No.

Q. There are two words in the name, one is pub and one is squash. Did either of those words mean anything to you? A. Squash meaning - well, let's say what sort of squash it was going to be and, as it turned out, it finished up a lemon squash. Well, really, pub lemon squash or pub soda lemon squash or whatever.

Q. What did the pub part of it convey to you? A. Nothing, really. It is just that they drew the pub doors on the can and the idea they may have been trying to get over was, you know, pub squash, you go into a pub to have a squash.

Q. Did you not think when you first came across that name as being a name of a product that the product inside the can was going to be the sort of drink - the can was saying that the drink you were going to get was the sort of drink you would get as a squash drink in a pub? A. No, not really. I mean, they had the pictures of the pub, this might have been the impression they were trying to get to people to try and sell this drink, but this wasn't the impression I got of it.

Q. As soon as you tasted the drink you thought to yourself, "That is not like the squash you get in pubs"? A. It is just another lemon drink and that was it.

Q. But before you tasted it you thought the can was telling you, rightly or wrongly, that what you were going to get was a squash like the pubs used to make? A. I didn't think that.

Q. Even before you tasted it? A. Even before I tasted it I didn't think that, but judging by the picture on the can, just going by that alone, I think that the company may have been trying to put that over to consumers.

Q. By the way, how did you come to be asked to give evidence, who asked you to give evidence here? A. Nobody here.

Q. Who was it though? A. It was somebody from the Pub Squash company.

Q. Do you remember who? A. I think he is their state assistant sales manager or - Mr. Charlie Deeb.

Q. Dee or Deeb? A. Dee.

Q. Do you know how to spell that? A. D-E-E-B.

Q. Is he a relation of yours? A. No.

Q. Any connection of yours? A. No.

Q. Met you in the course of selling Pub Squash to the shop? A. He used to bring all the new lines up and present them.

Q. Were you present in the shop when the Solo salesman came round for the first time asking that the shop carry Solo? A. No.

Q. It was your younger brother who came to give evidence before? A. That's right, his full time job is working in the shop.

Q. Has there been any discussion between you and him of the evidence that he gave? A. No.

(Witness retired and excused.)

(Matter adjourned part heard to Monday 12th June at 10.00 a.m.)

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

PUB SQUASH COMPANY PTY. LIMITED

TWENTY-FIRST DAY: MONDAY, 12TH JUNE, 1978

CASE FOR THE DEFENDANT CLOSED.

CASE IN REPLY

STANLEY GLASER
Sworn and examined:

MR. HORTON: May I tell your Honour, Dr. Glaser will be giving expert evidence on the impact of advertisements and Solo advertisements in particular in reply especially to Mr. Harris's *evidence -- (p. 449 referred to.)

Q. Doctor, - that is your correct title? A. Yes.

Q. Is your name Stanley Glaser and do you reside at 111 Shirley Road, Roseville, and you are a lecturer in behaviourial science at the school of Marketing at the University of New South Wales? A. That is correct.

Q. And you are a Bachelor of Arts of the University of Sydney? A. That is right.

Q. A Doctor of Philosophy in the School of Marketing in the University of New South Wales? A. That is correct.

Q. And your experience comprises this, does it, doctor, between 1962 and 1969 you were employed by a number of marketing and research organisations in both England and Australia including the Beecham Group of companies in England where you were responsible for research for the Food and Drink Division (Softdrinks) and for all psychological research and also by an entity called C. Consensus which was the research division of George Patterson Pty Limited, I think an advertising company, isn't it? A. That is correct.

Q. Where you were the senior research psychologist? A. That is correct.

* Not reproduced in this evidence.

Q. And I think in about 1965 you became a foundation member of the Australian Psychological Society and before that you were a member of the British Psychological Society? A. That is correct.

Q. From 1969 up until the present you have taught at universities and carried out a number of consulting engagements? A. That is correct.

Q. I think during 1966 and 1977 you were visiting professor of economic psychology at the Stockholm School of Economics and visiting professor of management at the Cranfield Institute of Technology in England? A. That is correct.

Q. In the course of obtaining your doctorate in Philosophy you wrote a thesis entitled "Towards an environmental theory of advertising effectiveness."? A. That is correct.

Q. And you used data gained in your experience in the softdrink industry in the preparation of that thesis? A. That is correct.

*Q. Now, doctor, would you tell his Honour, please, whether there is a theory of advertising in relation to products such as softdrink which does not depend on a mere puffing of their intrinsic qualities? (Objected to.)

HIS HONOUR: I think at this stage I would receive this evidence subject to objection, it being noted that if I came to the conclusion ultimately that the evidence was either not relevant or not properly the subject of expert evidence I would reject the whole, including any answers contained in cross-examination or re-examination.

MR. BANNON. Your Honour, may I also indicate that I do also object to it on the basis that it is not evidence in reply, that my friend is splitting his case and it is evidence that should have been led in chief it is to be admissible at all and also on the basis, your Honour, that it is evidence as to a matter which is a matter of judicial notice and not a matter on which expert evidence is normally admitted in a Court.

HIS HONOUR: If I come to the conclusion it is not properly admissible on any basis I would reject the lot of it.

MR. BANNON: I just want to make it clear I did not want to limit myself solely to relevance.

(Question marked * read.)

WITNESS: Would you like me to answer that?

MR. HORTON: Q. Yes, please. A. In introducing new products the general strategy is to try and - (Objected to: allowed.)

Q. Again, please, doctor, with his Honour's permission? A. The general strategy is to fit the product, the presentation of the product in a context that is meaningful to the consumers and the jargon that is used is to position the product in a certain way. In order to do that what people generally do is to undertake research to find out the general features of society, the way society is going, the way in which the product or the proposed product would fit into those trends and then to build a product, if you like, that would integrate into the social context of the time.

Q. They mention that advertisers attempt to position the product. What is involved in that, is there some theme of the advertising that is repeated or adopted and then repeated? A. Well there are two ways in which products are positioned. One is in terms of the physical product. One looks for gaps in the market place purely in terms of the physical nature of the product and another one is psychological in that you try and devise a theme which you feel will be somehow unique and meaningful to consumers.

Q. A theme not necessarily related to the physical product, the physical qualities of the product, I suppose? A. You would hopefully relate it in a meaningful way so that what you end up essentially, if you like, is where all the elements of the product and the presentation of the advertising and so on integrate.

Q. If you, in your studies, formed a view as to the trends in the Australian Society of the seventies, which would cause an advertiser to frame his advertisements so far as he could in a particular way (objected to.)

MR. BANNON: I take it all of this evidence will be covered by my objection?

HIS HONOUR: Yes, the whole of it.

WITNESS: It would strike me that one of the strong themes was a theme of if you like independence and accountability which emerged I would say in society probably in the early seventies late sixties.

Q. Is there any other characteristic that you have observed emerging at that time? A. I think the independence goes along with an accountability type theme which is expressed in many ways still throughout society.

Q. And what about nostalgia? A. Yes, I think nostalgia was

a predominant theme in society and still is a predominant theme although perhaps at this stage somewhat declining.

Q. Have those themes you have observed been reflected in changes in methods and emphasis in advertising over those years? A. Yes..

Q. Have you seen the Solo advertisements - I speak of the television advertisements at the moment. A. Yes, I have.

Q. And the Pub Squash advertisements? A. Yes, I have.

Q. Would you comment upon the Solo advertisements, please? (objected to.)

Q. The canoeist going down the rapids with music being played, do you recollect, doctor, and some oral material as well? Would you comment on that advertisement, please, doctor? A. Well, it struck me as being an advertisement that reflected if you like the nostalgic and independence themes that I have already mentioned and I thought reflected them very well.

Q. And was a position or an image, as you have described it, set for Solo by that first television advertisement, in your opinion? A. In my view it would have been critical to establishing the positioning of the product or the image.

Q. Was it only the visual part or was there some of the oral part which set the image? A. Well, I think the refrain "Squash like the pubs used to make" and to a degree "a man's drink", voice over, would have undoubtedly contributed to that. They would have been all nostalgia.

Q. Were there other factors which you thought established an image? A. I think the other clever association is if you like the establishing of an individual problem which is a combination of tiredness, heat and then presenting the product as a solution to those problems, after the activity. I think also the design of the can made a very clever use of colours and integration of colours to also bring across that mood.

Q. What was your opinion of the quality of that advertisement? A. As I have said just a moment ago, I thought it was excellent.

Q. You have seen the other television advertisements that came along later, I think there is a horse-breaking advertisement and an arm-wrestling advertisement and a catamaran or surf-cat advertisement and there may be others, was the image maintained in those advertisements, such as you have described? A. Yes, I think the advertisements were still within the overall context of the image set early by the canoeing or kayacking advertisement.

Q. What about the oral part? A. I think that was still within the general theme or structure that was established earlier on.

Q. I think in respect of most of the television advertisements there was a reference to "those great lemon squashes that pubs used to make", or words to that effect? A. Yes.

Q. From an advertising point of view, did that phrase have any particular quality, did you think? A. In my view it would have, yes.

Q. Do you think that it would be a slogan, if I can call it that, which would be remembered by persons to whom that advertising was shown? A. Yes.

Q. Would they associate it with a product? A. Yes.

Q. A lemon squash product? A. Yes.

Q. You mentioned a mosaic of features a little while ago. Would you just tell his Honour, it is probably implicit in what you have said already, but just for clarity what makes up in the main that mosaic impression? A. It is obviously the product itself, its packaging, the colour of the pack and so on and it is also the way in which the product is presented in its symbolic form by the advertising and all these, including the music that is behind, the commercial, the idea, the seting etc., integrate to form if you like one whole that the consumer sees.

Q. What about the slogan, is that an important part of the mosaic? A. Yes, if I could comment, what the advertiser will try to do is to make some features of the advertising particularly memorable to people and it would strike me that that would have been a particularly memorable phrase and particularly effective as far as consumers are concerned.

Q. Well now, doctor, if a person who had seen the Solo advertisements a sufficient number of times to have had an impression of them saw the product Pub Squash, a can of which I think you have probably seen, can you express an opinion as to what reaction that person would be not unlikely to have? A. I think it is likely that at least some consumers would have been confused.

Q. In what way, doctor, by associating one product with the other? A. Yes, by associating the slogan "the squash like the pubs used to make" with Pub Squash, rather than the Solo.

Q. And I think you have read the evidence, I am not sure whether all of it but at least a deal of it given by what we

have been calling the confusion witnesses in this case.
A. That is correct.

Q. And having read that evidence and of course seen the advertisements can you express an opinion as to the effect of the slogan that we have been talking about upon the public? (objected to: rejected.)

Q. Do you have available to you the transcript of the evidence that you looked at? A. No, I do not have it here. I have it at the office.

Q. If I showed you the names of the witnesses would you remember which ones you had read, do you think? A. Yes.

Q. (Witness approached by Mr. Horton) I think these are simply in the order in which they gave evidence, doctor. I see, the index excludes the confusion witnesses. That does not help you very much? A. If I could short-cut, I was given a list of witnesses for the plaintiff and for the defendant, and some of these were marked as confusion witnesses. I read through the evidence of witnesses for the plaintiff and witnesses for the defendant.

Q. That were marked as confusion witnesses? A. That were marked as confusion witnesses, yes.

MR. HORTON: Perhaps it can be agreed between solicitors later, with your Honour's permission, as to what the list was, and that may resolve it.

(Mr. Bannon addressed on admissibility.)

HIS HONOUR: As I have indicated, Mr. Bannon, the whole of the evidence of this witness is subject to debate as to admissibility.

MR. HORTON: Q. Having read the evidence of the confusion witnesses, the names of which will later be tendered, and having seen the advertisements, are you able to express an opinion about the effect of the slogan "a great lemon squash like the pubs used to make" as an advertising instrument? A. Well, as I have said before, I think it was very effective in that it was evocative and seemed to be a cue that had a whole lot of potent associations as far as consumers were concerned.

Q. Would it be one likely to be remembered, perhaps more to the point? A. Yes, yes, I think so.

CROSS-EXAMINATION

MR. BANNON: Q. Dr. Glaser, you said you belonged to some

psychological society in the United Kingdom, is that right? A. No, what actually happened was that I was initially a member of the Australian branch of the British Psychological Society.

Q. British Psychological Society, when did you join that? A. About 1962, 1961.

Q. Are you still a member? A. No, the Australian branch of the British Psychological Society was then founded as the Australian Psychological Society.

Q. And membership of that Society, what are the qualifications to become a member? A. At that time one had to be a graduate in psychology from a recognised university.

Q. Is that still a qualification? A. Yes, I think it is, well, I am not too sure in fact but I think it is now four-year training in psychology plus some supervision for a period of two years after training.

Q. But I take it anyone who had taken the Arts degree in Sydney and done Professor O'Neil's course would have been admitted as a member? A. That is correct.

Q. Then you say that since 1969 you have been lecturing, is that right? A. That is correct.

Q. Where have you been lecturing? A. University of New South Wales.

Q. That is in a school which is called the School of Marketing Research? A. No, School of Marketing.

Q. Marketing? A. Yes.

Q. Is that in part of the Faculty of Economics? A. No, the Faculty of Commerce.

Q. Well, that is the name that Economics is given at the University of New South Wales, is it not? A. No.

Q. Well, it includes Economics studies at all events? A. That is right.

Q. A graduate in commerce of that university would be expected to have studied economics, would not that be right? A. Some economics, that is correct.

Q. Now this company, Beecham United Kingdom, that is a company which is engaged in a great deal of research on penicillin and -- is it not? A. That is correct.

Q. It is largely concerned with the manufacture of chemicals and drugs? A. That is part of its activities.

Q. Is not that the major part of its activities? A. I couldn't tell you precisely but they have a very heavy investment in consumer goods, like canned goods, softdrinks and in fact are, I think, the manufacturers and distributors for Coca-Cola in the southern region of the United Kingdom as well.

Q. When you were working for Beecham in the United Kingdom were you engaged in any research with regard to for example ampicillin or penicillin? A. No, I did do some research in the field of ethical pharmaceuticals only in so far as it was in the province of what one could call psychological research.

Q. Which ethical pharmaceuticals were you engaged in research for? A. I was mainly looking for doctors' prescribing habits.

Q. But with respect to which ethical products? A. I think it was with the synthetic penicillin for Beechams.

Q. Penicillin? A. Yes, that Beechams had introduced. They had introduced the first synthetic penicillin.

Q. Was that the only ethical product that you researched? A. While I was there?

Q. Yes? A. Yes, I think so.

Q. When did you graduate from Sydney University? A. 1962.

Q. So you went from your graduation immediately to the United Kingdom, is that right? A. No, I went to work with a research company in Sydney after that and I also started doing a master's degree in psychology part-time.

Q. But it was within the year of your graduation that you went to Beechams? A. No, I went to Beechams in 1965.

Q. 1965, I see, so you were there for four years altogether, was it? A. Where?

Q. Four years with Beecham? A. No, no, I was at Beechams about 12 months, I think.

Q. I thought you had said earlier 1962 to 1969? A. No.

HIS HONOUR: The note I have is market research organisations in England and Australia in that period.

MR. BANNON: Q. Then you worked for some company called George Patterson Pty Ltd. When was that, Dr. Glaser? A. That would have been about 1967, 1968, something like that.

Q. What is that company's business? A. They are advertising agents.

Q. Was that in Australia or in the United Kingdom? A. No, that is in Sydney, in George Street.

Q. What sort of products do they advertise or were they advertising when you worked for them? A. A whole range, paints, dog food, I think most of the Colgate Palmolive products, a range of other products.

Q. And then I think you said something about having worked in, you were doing some work as a visiting professor at some place in Stockholm, is that right? A. That is correct.

Q. How long was that for? A. I was there for six months.

Q. And you were also working in some school in United Kingdom call the Cranfield School? A. That is correct.

Q. Was that at the same time? A. No, it was my sabbatical. I spent six months at the Stockholm School of Economics and six months at the Cranfield ...

Q. The Cranfield School of Technology, so is that concerned with -? A. The correct title is the Cranfield Institute of Technology. It is the only post-graduate university in Great Britain.

Q. In England? A. That is right.

Q. In any topic? A. It has no undergraduate students, only post-graduate degrees.

Q. Then you wrote a thesis, "Towards an environmental theory of advertising effectiveness"? A. That is correct, in fact I wrote the theory in 1976.

Q. Was this concerned with preparing advertising so that the products did not litter the landscape, was it concerned with disposal of cans and this sort of thing so that they did not affect the environment, was that the sort of topic or something broader than that? A. Something narrower, actually. Would you like me to explain it?

Q. If you would, please. A. It was broadly concerned with trying to establish the environmental conditions under which communication generally in advertising in particular is a potent force in re-directing behaviour and also trying to get close to a theory of how advertising works.

Q. I just don't understand at the minute how the word

"environment" fits into it. Was it concerned with making your advertisement fit, say, about affecting the environment of Botany Bay ...? A. No, it refers to social and psychological environments more so than a physical environment.

Q. Of a physical environment, but upon the mental approaches of people, is that the topic, is that the way it worked? A. Like most doctoral theses, it was somewhat obscure but the environment that was conceptualised was conceptualised in terms of underlying dimensions of dynamism and complexity and there is a body of theory which supports that as the meaningful way of conceptualising the environment.

Q. Doctor, you said something in your evidence about having formed a view as to trends in Australian society in the 1970's and you have told us that for part of the 1970s you were away overseas and what I wanted to ask you is this, did you read any literature prior to forming this view? A. I am sorry, are you implying I formed the view at some particular point in time?

Q. No, I am just asking you, my friend said to you that you had formed a view as to trends in Australian society in the 1970s. What I am asking you is had you read any literature before you formed that view as to trends in the seventies? A. Well I don't think it is possible to say that I read some literature and then my view became immediately formed. Obviously the two things interact, obviously yes, I would have read things.

Q. If you have read books like Donald Horn's "Lucky Country" would that have affected your view? A. It is a long time since I read that but I imagine I would have found it interesting and taken notice of it.

Q. That was a set book in the University of New South Wales in one of the schools? A. I think it was in sociology, yes.

Q. Professor Manning Clarke's History? A. No, I have only read Professor Clarke recently.

Q. You spoke about independence going along with an accountability type theme. Had you formed your views on that after also reading some literature on that topic? A. I think the views are not only formed by reading literature.

Q. I am only asking you have you read literature on that topic prior to forming the view? A. I don't think I can pinpoint that to any specific piece of literature, no.

Q. Prior to forming your views regarding nostalgia had you read any literature on nostalgia? A. No, I don't think I have read any literature on nostalgia.

Q. Concerning the Solo videos that you have seen, you referred to seeing the video of the canoeist going down the rapids with some music and a voice speaking, remember that? A. Yes.

Q. Can you remember how much of the time, how long that video took? A. Probably 30 seconds or 60 seconds, it would be one of the two.

Q. How much of the time was taken up with music and how much with a voice speaking? A. I couldn't be exact but I think music was in the background most of the time and I think the voice over came on towards the end.

Q. Do you remember the exact words that were used in the voice over in that video? A. No, not really.

Q. Do you recall whether or not the phrase "a man's drink" was used in that video? A. I think it was in that one, yes.

Q. And you did say something to my friend concerning nostalgia being a theme which is now somewhat declining? A. Yes, that is correct.

Q. Are you aware that Solo abandoned the use of the slogan, the phrase, "A squash like the pubs used to make."? A. Am I aware they abandoned it?

A. Yes? A. No, I can't say I was aware of that.

Q. I may be mistaken but I suggest to you that it was abandoned somewhere around the end of 1976, have you any awareness one way or the other? A. I was overseas at the end of 1976.

Q. You have not heard that slogan since 1976? A. I don't think I have heard it over the media, no.

Q. Have you seen Solo advertisements since 1976, giving emphasis to other slogans? A. Could you exemplify that for me?

Q. Well, certainly an emphasis given to the slogan "A man's drink", the one you mentioned in the first -? A. I cannot say that I recall any Solo advertising since I have been back in Australia.

Q. When did you come back to Australia? A. The middle of 1977.

(LUNCHEON ADJOURNMENT.)

ON RESUMPTION:

Q. Doctor Glaser, you know that the music in the Solo video of the man in the canoe is the theme music from a film called "Deliverance"? A. Well, I know it now that you have told me.

Q. Well, do you know that there was an American film called "Deliverance" showing a man in a canoe going down the Colorado River on his own? A. Yes, I do.

Q. And a similar theme to the theme of Mr. Ace battling on his own in the canoe down the rapids, do you agree with that? A. I suppose there is similarity, yes.

Q. And of course the word "Solo" means alone, doesn't it? A. Usually, yes.

RE-EXAMINATION:

MR. HORTON: Q. You were asked how you formed your views about trends in the Australian society, more correctly, whether you had read novels and the like, how did you form your views? (objected to.)

HIS HONOUR: I will have it noted then, Mr. Bannon, that it is not your purpose to suggest that Dr. Glaser's views as to trends were derived from the material which it was suggested that he read.

MR. BANNON: Very well, your Honour.

HIS HONOUR: In that case, then, Mr. Horton, I reject the question.

(Witness retired and excused.)

(Schedule setting out passages in evidence to which it is said Dr. Glaser's attention was directed tendered, admitted and marked Exhibit DD.)

(Case in reply closed).

(Matter adjourned to 10 a.m. Thursday, 15th June, 1978, for addresses.)

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PROPRIETARY LIMITED

v.

THE PUB SQUASH COMPANY PROPRIETARY LIMITED

TWELFTH DAY: WEDNESDAY, 8TH FEBRUARY, 1978.

JUDGMENT

(On application to extend area of disclosure of documents *contained in Exhibit 27; see p. 306 of transcript.)

HIS HONOUR: Mr. Priestley has made an application to me to extend the area of disclosure of the documents contained in Exhibit 27. In short, these documents appear to record the results of a series of experiments or like activity carried out by officers of the defendant, The Pub Squash Company Proprietary Limited, in the course of producing the ultimate formulation of their present product.

For obvious reasons, one could understand that the defendant would be reluctant to let the nature and extent of the result of their experiments and sale if it be included in the material the ultimate formulation of their product and fall into the hands of a trade competitor such as the plaintiff.

It seems to me, however, that material in Exhibit 27 is such that counsel seeking to cross-examine in relation to it

*See now page 370.

would need the assistance of an expert to explain to him not only the various scientific terms referred to but also the nature and purpose of the various experiments. One must in these cases always keep a balance between the demands of justice which require disclosure and the legitimate trade interests of a party. It seems to me that in the present case those demands can best be balanced if I permit the contents of Exhibit 27 to be disclosed to Mr. Swan who has been nominated by Mr. Priestley as the expert that he would desire to use; but upon the condition that Mr. Swan gives me his personal undertaking, firstly, that he himself will not disclose the contents of Exhibit 27 or discuss the contents of Exhibit 27 to or with any person other than counsel for the plaintiff and its instructing solicitors; secondly, that he not make use of any of the information contained in Exhibit 27 except for the purposes of the present proceedings; and, thirdly, that, if for the purposes of instructing counsel he makes notes of any aspects of the matters appearing in Exhibit 27, he will, as soon as counsel has been properly instructed, deliver those notes up to Mr. Priestley personally to be destroyed by him.

HIS HONOUR: Do you understand the nature of the undertakings I seek?

MR. SWAN: Yes, I do, your Honour.

HIS HONOUR: Are you prepared to give the undertakings that I seek?

MR. SWAN: Yes, your Honour.

HIS HONOUR: I should indicate that a breach of an undertaking is punishable in the same way as contempt of court, so it is a very solemn undertaking you give.

MR. SWAN: I understand.

HIS HONOUR: I will extend access on that basis.

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

CORAM: POWELL, J.

FRIDAY, 16th JUNE, 1978

CADBURY-SCHWEPPES PTY. LIMITED

v.

PUB SQUASH COMPANY PTY. LIMITED

JUDGMENT

(On an application by defendant to file a further amended defence and on an application by the plaintiff to re-open it's case in reply and tender further affidavits.)

HIS HONOUR: On 12th June last, that is, the 21st day of the hearing of this proceeding, the defendant sought leave to file in court a further amended defence. When the further amended defence was tendered I was informed by counsel for the defendant that the need for it to be tendered was consequent upon an amendment to the statement of claim which I had allowed some considerable time ago. I was further informed that, while there had been some changes to the defence which had been filed at an earlier stage, those changes for the most part did no more than convert a paragraph in which a fact was not admitted into a paragraph in which a fact was denied, or which were paragraphs added to the defence in consequence of the amendment which had been made earlier. As counsel for the plaintiff at that stage had not had an opportunity to consider the further amended defence the matter was allowed to remain until he had such opportunity.

The evidence having concluded on Monday last, at the request of the parties I adjourned the matter until yesterday so that they might have an opportunity to prepare their submissions, which it was contemplated would last some days.

When the matter came back before me yesterday I returned to the matter of the further amended defence, and it appeared upon an examination of that defence that a new issue was raised, namely that proffered by par. 18 of the further amended defence, which contained an allegation that the plaintiff had abandoned the use of the slogans and advertising which formed an important element in the plaintiff's claim for passing-off or unfair trading. Counsel for the defendant told me, when attention was directed to this matter, that it was raised in consequence of questions put to and answers given by Mr. Lowe, the principal witness for the plaintiff, who had been called at a very early stage in the proceedings, some ten months ago.

Counsel for the plaintiff opposed the allowing of the amendment at that stage, as he wished to have an opportunity to take instructions in relation to the claim of abandonment. It now appears that the allegation as to abandonment would need to be the subject of further evidence in order that the matter might, according to the plaintiff, be put in its proper perspective.

While I recognise that I am required to allow all such amendments as will enable the issues between the parties properly to be tried, it seems to me that that obligation cannot be

unqualified. It seems to me that there must come a time in the conduct of a proceeding when it is unfair and unjust to the opposing side to allow an amendment, and it seems to me that now is such a time. We are now into the second day of the plaintiff's final submissions. To allow an amendment based on an answer to a question asked ten months ago, at a time when the matter was not an issue, seems to me to be stretching to the ultimate any obligation which the Court might have to allow amendments. Indeed, although I have not of recent times looked at the authorities, it is my recollection that there is authority in the old Full Court which would support the view that it is improper to allow an amendment in those circumstances. Accordingly, while I am prepared to allow the filing of the re-amended defence, proffered by the defendant on Monday last, I would not allow that re-amended defence to contain par. 18. I allow the filing of the re-amended defence in that way since, although the defendant is some six months out of time in filing, and therefore has no right to file it, it does not seem to me that the earlier parts of the defence materially change the issues.

There has also been debated before me an application by the plaintiff to re-open its case-in-reply for the purpose of tendering two affidavits - one an affidavit sworn in the United States of America about a week ago, and a further affidavit sworn by a partner in the firm of solicitors instructing the plaintiff's counsel, sworn this day. The purpose of these

affidavits is to destroy the evidence given by the defendant's principal witness, a Mr. Brooks, which evidence, in part, was to the effect that some eight years ago, in the time when he was employed by one or other of the Coca-Cola Bottlers Pty. Limited or Coca-Cola Export Corporation in Australia, and at a time when he was on a study tour to America, he found within the records of the Coca-Cola Export Corporation in New York a reference to and a physical representation of a trademark registered in the United States of America, on which trademark the word "Pub" formed a material part.

I appreciate, as Mr. Horton has put, that this is evidence which the plaintiff would be entitled to tender in reply. However, just as I have pointed out that Mr. Lowe was called a considerable time ago, so also I must point out that the evidence given by Mr. Brooks on this matter was given in the early part of February this year. So far as I can observe from the affidavits and the material proffered no attempt was made on behalf of the plaintiff to seek to check Mr. Brooks' affidavit until April this year, and it appears not to have been until late in May that an attempt was made to obtain an affidavit from the United States on the matter.

Mr. Bannon has opposed the application to re-open, and has submitted that if I were to grant leave to re-open and allow affidavits to be tendered the allowance of the application ought to be on two bases: first, that the deponent of the American affidavit be available for cross-examination and be brought

here at the plaintiff's expense; second, that the defendant should have an opportunity to consider whether it ought to re-open its case in order, if need be, to tender further evidence to support the evidence given by Mr. Brooks.

I recognise that I have a discretion under the rules to allow evidence to be proved by affidavit, and further, that although the prima-facie position under the rules is that deponents of affidavits ought to be available for cross-examination. I may nonetheless receive an affidavit without according an opportunity to the other side to cross-examine the deponent. However, it seems to me that such a course should not be adopted on a matter which might be critical, and that if indeed it were adopted the weight that one could attribute to an affidavit which had not been tested in cross-examination in such circumstances would not be very great. Since, therefore, I feel that if I were to allow the application at this stage I would be obliged to accede at least to the first of Mr. Bannon's submissions, and since this would inevitably lead to even further delay and a significant increase in the costs of a matter which ten months ago I was told was urgent, I think I ought not to allow the application. I accordingly refuse the application for leave to re-open to tender the affidavits. If desired I would be prepared to have the affidavits marked in some way so that they can be identified.

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

CORAM: POWELL J.

Tuesday, 8th August 1978

CADBURY-SCHWEPPES PTY. LIMITED & ORS.

v.

THE PUB SQUASH CO. PTY. LIMITED

INDEX TO JUDGMENT

* * * * *

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

CORAM: POWELL J.

Tuesday, 8th August 1978

CADBURY-SCHWEPPES PTY. LIMITED & ORS.

v.

THE PUB SQUASH CO. PTY. LIMITED

JUDGMENT

HIS HONOUR:

1. INTRODUCTION - THE COURSE OF THE PROCEEDINGS

The present proceedings were commenced by Statement of Claim filed in the Common Law Division on 1st June 1977 on behalf of the now First Plaintiff, Cadbury-Schweppes Pty. Limited (to which company I shall refer as "Cadbury-Schweppes"). In its Statement of Claim Cadbury-Schweppes sought against the Defendant The Pub Squash Co. Pty. Limited orders, at its option, for either damages or an account of profits, for the alleged passing off by the Defendant as and for a soft drink manufactured and sold by Cadbury-Schweppes under the name of "Solo" of a similar soft drink manufactured and sold by the Defendant under the name of "Pub Squash", and an order for the rectification of the Register of Trade Marks by the expungement therefrom of the entry in respect of the Defendant's trade mark "Pub Squash".

When the matter came before Mears J. on 1st July 1977 in pursuance of a Motion for Directions his Honour ordered that it be transferred from the Commercial List to the Equity Division of the Court.

On the same day application was made to Holland J., then the Duty Judge in the Equity Division, for an Order that the hearing of the proceedings be expedited. Upon being informed that it was anticipated that a hearing on the question of liability would occupy only 3 days, and upon being assured that the parties would be ready for trial on the issue of liability by 23rd August 1977, his Honour ordered that the hearing be expedited, appointed 23rd August 1977 before me for hearing, and, meantime, stood the matter over to the Master for any necessary directions as to procedural matters.

The hearing in fact commenced before me on 23rd August 1977. At the commencement of the hearing the Plaintiff sought and was granted leave to amend its Statement of Claim by adding paragraphs (which had been foreshadowed in correspondence between the solicitors) designed to raise a case based upon what Cross J. (as he then was) has called the "new-fangled tort called 'unlawful competition'" (Vine Products Limited & ors. v. Mackenzie & Company Limited & ors. (1969) R.P.C. 1, 28). That having been done, the Defendant sought leave to amend its Statement of Defence so as to raise defences (not previously foreshadowed in correspondence) based upon the provisions of the Trade Practices Act 1974 (Cth) and of the Consumer

Protection Act 1919 (N.S.W.). However, as the Plaintiff's counsel indicated that, in the event of such amendment being allowed, he would seek an adjournment of the hearing, the Defendant's counsel withdrew his application, while reserving the right to renew it if the hearing did not conclude within the 3 days which had initially been set aside for the hearing.

As things transpired, I was able to make available to the parties for the hearing a fourth day during the week. Despite this, the Plaintiff's case was far from concluded by the end of the fourth day, at which time the Plaintiff's principal witness was still being cross-examined.

At the conclusion of the fourth day the Plaintiff, in the light of certain matters which had emerged during the course of cross-examination, sought and was granted leave further to amend its Statement of Claim by adding as parties Plaintiffs Tarax Drinks Holdings Limited (to which company I shall refer as "Holdings"), Tarax Drinks Pty. Limited (to which company I shall refer as "Drinks") and Tarax Pty. Limited (to which company I shall refer as "Tarax").

That amendment having been allowed, the Defendant's counsel renewed his application for leave to amend the Statement of Defence by raising the defences based upon the provisions of the Trade Practices Act 1974 (Cth) and of the Consumer Protection Act 1969 (N.S.W.). After argument upon the matter I came to the conclusion that, while it might be possible to sustain a defence based upon the provisions of the Trade Practices Act 1974 (Cth), it was not possible, in the

circumstances of the case, to sustain a defence based upon the provisions of the Consumer Protection Act 1969 (N.S.W.). Accordingly, when, on 2nd September 1977 I granted the Defendant leave to amend, I limited that leave to amendments seeking to raise a defence based upon the provisions of the former Act.

It having, by this stage, become apparent that, even if the hearing was limited to the issue of liability, it would occupy far more time than was originally estimated, the hearing was then adjourned to a day to be fixed, a course which was rendered necessary since, although I was able to make available to the parties for the hearing a further period of two weeks before the end of the year, it was not then known what the likely duration of the hearing would be nor whether counsel would be available for a hearing at that time.

In the events which happened the parties were unable to take advantage of the time then available before the end of the year, so that the hearing did not resume until 31st January 1978.

On the resumption of the hearing the Plaintiffs again sought, and were granted, leave further to amend their Statement of Claim so as to extend the range of matters upon which the Plaintiffs sought to rely as the foundation of the goodwill and reputation of of its product. Thereafter, the taking of evidence continued, the Plaintiff's case being closed (subject, by agreement, to the later interposing of some of its

"confusion" witnesses at convenient times later, and to the recall, for the purposes of providing documentary material of witnesses who had been called earlier) on 2nd February 1978. However, although I had been able to make available to the parties substantially the whole of the month, the evidence still had not concluded by 28th February 1978, on which date the hearing had to be further adjourned until 12th June 1978.

On the resumption of the hearing on 12th June 1978 the Defendant's counsel sought leave to file a further amended Statement of Defence. As counsel for the Plaintiffs had not had an opportunity to consider the proposed amendments I deferred ruling upon them until later in the week, at which time I granted leave to the Defendant to file an amended Statement of Defence but refused leave to the Defendant to raise as a defence to the proceedings the alleged abandonment by the Plaintiffs of one of the advertising slogans upon which the Plaintiffs in part based their claim for the goodwill and reputation of their product. The reasons for my adopting this course appear in the Judgment which I delivered at the time.

After calling one further witness, the Defendant's counsel closed the Defendant's case. The Plaintiffs' counsel, having called some three witnesses, closed the Plaintiff's case in reply. At the conclusion of the evidence, the further hearing was adjourned until 15th June 1978 in order to give counsel an opportunity to prepare their addresses and, as well, to prepare and exchange between themselves, summaries of relevant

parts of the evidence, which summaries counsel indicated they wished to provide for my assistance.

On the resumption of the hearing on 15th June 1978, the Defendant's counsel sought leave to withdraw the answer to one of the Interrogatories delivered by the Plaintiff's, which answer had been tendered by the Plaintiff's counsel (as part of Exhibit "D"), and which answer had led to considerable cross-examination of those of the Defendant's officers who had been called as witnesses. The basis upon which the application was founded was the inherent jurisdiction of the Court to allow an admission (even a sworn admission) to be withdrawn if admission were mistaken (Hollis v. Burton (1892) 3 Ch 226, 231-2; Gannon v. Gannon (1971) 125 C.L.R. 629, 643 per Windeyer J.). However, as, in order to determine whether or not the answer had been given by mistake, I had to assess the credibility of the relevant answers of all the Defendant's officers who had been cross-examined upon the subject of the answer I declined to grant the Defendant leave to withdraw the answer.

After he had commenced addressing on 15th June last the Plaintiff's counsel foreshadowed that he would, at a later stage seek leave to re-open the Plaintiff's case in reply in order to tender an affidavit which had been sought in the United States of America. However, when the application was later made, I refused leave, for reasons which appear in the Judgment which I delivered at the time.

The hearing finally concluded on 21st June last, after addresses occupying a little in excess of five normal hearing days.

In all the hearing occupied some twenty-six days, of which twenty days were occupied by evidence, and the better part of six days by addresses. Some sixty-four witnesses gave evidence, and some sixty-five exhibits (some of many pages) were tendered. The exhibits tendered included the video-tapes (which I have viewed) and the shooting scripts for the various television advertisements for both "Solo" and "Pub Squash" which have been screened over the past four years, and, as well, the scripts for the radio commercials for "Solo" which have "gone to air" during that time.

It is to be regretted that although, as I have set out above, the hearing of the proceedings was expedited, it has not been possible for the proceedings to be determined earlier. However, as the brief record which I have set out will demonstrate, the hearing of the proceedings assumed dimensions far beyond those originally contemplated, in consequence of which it was just not possible for the Court, while respecting the understandable desire of the parties to retain the services of counsel who originally appeared for them, to determine the matter earlier.

2. THE ISSUES

A further reference to the brief record which I have set out above will serve to demonstrate that, from time to time

during the hearing, the issues, both legal and factual, which were examined before me fluctuated. This situation continued until the end, for some of the issues (as, for example, the amendment of the Statement of Defence to include a defence based upon the provisions of the Trade Practices Act 1974 (Cth)) which gave rise to lengthy legal argument, and extensive cross-examination during the course of the hearing, were not the subject of argument from either side in counsel's final addresses.

Since, notwithstanding the fluctuating nature of the issues during the hearing, I take my task to be to determine the matter in accordance with the issues finally embraced, and the arguments finally presented to me, by the parties, I think it proper that I should here record those issues and those arguments in outline. They are as follows:-

a. the Plaintiff's Case

(i) by the end of April 1975, in consequence, in particular, of the intensive television and radio advertising campaign mounted by the Plaintiffs or some one or more of them, the product "Solo" had become associated in the minds of the buying public with one or more of the following, both alone and in combination:-

(A) a lightly aerated lemon squash style of soft drink;

(B) which soft drink was sold in cans having a

capacity of 250 and 370 ml, the predominant colour of which was lemon or yellow, and in bottles having a capacity of 1.25 litres, the predominant colour of the labels upon which was lemon or yellow;

(C) the advertising slogan or slogans "those great lemon squashes that pubs used to make", those great lemon squashes a few country pubs still make", "those lemon squashes the pubs used to make", "the kind of lemon squash pubs used to make" and other similar slogans and themes;

(ii) whether deliberately or not (although it was submitted that the Defendant's actions were deliberate) the Defendant appropriated for its product "Pub Squash" the reputation and goodwill of and market for "Solo", that appropriation being effected by one or more of the following, both alone and in combination:-

(A) making "Pub Squash" a soft drink similar in style to "Solo";

(B) marketing "Pub Squash" in cans of similar size and colour, and in bottles of similar size, with labels of similar colour, to those in which "Solo" was marketed;

(C) adopting the name "Pub Squash" (later "Pub Soda Squash");

(D) using as part of the mark for "Pub Squash" golden yellow bar doors similar to those used in old-style hotels;

(E) utilising in the advertising (particularly in its television advertising) for "Pub Squash" themes and slogans similar to those used in advertising for "Solo", as for example "when the heat is on, and your throat is asking for the local, rip into a Pub Soda Squash; drown that thirst with the biting taste of lemon in Pub Soda Squash";

(iii) even if, contrary to what was submitted in (i) and (ii), it were held that the necessary elements of the traditional tort of passing off had not been established, nonetheless the Plaintiffs, or some one or more of them, was or were entitled to rely, in the present case, upon the tort of unfair competition since, so it was submitted, the Defendant had, with fraudulent intent, set out to compete unfairly with the Plaintiffs by "pirating" the formula for "Solo", "pirating" the colour of the containers in which "Solo" was marketed, and "pirating" the theme upon which the advertising for "Solo" was based.

b. <u>the Defendant's Case</u>

(i) neither the colour of the containers in which or of the labels upon the containers in which "Solo" was

sold, nor the theme or slogans used in the advertising for "Solo" was capable, in the circumstances of becoming distinctive of "Solo";

(ii) even if it be otherwise, neither the colour of the containers or labels, nor the themes or slogans, in fact, ever became distinctive of "Solo";

(iii) even if it be otherwise, "Pub Squash" was sufficiently differentiated from "Solo" as to prevent passing off;

(iv) even if it be held that passing off had occurred, it was innocent, so that the Plaintiff should not be granted any relief;

(v) further, the Plaintiffs having been aware, from the "launch" of "Pub Squash" of the matters of which they now complained, and having taken no action for over two years, were disentitled, by reason of laches acquiescence and delay, to any relief in the proceedings;

(vi) further still, Cadbury-Schweppes had disentitled itself to any relief in the present proceedings by reason of its conduct in seeking to register in South Australia, in which State "Pub Squash" was also marketed, the business name "Pub Squash Company".

Both the legal and factual issues thus debated before me will need to be examined in greater detail later in these reasons. However, it is first necessary, in order that the

nature and extent of these issues be fully understood, that I give a little more detail of the parties and their relevant senior officials, and of the history of the "launch" and subsequent marketing of their respective products.

3. THE PARTIES

a. the Plaintiffs and their Officers

Each of the Plaintiffs appears to be a subsidiary or sub-subsidiary of Cadbury-Schweppes Australia Limited, Holdings, Drinks and Tarax having been taken over by the Cadbury-Schweppes group in early 1972.

It would seem that, at the date of the take-over, the Cadbury-Schweppes group was based on Sydney, and that, at that time it had a manufacturing plant at Alexandria, a suburb of Sydney, and a further plant at Newcastle. Perhaps there were plants elsewhere, but the evidence does not disclose this to have been so. At that time the Tarax group (which seems not, at that time, to have included Drinks) was based on Melbourne, its registered office and factory being at Huntingdale, a suburb of Melbourne. Tarax, which appears to have been the operating subsidiary, would seem to have had branches (probably factories) at Chullora, near Sydney, and at Queanbeyan, in New South Wales, at Brisbane, in Queensland, at Adelaide and Mount Gambier, in South Australia, and at Hobart,

in Tasmania. For present purposes, the two officers of the Plaintiffs with whom I am most concerned, were Mr. C.J. Lowe, and Mr. C.G. Milne.

Mr. Lowe was, during 1972, 1973 and 1974, General Manager, Retail Division of Holdings. On 1st January 1974 he was appointed Marketing Director of the Drinks Division of Cadbury-Schweppes. At about the middle of 1975 he became a director of Cadbury-Schweppes. As from 1st January 1977 he became Director, North-East Region, Drinks Division. He is, since late 1977 or early 1978, no longer associated with the Plaintiffs.

Mr. Milne was in 1973 and thereafter New South Wales Manager of Tarax. As from August 1976 he has been Franchise and Export Manager for Cadbury-Schweppes.

b. <u>the Defendant and its Officers</u>

The Defendant was incorporated on 24th October 1973 as Langeath Pty. Limited. It was then what is commonly known as a "shelf company". In about May 1974 the shares in the Defendant were acquired by a Mr. P.R. Brooks. Following upon Mr. Brooks' acquisition of the shares in the Defendant, the Defendant changed its name to Passiona Marketers Pty. Limited, which name it retained until April 1976 when it adopted its present name (although it seems that

due to some error in the office of the Corporate Affairs Commission the change of name was not correctly registered until January 1977).

At or about the time at which Mr. Brooks acquired control of the Defendant, the Defendant acquired from Cottees General Foods Limited the assets and undertaking of what has been described in the evidence as that company's Drinks Division (perhaps its correct name was Passiona Bottling Company (Sydney) Limited). Those assets included factory premises at Auburn, and manufacturing and bottling plant for the production of soft drinks. As well, the Defendant acquired either by grant or assignment, franchises to manufacture, bottle and market the range of soft drinks, as for example, "Passiona", formerly produced by Cottees General Foods Limited, and those formerly marketed by Pepsi-Cola International (or its Australian subsidiary, Pepsi-Cola Company of Australia Pty. Limited).

The officers or former officers of the Defendant with whom I am concerned in the present case are, Mr. Brooks, Mr. L. Mojsza, Mr. D.I. Robertson, Mr. J.R. Northey, Mr. M. Allman, Mr. J.M. Newell and Mr. J.N. Baxter.

Mr. Brooks had, for a number of years, been employed in a variety of positions, both at its Head

Office and in the operation known as Coca-Cola Bottlers, Sydney, by The Coca-Cola Export Corporation, his last position being that of Marketing Manager at Coca-Cola Bottlers, Sydney. Upon his acquisition of the shares in the Defendant, Mr. Brooks became, and has since continued, as its Managing Director.

Mr. Mojsza, who holds a Master's Degree in Economics from the University of Budapest, worked for a time for Pepsi-Cola Metropolitan Bottling Company, then for a time for Passiona Bottling Company (Sydney) Limited, and then for a further period for Pepsi-Cola Company of Australia Pty. Limited (during part of which time his services were, apparently, "lent" to Cottees General Foods Limited for the purpose of providing assistance in that company's Drinks Division). In all of these positions (and while he was "on loan") Mr. Mojsza appears to have had some management accounting or advisory function. Upon Mr. Brooks' acquiring control of the Defendant, Mr. Mojsza took up a position as Finance Manager of the Defendant. Subsequently (in April 1976) Mr. Mojsza became a director of the Defendant with the title of Finance Director.

Mr. Robertson had previously worked for Coca-Cola organisation in a variety of positions, having

joined as a management trainee, having then worked in the production, finance, sales and personnel departments, and having in 1971 or 1972 become a product manager in the Marketing Services Department of Coca-Cola Bottlers, Sydney. Upon Mr. Brooks' acquiring the shares in the Defendant, Mr. Robertson took up a position of Marketing Services Manager of the Defendant. Thereafter he became, and has since continued as, Victorian Manager of the Defendant.

Mr. Northey was, for a time, Manager of the Soft Drinks Division of Cottees General Foods Limited, which position he held until the end of 1974 or early 1975. He subsequently - the evidence is not clear, but, perhaps it was in 1976 - became South Australian Manager of the Defendant, a position which he held until he retired at the end of June 1977.

Mr. Allman is an industrial chemist. For five years prior to May 1974 - one assumes, in various technical positions, but the evidence is by no means clear on the point - he was employed by the Coca-Cola organisation. In May 1974 Mr. Allman took up a position with the Defendant as Technical Manager. In April 1976 he became a director of the Defendant with the title of Technical Director.

Mr. Newell is a food technologist. Prior to May 1974 he had worked for a time for Scotts Foods

(Aust.) Pty. Limited as a quality control chemist in that company's frozen food section, and, later, for the Coca-Cola organisation - one assumes, in some technical capacity. In May 1974 he took up a position with the Defendant, in which position, he seems, subject to the direction of Mr. Allman, to be responsible (inter alia) for the formulation of the Defendant's range of soft drinks.

Mr. Baxter had, prior to September 1974, been the Managing Director of Pepsi-Cola International (or its Australian subsidiary Pepsi-Cola Company of Australia Pty. Limited). Although a new Managing Director was appointed in September 1974 Mr. Baxter stayed on until about December 1974. In February 1975 Mr. Baxter took up a position with Canada Dry Corporation as Area Manager, Australia, a position which he held until September 1976. At about the beginning of June 1975 Mr. Baxter either set up or took over an organisation or company, referred to in the evidence as Watson's Soft Drinks, selling soft drinks in the Maitland area - the conduct of the business was, however, left to two employees or associates, a Mr. Cruickshank and a Mr. Spackman Watson's Soft Drinks held a franchise from the Pepsi-Cola organisation and, as well, appears to have acted as a distributor or wholesaler of the Defendant's

range of soft drinks. In about October 1976 Mr. Baxter took up a position with the Defendant as Franchise Manager. Subsequently the company, or business of, Watson's Soft Drinks, was taken over by, or sold to "an associate company of the Pub Squash organisation".

4. THE "LAUNCH" AND MARKETING OF "SOLO" AND "PUB SQUASH" - 1973-1975

a. "Solo"

Pre 1973 The soft drink industry in Australia has changed dramatically since earlier times. That change has been reflected in a dramatic expansion of the market, particularly in that part of the market called the "on premise" market, a dramatic reduction in the number of manufacturers, and a significant domination of the market by a small number of flavours. Thus, by the early 1970's the market had expanded to an output approaching 200,000,000 Imperial gallons, with a wholesale value of the order of $300,000,000.ØØ. Of that market, some 40% represented "on premise" sales, that is, sales of bottles or cans (mainly cans of 250 or 370 ml) bought for immediate consumption by the purchaser (this part of the market is said to have been "dominated" by the Coca-Cola organisation). While some smaller manufacturers still continued in business, by far the greater

proportion (some 80%) of sales to the major metropolitan markets represented sales by three companies (or their subsidiaries or franchise holders), they being the Coca-Cola organisation (38%) the Cadbury-Schweppes organisation (32%) and Amatil (13%). In terms of flavour, the break-up of the market was (I take the 1973 figures) Cola, 35%, Lemonade, 20%, Orange 15%, Mixers (for example, Dry Ginger Ale, Tonic Water, Bitter Lemon, Soda Water), 10%, Lemon 2%, the balance representing an assorted selection of general flavours.

As these figures would demonstrate, the Coca-Cola organisation was a dominating figure in the market, a position attributed by Mr. Lowe in part to its marketing strategy of marketing its products under a specially devised name instead of by reference to flavour (for example, "Leed", instead of "Coca-Cola lemonade"). So great was the dominance of the market by the Coca-Cola organisation that, unless the Cadbury-Schweppes organisation were able to close the gap between its market share and that of the Coca-Cola organisation, the continuing profitability of the Cadbury-Schweppes organisation's soft drink market might have become doubtful.

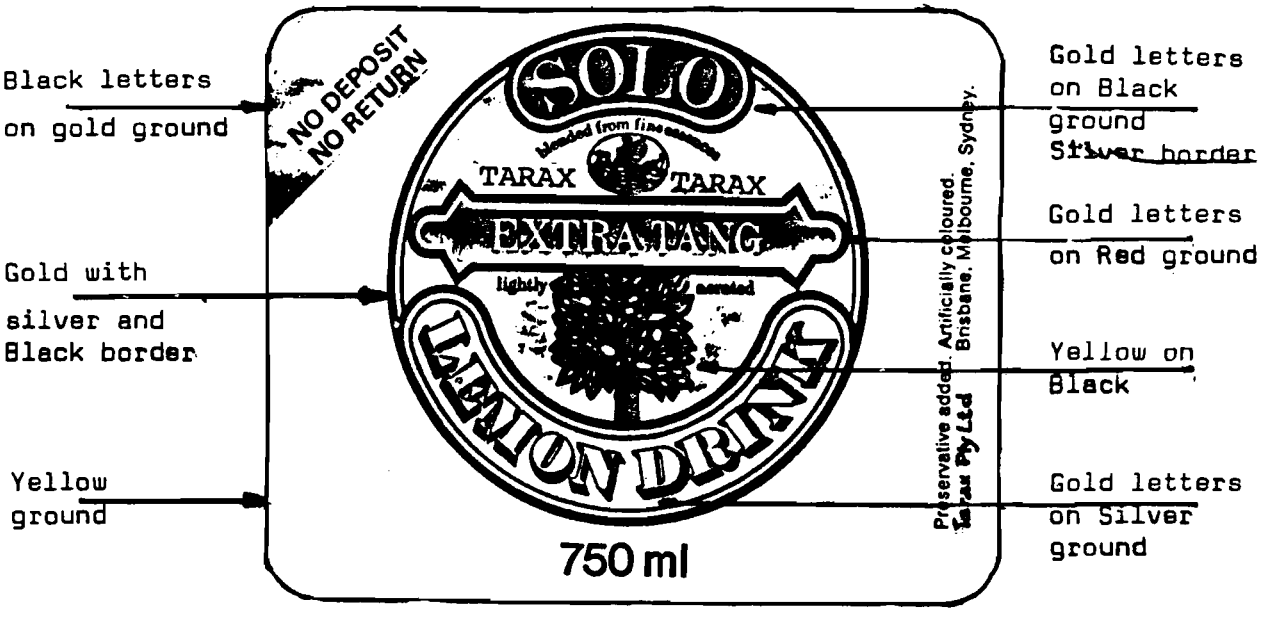
1973 It was in this context that the Cadbury-Schweppes organisation set about seeking to close the gap in

market shares. To this end, a two-pronged approach, utilising (to adopt what appears to be the current argot in the industry) a "frontal confrontation strategy" (that is, marketing a competitive Cola flavour) and a "lateral strategy" (that is, marketing a completely new flavour intended to provide a new alternative to Cola), was adopted by the Cadbury-Schweppes organisation.

Within the Cadbury-Schweppes organisation, the task of developing and promoting the proposed new product fell to Mr. Lowe. His first step in that task was, so it seems, to engage the services of a firm of market researchers, Quantum Market Research, with a view to determining the attitudes of persons who purchased and drank soft drinks. That firm's material having been made available, and having indicated that there was a real demand in the market for a flavour alternative to Cola, Mr. Lowe engaged the services of an advertising company Masius Wynne-Williams & D'arcy MacManus to assist in the development and marketing of the product. The process of development of the product and marketing "strategy" was, to say the least, unusual, for, instead of the product being first formulated, and the marketing "strategy" then determined, what happened was that a marketing "strategy" was first formulated, and, that having

been done, a product which fitted that marketing "strategy" was then developed. Thus, it was decided that the new product should be presented as an "adult" drink, the consumers of which would be robustly masculine, adventurous, even chauvinistic, in their attitudes. These themes suggested that the new product should be of a lemon squash type, a type of soft drink commonly accepted in hotels and licensed clubs and restaurants as an occasional alternative to beer. That type of product having then been determined upon, it was determined that part of any advertising campaign would be the invocation of "nostalgia" by the utilising of the slogan "a great old squash like the pubs used to make". These themes having been decided upon, it was then determined that the can, or product label, to be utilised should not resemble the then commonly used soft drink cans, or labels upon soft drink bottles, but that the cans and labels should be so designed as to invoke the "adult image" of the proposed new product. For this latter purpose special artwork was commissioned, the instruction to the designer being (inter alia) to produce a label which had "a beer feeling" and "created adult associations". The label finally adopted, which label was, so it is said, was strongly influenced by the label used on the "Budweiser" brand of beer sold in the United

States of America, used the device of a rondel or medallion which was a common feature of the labels on beer sold in Australia. With variations dependent upon the nature of the container used, it was similar to that set out below:-



(The label reproduced above is that used on the 750 ml non-returnable bottle; in the case of the 250 ml and 370 ml cans, paper labels were not used, the cans themselves being printed with the rondel or medallion on a yellow ground.)

It was not until the general marketing "strategy", the general form of the advertising campaign, and the precise form of the brand and packaging had been determined, that the Product Development staff were

commissioned to develop the proposed new product, the "product brief" given to them being to produce "a packaged lemon squash just like the pubs used to make".

While this was being done the precise form of advertising to be utilised for the "launch" was being formulated and the appropriate commercials developed. In the forefront of the advertising was a 60-second television commercial, and radio commercials taking up the themes of the television commercial. Since great stress was placed by the Plaintiffs upon both the form and context of these commercials (and, in particular the form and content of the television commercial) it is necessary to pause in the narration in order to describe them in a little more detail. They were as follow:-

(i) Television Commercial

The bulk of this commercial was devoted to action shots (accompanied by dramatic background music) of a rugged lone male canoeist shooting the rapids in a single kayak, attention being focused upon the potential dangers, such as rocky outcrops, bends, eddies, and the like upon the run down the rapids. At the conclusion of the run, the canoeist pushes his kayak ashore. He then reaches into a portable ice-box and,

having taken out and opened a can of "Solo", gulps it down. While he is drinking, a "voice-over" announcer says "You've never tasted a lemon drink like 'Solo' before ..... unless it was one of those great lemon squashes that pubs used to make ..... extra tang ..... not too many bubbles .....". As he drinks, the canoeist spills some of the liquid down his chin. He finishes his drink with a smile and wipes his chin with the back of his hand. The "voice-over" announcer says, and, as well, there is flashed on the screen, the words "'Solo' - a man's drink".

(ii) Radio Commercials

Although the first two radio commercials were not precisely identified, it seems that they were in or to the following effect:-

(A) "You hear the sound first ..... the hairs on the back of your neck rise. And you're into the white water. It's not so much the rocks you see that bother ya. It's the ones ya can't see. You've only a thin skin of fibreglass under you and no time to think. Just react. And all the time you're building up a Solo thirst. Solo lemon. With all the tang of those great

lemon squashes that pubs used to make. Solo lemon. A man's drink."

(B) "Remember those great lemon squashes the pubs used to make? Dry, hard extra tang. Today, Tarax have captured that true lemon squash in 'Solo'. 'Solo' is the lemon drink you can quaff straight down without too many bubbles getting in the way of your thirst. Just like the lemon squashes you remember. 'Solo' lemon. A man's drink."

To return to the narrative; at some stage during the development of the product Holdings applied for the registration of "Solo" as a trademark. That application was still not granted at the time at which the hearing commenced before me; nor had an application for transfer of the mark "Solo" to Cadbury-Schweppes.

When all the development work had been completed, it was decided that the initial "launch" should be a test launch, limited to two States, Victoria and Queensland. The corporate vehicle chosen for the launch was, for reasons which do not appear in the evidence, Tarax.

During the weeks prior to the beginning of December 1973 sales representatives of Tarax canvassed the major supermarkets in Melbourne and provincial

Victoria, hotels in Melbourne, and a large number of small storekeepers, milk-bars, sandwich shops and the like, circulating advertising material to them. In all probability, the advertising material included a coloured brochure or "sales presenter" (Exhibit "AA") on the front of which, over a representation of the rondel or medallion from the "Solo" label, appearing the words "Introducing SOLO Lemon Drink", and on the inside of which were the following (inter alia) words:-

" MARKET RESEARCH PROVED
a need for a lemon drink
just like the old time PUB SQUASH

. . . . .

Great product . research proven
. just like the old Pub Squash

. . . . . "

Advertising through the media commenced at about the beginning of the second week in December 1973. During that month television advertisements costing some $20,000.ØØ odd were shown on the three Melbourne commercial television stations, and on five Victorian regional and one Southern New South Wales television stations or networks. As well similar advertisements were shown on the three Brisbane television stations. As well, advertisements were broadcast on three Melbourne commercial radio stations and one Brisbane

and one Queensland provincial radio station.

From the start, "Solo" appears to have been produced by Tarax not only in Victoria but, as well, at the Tarax factory at Chullora - although at least initially, production at Chullora was limited to the production of cans. Of the "Solo" produced at the Chullora factory, at least initially, the bulk of it seems to have been "exported" to Tarax branches in Victoria, the Australian Capital Territory and Queensland or sold to wholesalers in the Northern Territory; of the remainder, the bulk of it seems to have been sold in country areas of New South Wales - probably in the Riverina area - which would have been within reach of the Victorian provincial television and radio stations, or of the television station at Albury.

1974 There appears to have been no television or radio advertising in either Victoria or Queensland in January 1974. However, the advertising campaign resumed in February 1974, and continued (although dimishing a little in April and May) until the end of May 1974, at which time, soft drink being a seasonal seller, it was stopped in Victoria and Brisbane for a while - radio advertising, however, continued in provincial Queensland.

Meantime, production of "Solo" at the Tarax

factory at Chullora continued. Although the bulk of production continued to be transferred to Tarax branches in Victoria, the Australian Capital Territory and Queensland or sold to wholesalers in the Northern Territory, I am satisfied that there were significant sales in Southern New South Wales and some small sales (in response to orders for Tarax "Lemon", a former product which was phased out) to supermarket chains in Sydney. As well, there were sales to such organisations as the Australian Services Canteens Organisation and the Railway Trading and Catering Service.

It would seem that, by the end of May or June 1974 it was determined that the limited "launch" had been successful and that a national "launch" was justified, that "launch" to commence at about the beginning of the Spring of 1974.

Radio advertising resumed in Melbourne in July 1974, the number of radio stations involved being increased to four.

The "national launch" of "Solo" commenced in September 1974, television advertisements costing approximately $57,000.ØØ odd being shown on Melbourne, Victorian provincial, Sydney, New South Wales provincial, Brisbane, Queensland provincial and Adelaide television stations, and radio advertisements being

broadcast on four Melbourne and three Sydney commercial radio stations. At or about this time representatives or salesmen from one or other of the Plaintiffs, Cadbury-Schweppes or Tarax, began canvassing the major supermarket chains and other outlets in New South Wales for orders - at this time each of Cadbury-Schweppes and Tarax, the former at the Alexandria factory, and the latter at the Chullora factory, was producing and marketing "Solo" in New *South Wales (Transcript p. 140). It is probable that those representatives or salesmen had with them the brochure or sales presenter (Exhibit "AA") to which **I referred on pp. 19 & 20.

While Tarax had originally been selected as the corporate vehicle to "launch" "Solo" in Victoria, that pattern was not continued for the purposes of the "national launch". Thus, while Tarax continued to produce and market within Victoria and Queensland, within New South Wales Tarax produced and marketed from the Chullora and Queanbeyan factories, while Cadbury-Schweppes produced and marketed from the Alexandria and Newcastle factories. In South Australia (Adelaide - September 1974, Mount Gambier - March 1975) and Tasmania (December 1974) production and marketing was by Cadbury-Schweppes.

Once the "national launch" commenced, the

intensive programme of advertising was maintained and in some respects intensified. So far as television advertising was concerned, the emphasis was switched from individual television stations to national networks, the cost of advertisements in October, November and December 1974 being respectively $57,000.ØØ odd, $46,000.ØØ odd, and $40,000.ØØ odd, bringing the total cost of television advertising for 1974 to approximately $243,000.ØØ. During the same period, radio advertising in Victoria was maintained at its previous level, that in New South Wales and Queensland was increased as use was made of regional stations and advertising commenced and was continued on two commercial radio stations in Adelaide. The total cost of radio advertising for 1974 was $56,659.ØØ. As well, there commenced in Victoria during this period a programme of cinema and theatre advertising, and billboard advertising, the cost of which for the months of October, November and December 1974 amounted to almost $35,000.ØØ.

Although the Victorian "launch" had utilised only the one form of television advertisement and the two radio advertisements which I have set out above, additional forms of television advertisement and radio advertisements were developed (and, in the case of some of the radio advertisements, utilised)

prior to the "national launch". The fresh advertisements, however, maintained what one might call the theme of the original advertisements. Thus the "macho image" (a phrase repeatedly used in the evidence) of the first television advertisement was maintained in the second (a lone sailor sailing a catamaran in a boiling surf) first screened in October 1974, and in the third (two virile men playing squash) first screened in November 1974 (cinema or theatre commercials were usually longer versions of one or other of the television commercials). So too, there was continuing emphasis, in both the "audio" in the television commercials, and in the radio commercials upon "those great lemon squashes the pubs used to make". Billboard advertising, however, does not appear to have utilised this theme.

By the end of 1974, Australian sales of "Solo" totalled some two million seven hundred and eleven thousand dozen, of which four hundred and fifty-five thousand dozen represented sales in 1973, and two million two hundred and fifty-six thousand dozen represented sales in 1974. Of the 1974 sales, the bulk, one million eight hundred and sixty-eight thousand dozen represented sales in Victoria (one million two hundred and ninety-four thousand dozen) and New South Wales (which included, as part of its

"sales territory", the Northern Territory) (five hundred and seventy-four thousand dozen).

1975 At the beginning of 1975 the identity of the production and marketing company in Victoria, in New South Wales (at Chullora and Queanbeyan) and Queensland was changed from Tarax to Drinks.

A further change in identity was effected in March 1975 when Cadbury-Schweppes took over production and marketing from Queanbeyan. Yet a further change occurred in April 1975 when Cadbury-Schweppes took over selling in Queensland.

Although the evidence is not clear on the matter, it was probably at or about this time that the label *which I have set out on p. 17 was slightly altered, the word "Tarax" where appearing on the rondel or medallion being replaced by the words "Premium Quality", and the words "Tarax Pty. Limited" appearing at the side of the label as the name of the packer, being replaced by the words "Solo Lemon Drinks".

The advertising programme continued with but little let-up throughout 1975, the cost of television advertising for that year being approximately $419,600.ØØ of which the bulk ($319,700.ØØ odd) was incurred in New South Wales ($209,700.ØØ odd) and Victoria ($110,000.ØØ odd). Radio advertising for

*See now page 620

1975 cost $161,890.ØØ, of which the bulk ($109,314.ØØ) was incurred in New South Wales ($69,732.ØØ) and Victoria $39,582.ØØ). For the first time, "Solo" was advertised in Western Australia in 1975, the bulk of the advertising being in the form of radio commercials broadcast in February and March, and from June to November, both inclusive, of that year. During this year expenditure on cinema and theatre advertising declined sharply. However, an extensive programme of newspaper and magazine advertising was undertaken, the cost, in 1975 being approximately $79,800.ØØ, of which the bulk ($57,000.ØØ odd) was incurred in New South Wales ($30,200.ØØ odd) and Victoria ($26,800.ØØ odd).

Additional features of the advertising campaign conducted in 1975 were "The Great Solo Search", which offered prizes in the form of a "Solo" jeans patch, and which was directed towards boosting off-season sales during the winter of 1975, and a joint promotion with Smirnoff Vodka, designed so it is said, to offer "Smirnoff and 'Solo'" as an alternative to "Bacardi and 'Coke'".

During 1975 additional television commercials were produced and utilised. As before, the "macho image" was maintained, the subjects being, a big-game fisherman (March 1975), a horse-breaker (March 1975),

Reasons for Judgment of his
Honour Mr. Justice Powell

a shark-fisherman (October 1975) and men engaged in wrist (or arm) wrestling (October 1975). Although not all utilised a "voice-over announcer" those which did maintained the theme "one of those lemon squashes the pubs used to make". Radio advertising used a number of variations on the same theme, as for example, "those lemon squashes the pubs used to make", "the country pub; where they still make the great lemon squashes", "those great lemon squashes a few country pubs still make".

During 1975, two new forms of "package" were introduced to the market, a 1¼ litre "Plastic-Shield" bottle, and "cluster packs" of four 285 ml non-returnable bottles. As well, Schweppes "franchise bottlers" throughout Australia were offered "Solo" in order to expand distribution into country and provincial markets.

By the end of 1975, Australian sales of "Solo" totalled some six million and eighty-one thousand dozen, of which the bulk, four million six hundred and thirty-three thousand dozen, represented sales in Victoria (one million eight hundred and thirty-four thousand dozen) and New South Wales (and the Northern Territory) (two million seven hundred and ninety-nine thousand dozen). New South Wales sales had thus increased almost five-fold from the previous

year, were more than double the Victorian sales in the previous year, were more than one and one-half times the Victorian sales for the then current year, and represented 46% of the total Australian sales for the then current year.

I pause here to remark (although, in so doing, I do not wish to be thought to be foreclosing my decision upon one of the critical issues in the present proceedings) that the impact of this advertising campaign, and, in particular, of the television advertising campaign, appears to have been quite remarkable. Nearly every witness who was called, whether by the Plaintiffs or the Defendant, recalled the television advertisements, particularly the first, and the incident of the canoeist spilling some of the drink down his chin, and many recalled the slogans "a great squash like the pubs used to make" and "a man's drink", although not all the witnesses associated the former slogan with "Solo".

Since it was during 1975 that the Defendant's product "Pub Squash" was launched on the market, it is convenient to turn now to the history of the development launch and marketing of "Pub Squash".

Before doing so, however, I should record (since the incident, and what followed from it, was relied upon by the Defendant) that on 22nd December

1975 one or other of the Plaintiffs (one assumes, Cadbury-Schweppes) had published in the "Daily Mirror" newspaper a double page colour advertisement (Exhibit "13") headed "Solo separates the men from the boys". In the foreground of the photograph reproduced in the advertisement stood a can of "Solo" (the image being some 10 inches high) while in the background stood, to the left, cans of "Pub Soda Squash" and "Shelleys Club Soda Squash", and, to the right, a can of "Shelleys Lemon Delite" (the images of the cans in the background being some 5 inches in height). (The significance of this advertisement, and, as well, of the two additional products, "Shelleys Club Soda Squash" and "Shelleys Lemon Delite" will appear later in this Judgment.)

b. <u>"Pub Squash"</u>

Although the various steps taken in the course of the development of "Pub Squash" are not, for the most part, the subject of significant dispute, some of those steps are the subject of dispute; so too are the circumstances in which some of those steps were taken. For this reason, I have, in this part of my Judgment, deliberately adopted, in many cases, neutral language; the task of determining where the truth lies in regard to matters in dispute is more conveniently dealt with later when I analyse in

detail the various issues which have been debated before me.

1974 As I have set out above, Mr. Brooks took over control of the Defendant in May 1974; at the same time the Defendant took over the factory plant and equipment at Auburn formerly used by the Drinks Division of Cottees General Foods Limited.

According to Mr. Brooks, it was his intention, from the time when he first conceived "taking over" the "operation" of the Drinks Division of Cottees General Foods Limited, to revitalise that "operation" by (inter alia) phasing out a number of soft drinks which that "operation" then produced, introducing new products, both to replace the soft drinks which were unsatisfactory and, as well, to expand the range of soft drinks produced.

According to Mr. Brooks, one of the former products which had proved unsatisfactory was a soft drink known as "Cottees 'Lemon"", and it was his intention that that soft drink should be replaced, at a comparatively early stage, by a lemon squash type soft drink to be known as "Pub Squash", a name which, so Mr. Brooks says he had had in mind for some time.

Further, according to Mr. Brooks, within two weeks of his taking control of the Defendant, he gave

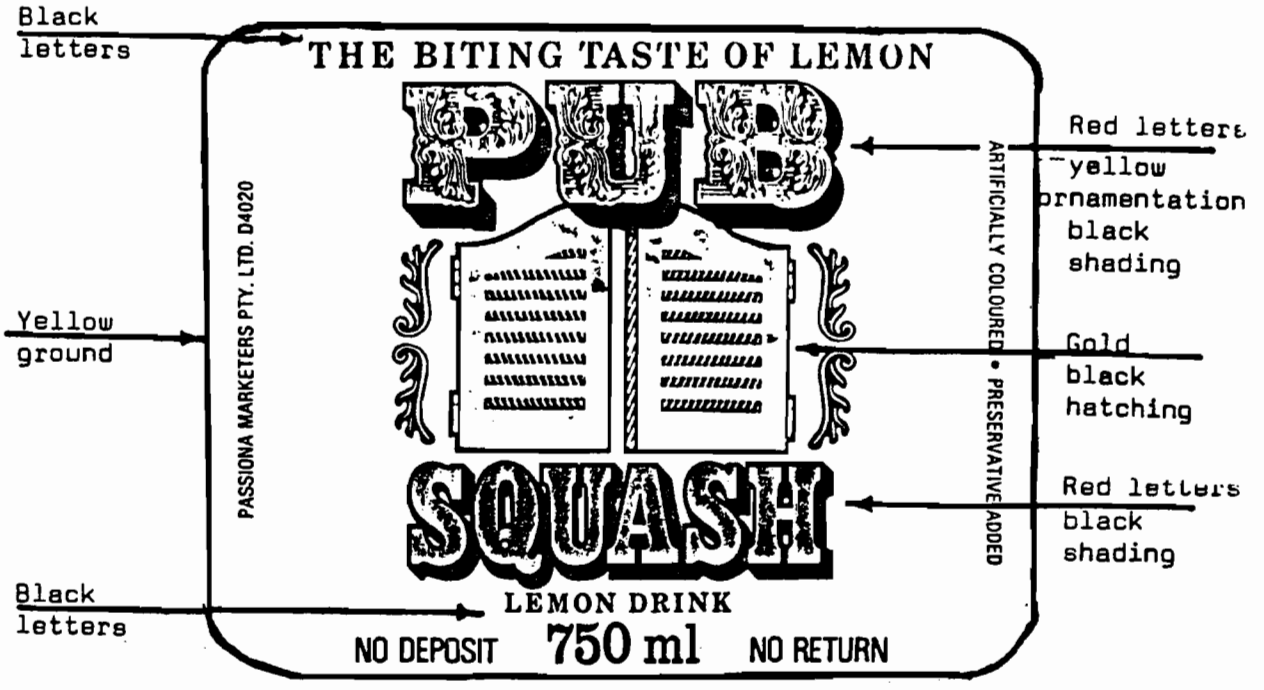
to Mr. Newell instructions to develop a lemon squash type soft drink.

Mr. Newell did, in fact, carry out work directed to formulating a lemon squash type drink, that work extending over a period of some three months (see Exhibit "27"). Initially, so Mr. Newell says he did not know the name intended to be given to the new product (Mr. Brooks says that he wanted to keep the name "under wraps"), and he merely described it, for his purposes, as "Lemon Drink" (see Exhibit "27" *p. 27). However, at about the end of August 1974 when, according to Mr. Newell, he had almost completed his work, he was told that the product was to *be called "Pub Squash" (see Exhibit "27" p. 22). The final formula was not determined upon until the period 29th August - 3rd September 1974 (Exhibit "27", "28").

Although the project was commenced in late May or early June 1974, and although the final formula was determined upon by early September 1974, no steps were taken to commission artwork for the new product, or to prepare an advertising campaign for the "launch" of the new product before late November or early December 1974. At that time, Mr. Robertson, apparently acting upon the instructions of Mr. Brooks, instructed a Mr. Harris, then and now a member of a

*Not reproduced

firm of advertising agents, Harris, Whitburn & Associates, but formerly a member or employee of another such firm, Hansen, Rubensohn-McCann, Erickson (which firm had acted for the Coca-Cola organisation) to prepare designs for a can (and, possibly for a bottle) for the new product. Preliminary design work was done by Mr. Harris, a number of concepts (one utilising lemons, and another utilising early historial Australian hotels - see Exhibits "W.1", "W.2", "W.3" and "W.4") developed. At about the middle of December 1974 Mr. Brooks visited Mr. Harris to view the progress which had been made. Mr. Brooks, so it seems, had very strong ideas about what he wanted, and, notwithstanding that Mr. Harris' firm had been commissioned to design the necessary artwork, rejected Mr. Harris' designs and, over the strong opposition of Mr. Harris, directed that his ideas be adopted. That having been done, the artwork was, so it is said, completed by some time in January 1975. That artwork was, with variations dependent upon the nature of the container used (as with "Solo", I have reproduced the paper label from the 750 ml non-returnable bottle) similar to that set out below:-



1975 According to Mr. Brooks it had been his intention to "launch" "Pub Squash" in February 1975. However, *for a variety of reasons (see Transcript p. 157) he was unable to do so, and the launch did not occur until April 1975.

Meantime, on 14th February 1975, the first Product Development Run of "Pub Squash" had been made. Such a production run involves the production of filled (but unlabelled) cans (and, perhaps, bottles - *cf & cp Transcript p. 157, Exhibit 24 (c) appendix D) with a view to determining (in a case such as the

*See now page 175

present) the acid reaction in the cans (see Trans-
*script p. 157).

At some stage (the evidence does not disclose when) Mr. Harris' firm was commissioned to produce a television commercial to accompany the "launch" of "Pub Squash". The script of the commercial finally adopted ("The Million Dollar Man" (Exhibit "33(a)")) appears not to have been completed until 24th March 1975. It was not, as were many of the "Solo" commercials, a 60 second, but only 30 second commercial. I express no view upon its "style" (for that I am not competent to judge) - I record, however, that certain features or effects appear to be common to both the "Solo" commercials and "The Million Dollar Man". Thus, the "hero" is engaged in vigorous physical endeavour (unarmed combat with an "evil villian") in which endeavour he succeeds, the "hero" "rips" the top off the can, the "spurt of mist" from the top of the can is featured, and the "hero" crushes the can when he is finished drinking. At the end, the "voice-over announcer" says "When your" (sic) "through with the hassles rip into a Pub Lemon Soda Squash".

On 3rd March 1975 Mr. Robertson, in company with a solicitor, appears to have consulted a member of the well known firm of Patent Attorneys, Messrs. Arthur S. Cave & Co. with a view to ascertaining

whether or not the Defendant could register the words "Pub Squash" as a trade mark. On 12th March 1975 (Exhibit "21(a)") that firm, having, apparently, carried out the usual searches, advised that the words were not the subject of any registration or pending application for registration; however, they advised that, in their view, because of the descriptive nature of the words, they were not registerable "per se" as a trade mark. They concluded by recording that an appropriate label was to be submitted for the purpose of seeking registration of the label as a trade mark.

The first sales of "Pub Squash" are said *(Transcript p. 157) to have been made on 8th April 1975; this seems, however, to have been but a small scale production run, as full-scale production is said **(Transcript p. 295) not to have occurred until June or July 1975 (this seems to be confirmed by the fact that the first deliveries to Woolworths Limited seem to have amounted to only 154 cartons of 24 cans in the 4 weeks to 21st May 1975, and the further fact that only another 457 cartons were delivered to Woolworths Limited in the following 4 weeks - cf & cp. the deliveries of the 370 ml can of "Solo" in the same period - 2130 and 1697 cartons respectively - (Exhibit "36").

* See now page 175
**See now page 355

The advertising programme for the "Pub Squash" launch commenced on 24th April 1975. In contrast to the "national launch" of "Solo" it was low-key; it was limited to the screening of "The Million Dollar Man" on one metropolitan television station at various times over a period of three weeks, the total cost being $19,000.ØØ odd. No radio commercials were broadcast.

On 6th May 1975 the Defendant lodged an application (Exhibit "21(b)") for registration as a trade mark, of the label which I have set out above on *p. 30. The label has since been registered in Class 32 No. B286,987.

At some time (the evidence is not clear, but it seems to have been before September 1975) the name of the Defendant's product was changed from "Pub Squash" to "Pub Soda Squash" and the label which I *have set out on p. 30 was amended accordingly, the words "Soda Squash" in letters approximately one third less in size replacing the single word "Squash" below the bar doors on the label. This change seems to have been necessitated by the provisions of the Regulations made pursuant to the Pure Food Act 1908, the pure juice content of the drink being less than that required if it were to be lawfully described as a "squash".

*See now page 638

A further 30-second television commercial, known as "Furnace" appears to have been prepared (although, apparently, not screened until January 1976 - but cf and cp. Exhibit "32(a)" and "32(b)") in September 1975. As its name suggests, it deals with a man working in a factory near a blast furnace. At the end of the commercial the "voice-over announcer" says "When the heat is on, and your throat is aching for the local, rip into a Pub Soda Squash; drown that thirst with the biting taste of lemon in Pub Soda Squash.".

In about October 1975 the Defendant set up a warehouse in Victoria and commenced selling its products to wholesalers in that State.

5. SUBSEQUENT DEVELOPMENTS - 1976-1977

a. "Solo"

1976 The advertisement (Exhibit "13") published in the "Daily Mirror" newspaper of 22nd December 1975 *(see p. 27 above) provoked a letter dated 13th January 1976 from Messrs. Arthur S. Cave & Co. to Cadbury-Schweppes, which letter (omitting formal parts) was in the following terms:-

" re Passiona Marketers Pty. Limited
'PUB SQUASH' - 'PUB SODA SQUASH'

We act for Passiona Marketers Pty. Limited, the proprietor of the above trade marks. Our client has used its trade marks continuously and

*See now page 634

extensively and has established substantial goodwill and reputation in the trade marks as applied to goods of its manufacture.

Our client's attention has been directed to a double page advertisement which appeared in the Sydney 'Daily Mirror' of 22nd December, 1975. This advertisement features cans of various Shelleys soft drinks and a can of our client's 'PUB SODA SQUASH'. One can, viz 'SOLO' lemon drink, is located ahead of the others and is larger in the advertisement than the others. Also the advertisement includes the words 'SOLO SEPARATES THE MEN FROM THE BOYS'.

Our client contends and we agree that: (a) your advertisement is a deliberate attempt by you to mislead the purchasing public into the belief that our client's 'PUB SODA SQUASH' is a product of Cadbury Schweppes Pty. Limited; (b) that your 'SOLO' lemon drink is a superior product to our client's 'PUB SODA SQUASH'; and (c) that having regard to the use of the trade marks "PUB SQUASH" and 'PUB SODA SQUASH' by our client the use by you of a can of our client's 'PUB SODA SQUASH' in the advertisement complained of, is false advertising which is likely to deceive the purchasing public and cause damage to our client.

We are therefore instructed to demand that you give the following undertaking:

1. You will immediately give a written assurance that you will not repeat the advertisement complained of and that this assurance will also extend to future advertisements caused to be published by you, in that you will not include any of our client's products in your advertisements.

2. That you will immediately cause to be published in the 'Daily Mirror' and in all other newspapers, trade journals and the like in which the advertisement complained of has appeared, a notice of apology for having included our client's product in the advertisement and that the said advertisement in its present form will not be repeated.

> Your acknowledgement of this letter and your agreement to the undertaking set out above are required within seven days of the date hereof. Otherwise our client will take such action as it is advised to protect its rights in this matter."

to which letter, Cadbury-Schweppes' solicitors, Messrs. Hedderwick, Fookes & Alston, replied on 20th January 1976 in the following terms:-

> "We act on behalf of Cadbury-Schweppes Pty. Ltd. and have been handed your letter of 13th January 1976. We have also had the opportunity to view a copy of the advertisement complained of.
>
> Our client denies that the advertisement is an attempt to mislead or that it is capable of interpretation sought to be drawn from it. Our client further denies that there can be any suggestion of false advertising or deception.
>
> On the contrary, our client considers the advertisement is a reasonable attempt on its part to inform the public that there is no relationship between its product and other products similarly packaged and presented which have subsequently appeared on the market."

After a delay of some five or six weeks, Messrs. Maunder & Jeffrey, on 4th March 1976 returned to the fray with a letter addressed to Messrs. Hedderwick Fookes & Alston which letter was in the following terms:-

> "We act for Passiona Marketers Pty. Limited on whose behalf Messrs. Arthur S. Cave & Co., wrote to you on 13th January. We have had the opportunity of perusing your reply of 20th January.
>
> We have sought the opinion of Senior Counsel, who has advised that your client's conduct may amount to a breach under the Trade Practices Act 1974; however, we now understand from our

> client that Mr. Saunders of your client company has indicated that such conduct will not occur again and that the posters based upon the offending advertisement have been removed from various retail outlets. Accordingly, in the circumstances we are instructed to take no further action in this particular case, but in view of Counsel's advice were your client to engage in similar conduct in the future, proceedings would be commenced forthwith."

Whether in response to the Defendant's complaint or not, the advertisement in question was not repeated.

This incident relating to the advertisement makes it convenient to pause in the narrative to record that by December 1975 there were available on the market, in addition to "Solo" and "Pub Soda Squash" at least two other lemon flavoured soft drinks, they being "Shelley's Club Soda Squash" (see also Exhibit "7") and "Shelley's Lemon Delite". As a reference to the advertisement (Exhibit "13") will demonstrate, each of those drinks, when packed in a can, was packed in a can, the basic colour of which was a shade of yellow either identical with, or very similar, to that used on the "Solo" can, and upon each of which cans the name was depicted in a rondel or medallion different from, but not unlike, that upon the "Solo" can. It may be that by the same time (if not, it had certainly occurred by the time the proceedings came on for hearing) there were available upon the market a further two similar soft drinks "Leed" Lemon Soda

Squash" (produced by Coca-Cola Bottlers) (see Exhibit "4") and "'Farmland' Sparkling Lemon Flavour" (produced by or for G.J. Coles and Company Limited) (see Exhibit "6") each of which was packed in a can which utilised a basic yellow ground and a rondel or medallion device which, to a greater or lesser extent, was similar to the rondel or medallion on the "Solo" can. Finally, it should be recorded that from a time earlier than December 1973 there had been, and there still, in 1976, was available in Sydney a further product "'Golden Circle' Lemon Drink" (produced by Golden Circle Cannery, Brisbane) (see Exhibit "35") packed in a can utilising a basic yellow ground, but utilising not a rondel or medallion but a representation of lemons; this product appears to have been marketed principally in Queensland, its sales in New South Wales (which do not appear to have been great) being, for the most part through the Franklins Stores chain and through a number (perhaps 20) beach kiosks in the metropolitan area.

The advertising programme which had previously been embarked upon continued through 1976. However, while the level of television advertising appears to have remained much the same (the cost, that year, was $411,732.ØØ) the level of radio advertising (down to $42,480.ØØ) and newspaper and magazine advertising

(down to $1,940.ØØ) was markedly reduced, while theatre cinema and bill-board advertising appears to have been discontinued until the beginning of 1977. Of the advertising the bulk (about 75% of television, and in excess of 50% of radio, advertising) was in New South Wales and Victoria.

Until about September 1976, the television commercials utilised in the campaign were either those *which I have previously described (see pp. 18, 23) or shorter or longer, or slightly revamped, versions of them, the basic theme and "voice-over" being retained in each case (cf & cp. Exhibits "F" and "N"). However, as from September 1976 a change was introduced; although the visual emphasis remained on robust masculine activity, the "voice-over" no longer used such phrases as "those great lemon squashes the pubs used to make" but, rather, tended to concentrate on such phrases as "'Solo Lemon'. A man's drink" and "'Solo'. A man's drink." 'Solo' says it all." - although, other phrases, such as "When you want a man's drink, dont' let anyone offer you an imitation of 'Solo'." and "'Solo'. The thirst crusher." **were, at times, used (see Transcript p. 100; Exhibit "N"). That change persisted at least until the commencement of the hearing before me.

*See now pages 621, 628
**See now page 136

Australian sales of "Solo" for 1976 (five million one hundred and twenty-one thousand dozen) were some 15% lower than they had been in 1975. This, however, was not due to an Australia-wide drop in sales, for in both Queensland and South Australia sales increased (the increases over 1975 being 27½% and 7% respectively). Nor were the decreases uniform in those States in which sales fell. Thus, in New South Wales, sales fell to 66.7% of the 1975 figure, in the Australian Capital Territory the fall was to 87.3% of the 1975 figure, while in Victoria the fall was only to 90.2% of the 1975 figure. These figures, in the light of the other evidence suggest that the fall was due not to a fall off in public demand for a lemon squash type of soft drink but to the competition (a word which, at this stage, I use in a neutral sense) provided, principally by the Defendant, but also by the other products which had been introduced to the market.

1977 At the beginning of 1977 Cadbury-Schweppes took over sales from the Chullora factory.

As from that time the position would seem to have been that except in Victoria, where production and sales of "Solo" remained in the hands of Drinks, all production and selling of "Solo" was centred on Cadbury-Schweppes.

On 18th March 1977 Cadbury-Schweppes lodged with the Registrar of Companies for South Australia an application to register in that State the business name "Pub Squash Company" which business name was registered on 14th March 1977. In its application Cadbury-Schweppes described its intended business as "manufacture and distribution of aerated waters" and stated that the proposed date of commencement of business was 1st April 1977.

On or about 15th March 1977 Cadbury-Schweppes lodged a similar application for Tasmania. However, the fate of that application does not appear from the evidence.

On 21st April 1977, the Defendant, which had commenced operating in South Australia in the second half of 1976 caused to be issued out of the Supreme Court of South Australia a writ in which it sought (inter alia) injunctions directed to Cadbury-Schweppes restraining that company from infringing the Defendant's registered trade mark and from passing off. On 26th April 1977 Hogarth J., in the absence of Cadbury-Schweppes, granted interim injunctions against that company, which injunctions were dissolved by Jacobs J. on 22nd June 1977, Cadbury-Schweppes having, so it seems, proferred undertakings not to manufacture or distribute or to accept orders

Reasons for Judgment of his
Honour Mr. Justice Powell

for aerated waters under the style "The Pub Squash Company" pending the determination of the proceedings. Those proceedings were at the time of the hearing before me not determined.

Meantime, on 27th May 1977 Cadbury-Schweppes had filed a Statement of Change in registered particulars, the nature of its business then being described as "sale of syrup concentrates" and the date of commencement as 10th May 1977.

At some time (the date does not appear in the evidence) Cadbury-Schweppes commenced proceedings (No. 1083 of 1977) in this Division seeking injunctions restraining The Coca-Cola Export Corporation from passing off its "Leed Lemon Soda Squash" as "Solo". Those proceedings were compromised, injunctions being granted and Orders made by consent and without admissions on or about 6th May 1977 (Exhibit "Q"). The Coca-Cola Export Corporation has since adopted a new style of can, which can, although not approved by Cadbury-Schweppes, seemingly does not meet with objection by that company; the can, although still yellow in colour, does not utilise the device of a rondel or medallion.

The advertising programme continued into 1977. By July 1977 the amount spent on television advertising was $152,926.ØØ, the bulk of it ($115,014.ØØ)

being spent in New South Wales and Victoria (the figures being $66,574.ØØ and $48,440.ØØ respectively). Whether or not radio advertising continued is not clear from the evidence, but it seems probable. In the early part of the year there was a return to bill-board advertising, some $20,649.ØØ being spent in New South Wales ($10,377.ØØ), Victoria $6,096.ØØ) and Queensland ($4,176.ØØ). No sales figures for 1977 were made available to me during the hearing.

b. "Pub Squash"

1976 As I have previously indicated, the Defendant set up a warehouse in Victoria in late 1975. As from the early part of 1976 it appears to have commenced production from factory premises located in that State. Further, as I have but recently mentioned, the Defendant, in the second half of 1976 commenced production and selling in South Australia.

As I have previously indicated, it was during 1976 that the Defendant changed its name from Passiona Marketers Pty. Limited to its present name.

The Defendant's "Furnace" television commercial was screened in New South Wales during January 1976 (but cf & cp. Exhibits "32(a)" and "32(b)") at a cost of about $20,000.00. Then in February 1976 the Defendant conducted in New South Wales a radio promotion called "Go for Gold", the cost being about

$12,000.ØØ; this promotion, however, was not limited to "Pub Soda Squash" but extended, as well, to its other products, "Pepsi-Cola", Ginger Beer and "Big Boy" Lemonade.

At some stage (apparently in late 1974 or early *1975 - see Transcript pp. 225-6) the Defendant had registered as a Trade Mark for Australia the word "Uncola", a word or mark used extensively in the United States of America by the 7-Up Corporation. This step, so it seems, was taken with a view to the Defendant using in Australia an advertising campaign, based upon the word "Uncola", which had apparently met with some success in the United States of America. A television campaign for "Pub Soda Squash", based on the "Uncola" theme appears to have been conducted in New South Wales during the months of September to December 1976 (but cf & cp. Exhibits "32(a)", "32(b)" and "33(d)") the cost being approximately $125,000.ØØ, by far the Defendant's greatest expenditure on advertising to that time. As from about this time the "get-up" of the "Pub Soda Squash" cans and bottles was slightly changed, the words "The biting taste of lemon, which had previous appeared above the word "Pub", being replaced by the words "The 'Uncola'".

1977 Early in 1977 the Defendant appears to have set up a manufacturing facility in Queensland.

*See now pages 262-3

I record here, since the Defendant places some reliance upon it, that as from about March 1977 Cadbury-Schweppes in South Australia "exchanged" with the Defendant empty bottles for the Defendant's products which had apparently come into its possession (see Exhibit "14").

I also record here, in order to complete the history from the Defendant's side of the matter, that in late April 1977 the Defendant in South Australia commenced the proceedings to which I have referred *on p. 38 to restrain Cadbury-Schweppes from "passing-off" "Solo" as "Pub Soda Squash".

In the months of February and March 1977, the Defendant conducted in New South Wales a further "promotion", this "promotion" being known as "The Half-Million Dollar Promotion". Whether or not the "promotion" extended to the whole range of the Defendant's products does not appear from the evidence. The total cost of the promotion was $74,300.ØØ odd, of which $37,500.ØØ odd represented television advertising, $14,000.ØØ was for newspaper advertising and $22,800.ØØ odd was for radio advertising.

Shortly thereafter, for a period of three weeks in March and April 1977 the Defendant conducted in New South Wales a radio campaign called the "Easter Show Promotion". Despite its vainglorius title, the

promotion was not very extensive, involving, as it did, a total of only 20 60-second and 70 30 second advertisements over a period of three weeks; the cost was only of the order of $4,000.ØØ.

Finally, in June 1977 there was prepared (whether or not it was screened is by no means clear - *cf & cp. Transcript pp. 445, 460-1, Exhibits "32(a)" and "32(b)") a further television commercial for "Pub Soda Squash" called "Kneeboard" (Exhibit "33(c)"). Since the Plaintiffs sought to lay some emphasis upon one aspect of this commercial I should describe it briefly. In short, it depicts the "adventures" of a "young surfer-looking bloke", the nature of which "adventures" can readily be visualized from the "voice-over" which was as follows:-

> "Well I'd been working all day, trying to make the thing pay .... and I was hitching with my kneeboard to the water .... Man I was thirsty and dry .... and then this chick came driving by .... and she said 'Step inside, my dear, and I'll take you' .... and then she laid this can of 'Pub Squash' on me .... She said 'you need it I see' .... I drank it all down .... And it tasted like a Lemon Squash oughta .... Now that lady has made me feel better .... And if she wants to be friendly, I'll let her .... Cause she laid that can of 'Pub Squash' on me .... She laid that cold can of 'Pub Squash' on me."

That particular aspect of the script (which was said to have been deleted, on legal advice, from the finished commercial) upon which the Plaintiffs laid emphasis was "the surfer" spilling the drink as he

*Not reproduced

drank it, an incident taken, or "lifted", so it was suggested, from the "Solo" television commercials *(see p. 18 (above).

Since, except for the computer "print-outs" from Woolworth's Limited (Exhibit "36") there are no sales figures available for "Pub Soda Squash" it is impossible to know to what extent the Defendant has succeeded in its marketing of its product. Nor, since, although it is obviously a major customer, Woolworth's Limited is but one customer, do the computer "print-outs" provide much of a guide. However, for whatever assistance it may provide as a guide I record that (if I interpret the "print-outs" correctly) the Defendant appears to have sold to Woolworth's Limited eighteen thousand seven hundred and eighty-seven dozen 370 ml cans of "Pub Soda Squash" in the twelve months to the end of December 1976, and, thirty-four thousand two hundred and ninety dozen such cans in the twelve months to the end of December 1977; for the same periods sales of the equivalent size cans of "Solo" appear to be twenty-six thousand four hundred and seventy-seven dozen, and fifty thousand nine hundred and twenty-eight dozen, respectively. The increase in sales for the two periods appears to be, in the case of "Pub Soda Squash", 82%, and in the case of "Solo", 92%.

*See now page 621

This, then, in as neutral a fashion as I have been able to record it, is the historical background in which the proceedings were commenced.

6. THE "MARKET PLACE"

Before turning to deal with the issues which have been debated before me, it is, perhaps, convenient to deal, in a little detail, with the nature of the "market place" in which both "Solo" and "Pub Squash" were sold, for the nature of the "market place" has a bearing on those issues.

The three principal types of sales location for soft drinks are supermarkets, mixed businesses and milk-bars and similar places.

Supermarkets cater principally for the "off-premise" or "take home" market. Although there are, no doubt, variations between the various supermarket chains, and, indeed, between individual stores in any particular supermarket chain, it is not uncommon for all soft drinks to be grouped together on the display shelves, bottles, according to size, being grouped together, and cans, again, according to size, being grouped together. In some, but not all, supermarkets, there is a further sub-grouping of flavours within each group; in others there may be a sub-grouping of each producer's drink (see, for *example, Transcript p. 526).

Mixed businesses seem to cater for both the "off-premise" and "on premise" market. In such places (and, perhaps, as well, in some milk-bars and similar places) it seems to be

*See now page 505

commonplace to have upright glass-fronted display refrigerators from which customers serve themselves, taking their drinks to the counter after they have selected them, and paying for them at the counter. Again, practices seem to vary, but it seems not uncommon for bottles, according to size, to be grouped together (such display refrigerators seem most commonly to be triple-fronted), with cans being grouped together in another part of the refrigerator. While some shop-keepers (see, for *example, Transcript pp. 512, 523) seem careful to separate similar types of drinks, others seem to group such drinks **together (see, for example Transcript pp. 56A, 63).

Milk-bars and other similar places cater mainly for the "on-premise" market. In those milk-bars and similar places which have display refrigerators, the practice seems to be much the same as I have set out above. Where display refrigerators are not in use, soft drinks seem to be kept either in a refrigerated cabinet forming part of the counter (see, for example, ***Transcript p. 74), or in a cool room behind the counter (see, ****for example, Transcript p. 513). In such locations it is usual for customers to ask by name for the soft drinks which they want, and to be served by the shop-keeper.

While customers purchasing soft drinks may take more care in making their selections, the evidence would seem to suggest that those who purchase soft drinks in mixed businesses and milk-bars are often less careful in making their selections. But whatever be the location where a purchase is made, it is,

* See now pages 488, 503
** See now pages 93, 102
*** See now page 116
****See now page 489

in the light of current marketing methods, hard to avoid the conclusion that mistakes in selection are not uncommon.

7. "PASSING-OFF"

a. The Law

It is trite law that it is an actionable wrong for a person in trade or business to represent, whether deliberately or not (although fraud seems to have been a necessary ingredient in the old common law action for damages), that his goods are those, or that his business is that, of another; and that, whether the representation of which complaint is made is effected by direct statements, or by some indirect means such as the use of names or "badges" commonly associated with the goods or business of that other, or any names or "badges" colourably resembling those commonly associated with the goods or business of that other, in connection with goods or a business or the same or a similar kind, in such a way as to be calculated to cause the ordinary purchasers of that other's goods, or the ordinary customers of that other's business, to take the goods to be those, or the business to be that, of that other (see, for example, Kerly's Law of Trade Marks and Trade Names 10 Ed. 362 Para. 362).

Since the object of the law's intervention into the arena of trade or business is the preservation

of a trader's or businessman's, goodwill from appropriation by another trader or businessman, a plaintiff must, if he is to succeed in an action for passing-off, establish:-

(i) that his goods have, or his business has, acquired a certain goodwill or reputation;

(ii) that the actions of the defendant have caused, or, in all probability, will cause, the ordinary purchasers of the plaintiff's goods, or the ordinary customers of the plaintiff's business, to believe that the defendant's goods are those, or that the defendant's business is that, of the Plaintiff;

(iii) that, in consequence, the plaintiff has suffered, or is likely to suffer, injury in his trade or business (see, for example, Turner v. General Motors (Australia) Pty. Limited (1929) 42 C.L.R. 352, 361-3 per Isaacs J. and cases there cited).

Whether or not the plaintiff's goods have, or his business has, acquired the requisite goodwill or reputation is, so it seems to me, essentially a question of fact, to be determined upon a consideration of the name or "badge" in respect of which goodwill or reputation is claimed, its nature, its history, the nature and history of its use by the

plaintiff, and the extent to which it is or had been used by others, be they purchasers, customers or competitors. If this be correct, as I believe it to be, then it follows, in my view, that, in contrast to the situation which exists under the Trade Marks Act 1955 (see, for example, Samuel Taylor Pty. Limited v. The Registrar of Trade Marks (1959) 102 C.L.R. 650) there can be no room, in one's consideration of that question, for such a priori notions as "a descriptive word can never be or become distinctive". Support for this view may be found in the Judgment of Gibbs J. in B.M. Auto Sales Pty. Limited v. Budget Rent A Car System Pty. Limited (1976) 12 A.L.R. 363, 369).

But what is the nature of the goodwill or reputation which must be established? Must it be established that the name or "badge" is universally and exclusively associated with the plaintiff's goods or business? And what is the relevant time for establishing that goodwill or reputation? Although some of the authorities (see, for example, Leahy, Kelly & Leahy v. Glover (1893) 10 R.P.C. 141, 155; S. Chivers & Sons v. S. Chivers & Co. Limited (1900) 17 R.P.C. 420, 428-430) seem to suggest that universal and exclusive association is the test which must be met, it seems to me that, while meeting that test may be the only way, in any particular case, to establish

that a surname, or a descriptive phrase, has become distinctive of the plaintiff's goods or business, the true test is, whether the name or "badge" has become, among those commonly concerned to buy goods of the type in question, or to deal with businesses of the type in question, distinctive of the plaintiff's goods or business - so much, so it seems to me, is suggested by the Judgment of Lindley L.J. in Powell v. The Birmingham Vinegar Brewery Company Limited ((1896) 13 R.P.C. 235, 254 ll.42-57; see to the like effect, the views of A.L. Smith L.J. ibid at 262 ll.37-49). If it be established that the name or "badge" has, in fact, become distinctive in the relevant sense it matters not that purchasers or customers do not know the identity of the manufacturer of the goods or of the proprietor of the business (William Edge & Sons Limited v. William Niccolls & Sons Limited (1911) A.C. 693; 28 R.P.C. 582). Although, in my view, the relevant date for determining whether or not a plaintiff has established the necessary goodwill or reputation is the date of commencement of the proceedings, one must accept that, more often than not that question will be concluded by ascertaining whether or not, at the date of the commencement of the conduct on the part of the defendant complained of, the plaintiff had acquired

the necessary goodwill or reputation; for, if at that time, he had not, it would be unlikely in the extreme that thereafter he would (see the analysis of the evidence in T. Oertli A.G. v. E.J. Bowman (London) Limited by Jenkins L.J. (1957) R.P.C. 388, 397, 1.35 - 398 1.31, and by Lord Simonds L.C. (1959) R.P.C. 1, 4 1.42 - 5 1.18).

Even if the relevant goodwill or reputation be established, the plaintiff, in order to succeed, must still establish actual deception or the probability of deception; that deception need not be limited to the defendant but may extend to cases of deception by retailers of the defendant's goods (see, for example, Singer Manufacturing Company v. Loog (1880) 18 Ch. D. 395, 412 per James L.J.; Reddaway v. Banham (1896) A.C. 199, 215-6 per Lord Macnaghten; Lee Kar Choo v. Lee Lean Choon (1967) 1 A.C. 617). While evidence of actual deception need not be given if the Court be otherwise satisfied of the probability of deception, cases of actual deception are not necessarily conclusive of the issue, for they may be insignificant in number (see, for example, Leahy, Kelly & Leahy v. Glover (supra)) or in effect (see, for example, Borthwick v. The Evening Post (1888) L.R. 37 Ch. D 449) or may not be brought about or facilitated by the actions of the defendant (see, for example,

Civil Service Supply Association v. Deen (1879) L.R. 13 Ch.D. 512). Where there is no evidence of actual deception, the other evidence adduced must, so it has been said, be "of the most cogent character" (see Gor-Ray Limited v. Gilray Skirts Limited (1952) 69 R.P.C. 99, 105-6 per Harman J. (as he then was)); yet the apparent burden imposed by this suggested test may, in an appropriate case be lessened, for the authorities establish that where an intention to deceive is found, it is permissible (although not obligatory) for the Court to infer that that intention has been, or, in all probability will be, effectual (Slazenger v. Feltham (1889) 6 R.P.C. 531, 538 per Lindley L.J., Claudius Ash, Sons & Co. v. Invicta Manufacturing Co. (1912) 28 R.P.C. 597, 603). On this latter aspect, the Court must be on its guard against finding fraud merely because there has been an imitation of another's goods, get-up, method of trading or trading style (see, for example, Goya Limited v. Gala of London Limited (1952) 69 R.P.C. 188).

Finally, it is said that damage is an essential ingredient of the cause of action. So it is, but it seems to me that, unless the very circumstances of any particular case suggested otherwise, the Court would be entitled, if passing-off be found established,

the Court would be entitled to presume that the plaintiff had suffered some damage (see, for example, Henderson v. Radio Corporation Pty. Limited 60 S.R. 576, (1969) R.P.C. 218).

b. The Facts

The first question to be determined is whether, by the relevant date (be that date April/May 1975, or June 1977) "Solo" had acquired with the public any, and, if so, what, goodwill or reputation.

The evidence relevant to the determination of this question consisted not only of the evidence upon which I have drawn to set out the history of the launch and marketing of "Solo" which I have set out above, but as well, of the evidence of somewhat in excess of fifty of the witnesses ultimately called to give evidence in the proceedings. However, while some fifty or so witnesses gave at least some evidence which might bear upon the question, I have thought it proper, in determining this question, to concentrate upon some thirty witnesses or thereabouts, those witnesses being, for the most part a group which, for convenience sake, came to be described during the proceedings as "confusion witnesses". In general terms, the group comprised persons accustomed to buying soft drinks, and a number of persons engaged in the day to day selling of soft drinks.

Thus, so it seemed to me, this group truly represented, for the purpose of the proceedings, the "market place" or "the buying public". By contrast, the officers both of the Plaintiffs, and of the Defendant, and, as well, some of the officers of the supermarket chains (as, for example, Mr. Hack, the Promotions Manager of Franklins Stores, and Messrs. Martin and Meagher, the Merchandise Manager of, and a Buyer for, Woolworths Limited) while convenient sources of information on such matters as advertising, sales and the like, were otherwise too far removed from "the market place" to represent the views and attitudes of "the buying public". Even some of the "confusion witnesses" proved to be less helpful than might, at first, have been thought; for, although engaged in the day to day selling of some form or other of soft drink, their activities did not seem to represent the norm in "market place". Thus those who were hotel-keepers or who worked as barmen or bar attendants in hotels or restaurants (as, for example, *Miss Hadlind, Transcript pp. 409 et seq., Miss Waters, **Transcript pp. 490 et seq., Mr. White, Transcript ***pp. 496 et seq., Mr. Mosman, Transcript pp. 514 et seq.) worked in an environment in which, so it would

* See now page 424
** See now page 459
***See now page 467

seem, it was not customary to order drinks by brand name, the customary order being merely for "a lemon squash"; whereas, those shopkeepers (as, for example, *Mr. R. Essey, Transcript pp. 518 et seq.) who had display refrigerators relied, for the most part, upon customers serving themselves.

I have read the evidence of the confusion witnesses on a number of occasions. Having done so, I am satisfied that, even by the early months of 1975, "Solo" had attained in New South Wales and elsewhere a significant level of recognition and acceptance among persons accustomed to buy soft drinks. I am further satisfied that that level of recognition and acceptance was not only maintained but increased in the ensuing two years. I am confirmed in my assessment of the evidence of "the confusion witnesses" by the evidence as to sales figures which has been given and, as well, by the evidence of the officers of the supermarket chains, all of whom confirm the success of "Solo" in the market.

So to find, however, does not conclude the matter, for it is necessary to determine what was the nature and extent of the goodwill and reputation which "Solo" had, by early 1975, attained, and which it thereafter maintained. The determination of this question is less easy than was the determination of the former.

*See now page 496

Nonetheless, I am persuaded that what those members of the general public who, in 1975, were accustomed to buy soft drinks recognised and accepted was that there was available upon the market a lemon squash type of soft drink, marketed under the name of "Solo", packaged, principally in yellow cans bearing a rondel-like or medallion-like device, but also in bottles featuring a similar label, and widely advertised on television by advertisements featuring a rugged masculine figure indulging, according to the advertisement seen, in one or other forms of rugged masculine activity, but more often than not in shooting the rapids in a kayak. I am not, however, persuaded that any of the variants upon the phrase "those great old squashes like the pubs used to make" and "a man's drink" was generally associated with "Solo". In coming to this latter conclusion I do not rely solely upon the evidence of "the confusion witnesses" (although, in my view, that evidence, looked at uncritically, supports it), for one must recognise that the fact that many of the confusion witnesses, by the time of the hearing, tended to associate the phrase "those great old squashes the pubs used to make" with the Defendant's product could well be due to the fact that, by then "Pub Squash" had been on the market for two years; rather, in

addition to that evidence, I have had regard to two particular features of the advertisements themselves, namely, the fact that television is principally a visual medium which the "audio" tends to have less impact than the visual image, and, secondly, the fact that no matter what variation be worked upon it, the phrase "those great old squashes the pubs used to make" is essentially descriptive of the type of product be advertised - it does not, of itself, identify, or denote the origin of, the product being advertised (cf & cp. the slogan in issue in Chemical Corporation of America v. Anheuser-Busch Inc. (1962) 306 Fed. R. (2d) 433).

This, then, being, in my view, the nature and extent of "Solo's" goodwill and reputation with the public, I must now determine whether, in marketing its product under the name, and in the "get-up" adopted by it, the Defendant, whether deliberately (and thus, for the purposes of the law of "passing-off", "fraudulently") or not "passed-off", or enabled others to "pass-off" its product as "Solo".

It would be an easy, but, in my view, too simplistic an, approach to this problem to say that, since, as the evidence demonstrates, there have been cases where persons seeking to buy "Solo" have either selected, or been given "Pub Squash", this question

must necessarily be concluded against the Defendant. Rather, so it seems to me, the whole of the evidence must be examined before one can properly determine the issue.

As I understand the evidence of "the confusion witnesses" the principal, if not the only, part of the market in which the wrong product has been selected or given, is in relation to cans; it may be, however, that similar incidents involving the sale of bottles have also occurred. The source of the problem seems to lie in the facts, firstly, that the cans in which soft drinks, in general, are sold come from a limited number of suppliers and are thus, for the most part, similar, if not identical, in size and configuration; and, secondly, that the ground, or predominant colour of the cans in which "Solo" and "Pub Squash" were and are marketed, is yellow. (If there have been cases of the incorrect selection or supply of bottles similar comments could well be made - cf and cp. Exhibits "J" and "L", the two 1.25 l. plastishield bottles in which "Solo" and "Pub Squash" are now marketed). These facts, so Mr. Bannon Q.C., who appeared for the Defendant, would submit, are fatal to any claim of "passing-off", for, so it is submitted, cans of the size and configuration in question, if not universal, are at least

very common, in the trade, and, further, the colour yellow, if not universal, was, nonetheless, a common device in the trade for "colour-coding" drinks with a lemon flavour (see, for example, W.H. Burford & Sons Limited v. G. Mowling & Son (1908) 8 C.L.R. 212, 216-7 per O'Connor J.; W. & G. Du Cros Limited v. Gold (1912) 30 R.P.C. 117; Edward Young & Co. Limited v. Grierson Oldham & Co. Limited (1924) 41 R.P.C. 548). Insofar as the size and configuration of cans is concerned, this submission is fully made out by the evidence (indeed, it seems to me that the matter is so notorious that one could probably, even in the absence of evidence, have taken judicial notice of it).

I am, however, not persuaded that, in late 1974 and early 1975, the practice of "colour-coding" soft drinks was as common as Mr. Bannon would submit; nor am I persuaded that, at that time, the colour yellow was a commonly used "device" for denoting a soft drink with a lemon flavour. Rather, I am persuaded, on the evidence, that the only lemon drink being marketed in New South Wales in a basically yellow can prior to October 1974 was "Golden Circle' Lemon Drink" (Exhibit "35"), the sales of which do not appear to have been extensive. Further, I am persuaded, on the evidence, that although "Solo" was

not the first soft drink marketed in New South Wales in a lemon can, it was the first such soft drink to achieve the level of recognition and acceptance which is demonstrated by the evidence.

It does not, however, follow from that fact, that "Solo" thereby became entitled to a monopoly in yellow coloured cans or that the mere fact the Defendant adopted a yellow can for its product dictates a finding of "passing-off". For that to follow, it would, in my view, need to be demonstrated that, by April 1975, yellow cans had become, in the minds of the relevant section of the public, associated only with "Solo", and that, after April 1975, yellow cans continued to be associated only with "Solo". The evidence, while demonstrating, in my view, that the relevant section of the public recognised that "Solo" was marketed in a yellow can, falls far short of demonstrating that, between October 1974 and April 1975, yellow cans became associated only with "Solo; and as for the ensuing two years, the evidence amply demonstrates that yellow became a common, if not the universal, colour for cans of soft drink with a lemon flavour.

But given that this was, and is, so, it still remained, in my view, encumbent upon the Defendant, when adopting, as the package, for a product similar

to "Solo", a can of the same size, and of a colour essentially the same, as that in which "Solo" was packaged, to distinguish its package from the "Solo" package (W.H. Burford & Sons Limited v. G. Mowling & Son (supra); W. & G. Du Cros Limited v. Gold (supra)).

The question then is, did it do so? There is no doubt that if the two cans (or two bottles) are placed side by side, it can readily be seen that they are different. This, however, is not necessarily enough, for one must take into account the nature of the market-place and the habits of ordinary purchasers (see, for example, Saville Perfumery Limited v. June Perfect Limited (1941) 58 R.P.C. 147, 174-5; Tavener Rutledge Limited v. Specters Limited (1959) R.P.C. 83, 88-9). As I have pointed out earlier, it is not uncommon, albeit that it is not the universal practice, both in supermarkets, and in mixed businesses and milk-bars which have self-selection display refrigerators for products such as "Solo" and "Pub Squash" to be displayed alongside each other; and in those cases in which they are not, they are, nonetheless displayed in close proximity to each other. Further, as I have pointed out, the purchase of a soft drink is often a casual transaction. These two features of the market seem to explain most, if not all, of

the cases of incorrect selection of which evidence has been given (see, for example, the evidence of *Mr. Bell, Transcript p. 59; Mr. Boulten, Transcript *p. 65). But even accepting, as I do, that by reason of the nature of the market-place and of the habits of purchasers, mistakes are likely to, and do, in fact, occur, the evidence would seem to demonstrate that in most, although not all, cases in which there has initially been a wrong selection by a customer, or the wrong product has been offered by the shopkeeper, the error has been recognised before the purchase has been completed (see, for example, the *evidence of Mr. Bell, Transcript pp. 56, 59; Mr. *Calderara, Transcript p. 62). This being so, it seems to me that the Defendant has sufficiently differentiated its product from that of the Plaintiff's (see, for example, Goya Limited v. Gala of London Limited (1952) 69 R.P.C. 188; Kerly's Law of Trade Marks and Trade Names 10 Ed. 373 Para. 16-15).

It follows, in the light of all that I have written, that, in my view, the Plaintiffs have failed to make out a case of "passing-off".

See now pages 97, 104, 92, 97, 99
respectively

8. "UNFAIR TRADING"

a. The Law

The existence of a cause of action based upon "unfair competition", which cause of action is independent of a cause of action based upon "passing-off", and which cause of action does not depend upon statute has long been recognised in the United States of America (International News Service v. The Associated Press (1918) 248 U.S. 215, 239 et seq; Chaplin v. Amador (1928) 269 p. 544; Patten v. Superior Talking Pictures Inc. (1934) 8 F. Supp. 196; A.L.A. Schecter Poultry Corporation v. United States (1935) 295 U.S. 495, 531 et seq.; Lone Ranger Inc. v. Curry (1948) 79 F. Supp. 190; Chemical Corporation of America v. Anheuser-Busch Inc. (1962) 306 F (2d) 433).

Whether or not the existence of such an independent cause of action is, or is to be, recognised in the United Kingdom is, if I may be permitted to say so, despite the observation of Cross J. (as he *then was) to which I referred on p. 2 of this Judgment, far less clear. I say this since although Cross J. in Vine Products Limited v. Mackenzie & Company Limited ("the British Sherry Case") ((1969) R.P.C. 1, 23, 28) appears to have regarded the

*See now page 600

Judgment of Danckwerts J. (as he then was) in Bollinger v. Costa Brava Wine Co. Limited ("the Spanish Champagne Case") ((1960) R.P.C. 16; (1961) R.P.C. 116) as bringing into being a new and independent cause of action, Danckwerts J. does not, in my view, appear, in his Judgment in the Spanish Champagne Case, to think that he is creating a new cause of action; rather, as I read his Judgment, his Lordship considered that he was merely applying "passing-off" principles to a novel factual situation. This view of the Spanish Champagne Case appears to have been adopted by Foster J. in John Walker & Sons v. Henry Ost & Co. ("the Scotch Whisky Case") ((1970) R.P.C. 489), by Whitford J. in H.P. Bulmer Limited v. J. Bollinger S.A. ("the Babycham Case") ((1976) R.P.C. 79) by Goulding J. in Erven Warnink B.V. v. J. Townend & Sons (Hull) Limited ("the Advocaat Case") ((1978) Fleet Street Patent Reports 1) and, as I read his Judgment, again by Goulding J., in Morny Limited v. Ball & Rogers (1975) Limited ((1978) Fleet Street Reports 91). Although the decision of Whitford J. in the Babycham Case was reversed by the Court of Appeal ((1977) 2 C.M.L.R. 625) this was due to the Court of Appeal's view of the facts differing from that of Whitford J., the appellant not challenging the correctness of the decision in

the Spanish Champagne Case. Nonetheless, although both Buckley L.J. and Goff L.J. were at pains to point out that they were deciding the appeal in the Babycham Case without deciding whether or not the Judgment in the Spanish Champagne Case was correct, each made a number of observations (extracted by Goulding J. in the Advocaat Case ((1978) Fleet Street Patent Reports at pp. 18-19) which suggest to me that they regarded the Judgment in the Spanish Champagne Case as merely a special application of the principles relating to "passing-off". I have been informed that an appeal was lodged against the decision of Goulding J. in the Advocaat Case but, at the date of writing this Judgment, I have been unable to ascertain the fate of that appeal.

In Hong Kong, Huggins J. in Shaw Brothers (Hong Kong) Limited v. Golden Harvest (H.K.) Limited ("the One Armed Swordsman Case") ((1972) R.P.C. 559) after considering not only the Spanish Champagne Case and the British Sherry Case but, as well, most of the United States decisions to which I have referred above, came to the conclusion that there was, so far as Hong Kong was concerned, no separate tort of unfair competition and that, although he regarded both the Spanish Champagne Case and the British Sherry Case as correctly decided, each, on its true analysis,

fell with the principle applicable to "passing-off".

In Australia, the subject of "unfair competition" has been discussed, albeit, I think, in an inconclusive way in Willard King Organisation Pty. Limited v. United Telecasters Sydney Limited ("the 'It's Academic' Case") (12th January 1970 unreported, Else-Mitchell J.) and in Hexagon Pty. Limited v. Australian Broadcasting Commission ("the 'Alvin Purple' Case") ((1975) 7 A.L.R. 233).

In the "It's Academic" Case Else-Mitchell J. found for the Plaintiff, the originator, in Australia, of the television programme "It's Academic" on the ground of "passing-off", albeit that he appears to have considered that, in considering the commercial value attaching to the programme's reputation worthy of protection, he was extending the traditional concept proprietary rights for the protection of which the doctrine of "passing-off" existed; a course which his Honour thought necessary and proper. Having done so, however, his Honour declined to speculate upon the question whether further development of the principles of passing-off would lead ultimately to the development of a tort of "unfair competition" as recognised in the United States of America.

In the "Alvin Purple" Case Needham J. would, but for the existence of certain discretionary defences, have been prepared to find for the producers of the original "Alvin Purple" film upon the ground of "passing-off". However, the question of "unfair competition" having been argued before him, his Honour expressed the view that "there is room in our jurisprudence for a concept such as 'unfair competition'.... (although) it may be, of course, that no new tort is necessary" (7 A.L.R. at 252). However, as there was no underhand or sharp conduct upon the part of the Defendant, which conduct his Honour considered an essential ingredient of any such tort, his Honour was not prepared to find against the Defendant on that ground.

What, then, is one to make of all this? With great respect to Cross J. (as he then was) I do not consider that the Judgment of Danckwerts J. (as he then was) in the Spanish Champagne Case brought into being a new species of tort independent of the tort of "passing-off". Rather, I consider the Judgment in the Spanish Champagne Case as no more than a particular example of the development of the law by the adaptation of existing principles to new situations or new circumstances, in much the same way as the concept of "a common field of activity" was developed

in Henderson v. Radio Corporation Pty. Limited (60 S.R. 576). This view would seem to accord with the views of Foster J. in the Scotch Whisky Case, of Whitford J. and of Buckley and Goff L.JJ. in the Babycham Case, of Goulding J. in the Advocaat Case, of Huggins J. in the One Armed Swordsman Case, and, perhaps, of Needham J. in the Alvin Purple Case. It may be that, despite the description which he first gave to the decision in the Spanish Champagne Case, Lord Cross would not necessarily dissent from such a view, for, later in his Judgment in the British Sherry Case, the following passage occurs ((1969) R.P.C. 29 ll.12-21):-

> "As I read the Spanish Champagne Case, what differentiates an ordinary case of passing off from the special type of passing off illustrated by that case is that in the latter type of case the plaintiff is not saying that the defendant is leading people to think that his goods are the goods of the plaintiff; he is merely saying that the defendant is selling his goods under a false trade description and that he is being, or is likely to be, injured thereby. That, of course, necessarily involves the deception of anyone who does not already know that the description is false - but it is a quite different sort of deception from that usually relied on in passing off actions, and that, no doubt, is why the pleader in the Spanish Champagne case gave that particular type of passing off the label 'unfair competition'."

But, whatever be the correct view of the effect of the Judgment of Danckwerts J. (as he then was) in the Spanish Champagne Case, it seems to be accepted

that an essential ingredient of, on one view of it, the expanded concept of "passing-off", or, on the other view of it, "the new fangled tort of 'unfair competition'" is that the Defendant should have made a false representation about his goods - that representation being, in my view, that the defendant's goods are the goods of the plaintiff, or are, or have the characteristics of, the goods of a group or class of persons of whom the plaintiff is one.

b. The Facts

If my view of the state of the law be correct then the Plaintiffs have failed to make out a case for relief on this aspect of the case as well; for the facts, as I have found them above, reveal no relevant misrepresentation on the part of the Defendant as to its goods.

However, as the Plaintiffs have submitted not only that there is a tort of "unfair competition" independent of "passing-off" in the traditional sense, but, also, that that tort is far more extensive in ambit than I have held it (if it exists) to be, it is, I feel, encumbent upon me to make all such findings of fact as are relevant to the more extensive case argued for by the Plaintiffs. I take that view since, if the Plaintiffs are minded to appeal, and if my view of the law be held to be wrong,

the Court of Appeal will have available to it all the facts necessary for the determination of the issue, and the parties will thus be spared the additional time and, perhaps, expense which would be involved if the matter needed to be remitted to me for further findings of fact before any appeal could be finally disposed of.

It is to be recalled that, as I have set out on *p. 8, the Plaintiff's case, on this aspect of the matter, was that the Defendant had deliberately set out to compete unfairly with the Plaintiffs by "pirating" the formula for "Solo", "pirating" the colour of the containers in which "Solo" was marketed, and "pirating" the theme upon which the advertising for "Solo" was based. The Defendant's conduct was, so Mr. Horton Q.C. who, with Mr. Priestley Q.C. and Mr. Hely, appeared for the Plaintiffs, submitted, "a most audacious and unblushing fraud".

The Defendant, for its part, vigorously denied any suggestion of impropriety on its part. Not to be outdone in the field of rhetoric, Mr. Bannon categorized the Plaintiffs' charges as "pharisaical slandering" and "the vindictive reaction of the multinational Goliath which had been bested in the market by the local David". The Defendant, however,

*See now page 608

was not content merely to put the Plaintiffs to proof of their charges; rather, it set out to establish affirmatively that it, and its officers had acted, at all times, with the utmost propriety. In particular, the Defendant said that Mr. Brooks had come across the trade mark "Pub" long before, and while still with the Coca-Cola organisation; that, even before "Solo" had been developed and first marketed in Victoria, he had it in mind that the company which he proposed either to form or acquire might have as its name "Pub Squash", and that it should market a lemon drink under the name "Pub Squash"; that, virtually immediately upon the Defendant's commencement of its operations, work upon the development of "Pub Squash" commenced; that "Pub Squash" was developed independently, and, indeed, in ignorance of the existence of "Solo"; that the packaging for "Pub Squash" was developed independently, and, indeed, in ignorance of the existence, of "Solo", that even when they became aware of the existence of "Solo" none of the Defendant's officers or advisers ever considered that there would be the slightest possibility of confusion between "Pub Squash" and "Solo"; and, finally, that the advertising for "Pub Squash" was developed independently of, and owed nothing in

its conception, to the advertising campaign utilised for "Solo".

In the peculiar circumstances of this case, the resolution of many of the factual issues examined and debated on this aspect of the proceedings turned, in the ultimate, upon the acceptability or otherwise of the various witnesses called, and evidence tendered, by the Defendant in support of the positive case put forward by it. This apparently curious situation arose since many of the issues of fact involved matters entirely within the knowledge of the Defendant and its officers so that the Plaintiffs were, for the most part, limited to establishing facts from which they submitted I should draw appropriate inferences, and since the weight to be given to any available inference depended, in part, upon the case sought to be established to rebut it. This does not mean that, in those cases in which I have rejected evidence called by the Defendant, I have, without more, held that the opposite has been established; rather, I have had regard to the fact that, in an appropriate case, it is permissible (although not obligatory), in such a case, to give greater weight to an available inference than might otherwise be the case (see, for example, Steinberg v. Commissioner

of Taxation (1974-5) 134 C.L.R. 640, 694; 50 A.L.J.R. 41, 50; per Gibbs J.).

Before turning to deal in detail with the particular factual issues examined before me it is desirable that I make some general observations as to the credit of four of its officers upon whom the Defendant principally relied to establish this aspect of its case; they are, Mr. Brooks, Mr. Mojsza, Mr. Newell and Mr. Robertson.

The impression which I have of Mr. Brooks is that he is a highly perceptive and astute man and one who is aggressive, and even ruthless, in matters of business. Quite clearly, he is the dominating figure among the Defendant's officers. Mr. Brooks' personal traits were quite apparent during the period which he spent in the witness box. I need mention only one; if he were faced with a question the answer to which he conceived might be damaging to the Defendant's cause he would, while appearing to answer it, go to great lengths to avoid answering it in fact. So persistent was this habit that I felt it proper *(Transcript p. 188) to point out to Mr. Brooks the possible consequences which might flow from his continuing in it; and yet, despite my warning, he continued to do so (see, for example, Transcrpit **pp. 194, 204, 209 and 214 all of which instances

* See now page 213
**See now pages 222, 235, 241, 247 respectively

occurred on the same day as my warning was first given). I am satisfied that, on any occasion when it suited his purpose to do so, Mr. Brooks would not have been averse to disregarding his obligation to tell the truth in these proceedings. I have accordingly, felt constrained to treat his evidence with considerable reserve.

Mr. Mojsza, too, gives the impression of being a highly intelligent man; and yet, I found him, too, to be a less than satisfactory witness. I am conscious, as Mr. Bannon very properly pointed out, and as a reference to the transcript would readily confirm, that in Mr. Mojsza we were dealing with a man whose native language was not English, so that there was always present the possibility, on the one side, of lack of comprehension, and, on the other, of inadequate expression. Nonetheless Mr. Mojsza displayed, on many occasions, an apparent desire to temporise and to avoid answering questions, and, further, to say what he thought suited the Defendant's case whether it was relevant to a question *or not (see, for example, Transcript p. 275). Mr. Mojsza's evidence, too, needed, in my view, to be treated with considerable reserve.

Mr. Newell was, in my view, a totally

*See now page 326-7

unsatisfactory witness and one whose evidence, in the absence of corroboration, was not worthy of acceptance. Whether or not his evidence in chief as to Exhibit "27" and his activities relating to it was the result of faulty recollection or deliberately untrue in one sense does not matter; for it is abundantly clear from Mr. Newell's cross-examination that he had come to Court with a story to tell and that it was his intention to adhere religiously to that story no matter that it could be demonstrated beyond any peradventure that the story was untrue (see, for example, Exhibits "Y" and "27" and Trans-
*cript pp. 324-6).

Mr. Robertson, too, was a less than satisfactory witness, one who left me with the inescapable feeling that he had himself rehearsed, or been well rehearsed in, the story he came to tell. He, too, gave the impression (see, for example, my comment
**at Transcript p. 582) that he was anxious to say what suited the Defendant's case whether it was relevant to a question or not; he, too, gave the impression of having an overwhelming desire to temporise and to avoid answering questions (see, for
**example, Transcript pp. 552, 564); and, as well, he

* Not reproduced
** Not reproduced

had the noticeable tendency to "parrot" stock phrases, of which "I cannot specifically remember" was the most frequent, in answer to questions which he appeared to consider potentially dangerous (see, for *example, Transcript pp. 582-3) - to say the least, "I cannot specifically remember" was, in the circumstances, a most misleading answer. Mr. Robertson's evidence, too, must, in my view, be treated with considerable reserve.

With this preface, I turn to examine the particular factual issues examined and debated before me on this aspect of the proceedings:-

(i) the origin of the name "Pub Squash"

**Mr. Brooks says (Transcript p. 152) that when, in 1970, he attended a marketing seminar conducted in New York by the Coca-Cola organisation, he saw, among material which had been collected by that organisation a record of the trade mark which I set out below -

which trade mark had apparently been registered

* Not reproduced
**See now page 168

in the United States Patent Office. Mr. Brooks *further says (Transcript p. 174), that, being struck by the apparent incongruity of the trade mark he asked for a copy of it. Mr. Brooks **further says (Transcript pp. 182-4) that, after he returned to Australia in 1971 he mentioned the trade mark, or, perhaps the name "Pub Squash" to at least, a Miss Maralyn Johnson, a Mr. Litchfield and a Mr. Tollis, employees of the Coca-Cola organisation - although whether merely in passing or as a suggested product name for the future is by no means clear. It seems to be clear however that, although, according to Mr. Brooks, some developmental work was done towards producing a formula for a lemon squash to be canned and ***bottled (Transcript pp. 152, 175-6) not only did that project not come to fruition, but no product name was ever decided upon - in particular, the name "Pub" or the name "Pub Squash" was, to use Mr. Brooks' curious phrase, "not offered to anyone of the management people or discussed with any of the management people at ****Coca-Cola" (Transcript pp. 231, 234).

* See now page 198
** See now pages 206-9
*** See now pages 168, 199-200
**** See now pages 269, 273

The next witness called on this issue was Miss Johnson, who in 1971 had been a Market Research Officer with the Coca-Cola organisation. While Miss Johnson supported Mr. Brooks to the extent that she recalled a research project on the subject of lemon squash, and the use of the name "Pub" or "Pub Squash, her re-
*collection (Transcript pp. 247-248a) was that what was contemplated was a launch of a new product under the name "Pub". Further, Miss Johnson added that Mr. Robertson was privy to the discussions. Finally, Miss Johnson said that a "new product" file was opened.

In chief, Mr. Robertson gave no evidence whatsoever on the issue. In cross-examination, Mr. Robertson, while giving evidence of the development of a "post-mix" lemon squash, said that he was not party to any discussion concerning the "launch" of a canned or bottled lemon drink, and, further, that neither "Pub" nor "Pub Squash" was ever mentioned to him (Trans-
**cript pp. 551-2).

In reply, the Plaintiffs called Mr. Litchfield, now Marketing Services Manager, and Mr. Tollis, now Manager, Third In Route

* See now pages 289-291
**Not reproduced

Market, of Coca-Cola Bottlers Sydney. Each denied that Mr. Brooks had, on his return from the United States shown him a trade mark, or mentioned the word "Pub" as a trade mark. Further, Mr. Litchfield, who in 1971, had been Sales Promotion Manager denied that a lemon drink was, at that time, tested for canning or bottling, and further denied that a "launch" of any such product was contemplated.

It will thus be seen that the only witness from whom Mr. Brooks received any (but, then, not total) support was Miss Johnson, whose recollection that Mr. Brooks reference to "Pub" was in the context of a new brand-name product is, in the light of all the evidence, and, particularly, the evidence as to the practice of the Coca-Cola organisation, clearly incorrect. So far as one could ascertain, Miss Johnson had no reason, which might lead her to favour the Defendant; although formerly a fellow employee with Mr. Brooks in the Coca-Cola organisation, she had left that organisation in 1973 to join the "Laporte group", which, so far as the evidence goes, has no association with the Defendant. I am satisfied that Miss Johnson did give her evidence to the best of her recollection;

I am, however, equally satisfied that, having regard to the passage of time and the demonstrated inaccuracy of part of her evidence, what she remembers, albeit that she has subconsciously put on it another interpretation, is discussion with Mr. Brooks, and, possibly, some market research, leading to the development of the lemon cordial for use in "post-mix" machines in hotels and clubs.

In all the circumstances, therefore, I am not persuaded that Mr. Brooks discovered the "Pub" trade mark at the time or in the circumstances deposed to by him; nor am I persuaded that he ever discussed that trade mark or the use of the trade name "Pub" with fellow employees of the Coca-Cola organisation at the time or in the circumstances deposed to by him.

(ii) the adoption of "Pub Squash" as a product name

*According to Mr. Brooks (Transcript p. 153) at some time (which was not specified in the evidence) he conceived the idea of acquiring the Passiona Bottling Company Sydney Limited or its assets so that he might go into the soft drink business on his own account. Insofar as one can piece the evidence together, the time at which, according to Mr. Brooks, he conceived

*See now page 169

the idea of going into business on his own behalf would seem to have been late in 1972 (cf *and cp. Transcript pp. 153, 176 as to Mr. Brooks' initial discussions with Mr. Lazzley of Cottees General Foods Limited).

Mr. Brooks says that, in or about February 1973 he gave notice to the Coca-Cola organisation, but that, in response to a request made of him, he stayed on until May or June 1973.

According to Mr. Brooks, preliminary discussions as to his taking over the Cottees General Foods Limited "bottling operation" commenced in about February 1973.

In April or May 1973, and while he was still with the Coca-Cola organisation, Mr. Brooks, so he says, went to see Mr. Baxter with a view to ascertaining whether or not, if he, Mr. Brooks, in fact, took over the Cottees General Foods Limited "bottling operation" he would be able to retain the Pepsi-Cola franchise. While he was there, so he says, he was introduced by Mr. Baxter to Mr. Mojsza. In his evid- **ence in chief (Transcript p. 154) Mr. Brooks seemed to suggest that, at his first meeting with Mr. Mojsza he asked Mr. Mojsza if he were

* See now pages 169, 200
**See now page 171

interested in joining his proposed new company, and, that Mr. Mojsza said that he was, and, among other things produced to him what has been described as the budget for the Cottees General Foods Limited "bottling operation" for the year 1st April 1973 to 31st March 1974 (Exhibit "20(a)" and "20(b)". In cross-exami-

*nation (Transcript pp. 177-8, 228-30) Mr. Brooks seemed to suggest, firstly, that his offer to Mr. Mojsza was later than the first meeting, and, secondly, that the production of the Budget was later.

The significance of Exhibits "20(a)" and "20(b)" is this:-

(A) (I) on the obverse side of Exhibit "20(a)" under the heading "10 oz NRB" (i.e. "non-returnable bottles") and alongside a list of products such as "Pepsi-Cola" and "Passiona" are written, in pencil, in Mr. Mojsza's handwriting the words "add C-Time, 7-Time, Pub Squash";

(II) on the reverse side of Exhibit "20(a)" are written in pencil, in Mr. Mojsza's handwriting, the words:-

" suggested major product for new company as P.R. Brooks

*See now pages 202-203, 264-7

(1) Pepsi-Cola)		
(2) Big Boy) existing lines		
(3) Passiona)		
(4) Coola)		
(5) Pub Squash	)	
(6) C-Time - with juice content	)	
(7) 7-Time - with lime	)	all new
(8) Strike-Cola - balancing Pepsi	)	flavour disclosed for
(9) Rate	)	Cottees only
(10) Citra	)	C-Time -
(11) Mixer range - 'Ambassador Royal' at least 4 flavour	)	7-Time "

(B) on the first two pages in Exhibit "20(b)" appear in pencil, in Mr. Mojsza's handwriting the words "add Big Boy - C-Time - PUB SQUASH - 7-Time For Future add to 26 oz OWB too!", and the words "add C-Time - 7-Time - Pub Squash - Rate - Citra - Strike Cola for future" respectively.

Although he did not say so expressly (see *Transcript pp. 154-5) it is implicit in Mr. Brooks' evidence, firstly, that the handwritten notes represented his intentions as to the products his proposed company would market, and, secondly, that he told Mr. Mojsza of his intentions.

Late in 1973 or early 1974, so Mr. Brooks **says (Transcript pp. 159-60, 167-8) there was produced by Mr. Mojsza for submission to Cottees General Foods Limited in connection with the

* See now pages 171-173
**See now pages 178-179, 188-9

proposed purchase a "Volume Budget for 12 months" the first page only of which (Exhibit "25") was preserved. The significance of this document, which is in pencil in Mr. Mojsza's handwriting in that, in relation to "returnable" bottles of various sizes there is a notation "*New Products" or "*New Products 4", and a footnote -

> "*New Products - 1) C-Time - to replace; Tango
> 2) 7- " - to replace; Big Boy
> 3) Pub Squash to replace; Lemon and if possible Coola
>
> One way packages and cans the same - add to cans L/C range - CITRA - Rate (Rate L/C lemonade - Citra L/C Lemon or Pub Squash see on other pages"

The Defendant commenced operations in May 1974, and shortly thereafter Mr. Newell was instructed to develop a lemon cordial. At this time, according to Mr. Brooks, he was endeavouring to keep the name "Pub Squash" under wraps. *In cross-examination (Transcript pp. 198) he said that the only officers of the Defendant who knew of it were himself, Mr. Mojsza and Mr. Robertson **(but cf and cp. Transcript p. 156).

Although the formula was perfected by the end of August 1974, Mr. Harris was not instructed to prepare the necessary artwork until November

* See now page 228
**See now page 174

1974. His instructions were to prepare artwork for a lemon squash to be called "Pub Squash".

* According to Mr. Brooks (Transcript p. 218) the necessary order was placed with Pacific Can in February 1975. The order was verbal.

The next witness who gave evidence on this topic was Mr. Mojsza. He, so he said, met Mr. Brooks in April 1973 when Mr. Brooks was introduced to him by Mr. Baxter. Mr. Brooks then told him of his intention to leave the Coca-Cola organisation and to set up his own soft drink company.

According to Mr. Mojsza, about a week or so later Mr. Brooks went to see him to ask for his help in calculating the sales volume and cash flow of the proposed new company. Mr. Mojsza says that he agreed to help and an appointment for a further meeting was made.

At the further meeting, so Mr. Mojsza says, he produced Exhibit "20" (which, according to him, he had prepared before he left Cottees General Foods Limited in November 1972). Then, according to him, he asked Mr. Brooks for details of what he had in mind for the new company. The notes on Exhibit "20" were, so Mr. Mojsza says, made by him during this conversation and recorded what Mr. Brooks told him. The note "all new

*See now page 253

flavour disclosed for Cottees only C-Time - 7-Time" records, according to Mr. Mojsza, that he and Mr. Brooks "agreed that when we had the budget we will disclose to Cottees just new flavour and the rest he wants to keep it for himself *for time being" (Transcript p. 251).

According to Mr. Mojsza, it was not until "I made the volume products sales" that Mr. Brooks invited him to join his proposed company **Transcript p. 252). This evidence does not seem to accord with that given by Mr. Brooks.

Exhibit "25" was, according to Mr. Mojsza, prepared by him in June 1973. This evidence does not accord with that given by Mr. Brooks who placed it in late 1973 or early 1974. Even greater confusion was introduced by Mr. Mojsza who, despite the evidence which he had given earlier as to the circumstances in which his notes on Exhibit "20" were written appeared to explain the references to "New Products" on Exhibit "25" as being necessary because at the time Exhibit "25" was first prepared he did not know what new products were contemplated (see, ***for example, Transcript pp. 268, 274 et seq.).

Mr. Mojsza also said that he prepared a

* See now page 297
** See now page 298
***See now pages 318, 325

number of Volume Budgets, similar to that of which Exhibit "25" formed part, but with differing dates of commencement, for submission by Mr. Brooks to Cottees General Foods Limited.

The next witness called on this issue was a Mr. Goodall, formerly an employee of the Coca-Cola organisation, and, at the time of the hearing, the Marketing Manager of Canada Dry Corporation, some of the products of which company are marketed by the Defendant under franchise.

Mr. Goodall gave evidence of having had a conversation with Mr. Brooks at a party to celebrate his (Mr. Goodall's) birthday on 12th March 1972. That evidence, according to the Transcript, was as follows:-

> "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.

> 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."

There are some curious features about Mr. Goodall's evidence, and they are these; firstly, Mr. Brooks gave no evidence whatsoever as to such a conversation; secondly, the fact that an enquiry was made as to the progress of the Cottees franchise, and the words "it is in the same state as it was when I was in Coca-Cola" attributed to Mr. Brooks, do not make sense as, at 12th March 1972, Mr. Brooks was still with the Coca-Cola organisation; thirdly, there is no other evidence that, as early as March 1972, Mr. Brooks was contemplating going into business on his own behalf; and, finally, the reference to "Pub Squash" as a name is curious since, according to Mr. Brooks, even when he was in the process of setting up his venture, "Pub Squash" as a product was low on the order of priorities, and, further it was not, at that stage,

contemplated that his company would bear the name "Pub Squash".

When, in the course of argument, I drew Mr. Bannon's attention to the features to which I have just referred, he submitted that the Transcript was not accurate and that the reference to "when I was in Coca-Cola" should be construed as a reference to the period (which ended in 1970) when Mr. Goodall was employed by the Coca-Cola organisation. However, not only does my own note, taken at the time, support the accuracy of the Transcript, but it should be recorded that, although, as is apparent throughout the Transcript, corrections to the Transcript were taken, first thing, on each hearing day, no application was made to correct the Transcript of Mr. Goodall's evidence.

Mr. Allman was the next witness to give evidence related to this issue. His evidence was to the effect that research to develop a lemon squash was an early priority within the Defendant. However, his recollection was that the name "Pub Squash" was first mentioned to him by Mr. Mojsza in August 1974 when he (Mr. Allman) asked Mr. Mojsza "how we were going to code the *material for costing purposes" (Transcript p. 294).

*See now page 354

Following Mr. Allman's evidence, Mr. Newell was called. Mr. Newell's evidence will need to be considered in greater detail on other issues. On this issue, however, he produced the working papers used by him in formulating "Pub Squash" (Exhibit "27) and the final formula adopted (Exhibit "28"). One of the sheets in Exhibit "27" is a sheet dated 29th August 1974 which bears the heading "Pub Squash 5:1". It was, according to Mr. Newell 29th August 1974 when he was first told that the product would be called "Pub Squash". Exhibit "28" bears date 3rd September 1974 and bears upon it "Product: PUB SQUASH".

Mr. Northey was called, apparently, to give evidence of the negotiations which led to Mr. Brooks taking over the Cottees General Foods Limited soft-drink operation; in particular he gave evidence of the receipt, in September/October 1973 of a series of "sales estimates which were turned into cash flows". However, two pieces of his evidence in chief appear to run counter to some of the evidence of Mr. Brooks and Mr. Mojsza. They are as is set out below:-

> "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.

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.

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."

and

"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."

The next witness to give evidence on this issue was a Mr. Fugger, said now to be "the Managing Director of a business known as 'Incredible Cars' at Cabramatta, and formerly associated with a company Nuford Sales Pty. Limited. The latter company had, apparently, been accustomed to provide the vehicle fleet for the Coca-Cola organisation.

According to Mr. Fugger he was telephoned by Mr. Brooks early in November 1973, Mr. Brooks saying that he wished to discuss a business proposition with him. In response to that telephone call, Mr. Fugger had lunch with Mr. Brooks, a few days later, at the Travelodge Motel in York Street. Mr. Fugger's evidence as to the discussion at lunch was as follows:-

> "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 detail, but the main thing was that he was asking -

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.

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 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.

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.

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 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."

While this evidence attracts less comment than does the evidence of Mr. Goodall, it, too, attracts the comments, firstly, that Mr. Brooks gave no evidence of such a conversation, and, secondly, that it is odd that stress was placed on a product to which Mr. Brooks did not intend to give any great early priority. It is, perhaps, not out of place to add that the circumstances in which Mr. Fugger was approached to give evidence are themselves a little odd; for it was almost six months after the hearing commenced, it was after Mr. Brooks had completed his evidence, and on the tenth hearing day that the Defendant's solicitor telephoned Mr. Fugger *and, according to Mr. Fugger (Transcript p. 402) "....mentioned that Mr. Brooks had this Court case going on now, from December I think,

*See now page 418

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 I am giving now relating to it." (see, also, *Transcript p. 403).

Mr. Fugger was followed by Mr. Harris. He gave evidence as to the receipt, from Mr. Robertson, of instructions to commence work on the can design for "Pub Squash", those instructions being received in late November or early December 1974. Other aspects of Mr. Harris' evidence will need to be considered later.

Finally, Mr. Robertson gave some evidence on this aspect of the case. He gave evidence that about two weeks before he joined the Defendant's employ he was approached by Mr. Brooks who offered him a position. The two men "discussed the whole range of products that we were going to launch ..... a whole new range of products called C-Time Orange, 7-Time Lemonade, Pub Squash, Citra Rate and a range of mixers and also (a) relaunch (of) a new taste Pepsi Cola" **(Transcript p. 540). Mr. Robertson also gave evidence of conveying Mr. Brooks' instructions

*See now page 419
**Not reproduced

to Mr. Harris in November or December 1974. In cross-examination, Mr. Robertson, in answer to a question as to the significance which he attributed to "Pub Squash" in the future of the Defendant, described it as ".... just one in a sequence ..... it was about fourth on the totem *pole" (Transcript p. 569).

This summary of the evidence on this issue, although necessarily short, is, I believe, sufficient to show that not only are there significant differences between some of the witnesses on matters which are more than mere detail, but, as well, that some of the evidence, as, for example, that of Mr. Goodall, is quite impossible to accept at face value.

What, then, is the conclusion to be drawn as to this aspect of the case? The resolution of this question has proved no easy task. While it is possible to reject some of the evidence, as, for example, the evidence of Mr. Goodall, upon the basis that it is the product of a defective recollection, the evidence of Mr. Brooks **and, perhaps, of Mr. Mojsza (but see Transcript pp. 275-6), particularly the evidence as to Exhibits "20(a)" and "25" is difficult to reject

* Not reproduced
**See now pages 326-7

on so simple a basis; that evidence was given in so categorical and detailed a fashion that mere faulty recollection is hard to credit. I have accordingly given great consideration to the evidence of Mr. Brooks and of Mr. Mojsza, for I am conscious that, if I am to reject their evidence on this issue, I must virtually hold that they have deliberately set out to mislead the Court (see, for example, Hilton v. Allen (1940) 63 C.L.R. 691; Rejfek v. McElroy (1965) 112 C.L.R. 517; (1966) A.L.R. 270).

Ultimately I have come to the conclusion that while it may be possible that Mr. Brooks, prior to his taking over the Defendant, considered that one of the products which his proposed company might, at some time, market was a lemon flavoured soft drink, it was not until about the time when he took over the Defendant that Mr. Brooks decided that such a product would, in fact, be marketed, in the future, by the Defendant. Further, I have come to the conclusion that Mr. Brooks had not, prior to his taking over the Defendant decided that the Defendant would market a lemon flavoured soft drink under the name "Pub Squash"; still less had he, in my judgment, decided that the

Defendant would, at some stage, be called "The Pub Squash Company" or any similar name (see, *for example Transcript p. 180/1).

(iii) the Defendant's officers' knowledge of "Solo"

Reduced to its most simple terms, the Defendant's case was that, although senior officers of the Defendant became aware of "Solo" and of the advertising for "Solo" at some time after the launch of "Solo" in New South Wales, the Defendant was, by that time, already committed to the production of "Pub Squash" under that name. (See Exhibit "26" Interrogatories 17, 18 36(a) & (b) and Answers thereto; Exhibit "D" Interrogatories 26-29 and Answers thereto.)

If the expression "committed" (see Interrogatories 26-29 and 36(a) & (b) and Answers thereto) was intended to convey, at least, that the appropriate formula had been developed, all artwork determined upon, and all necessary raw material, cans and bottles ordered and on hand, then the Defendant's case on this aspect of the matter would fail, no matter what version of the evidence be accepted. It is only if some lesser meaning is to be attributed to the expression "committed" that the case originally

*See now page 205-6

put forward by the Defendant may be supported by the evidence tendered on behalf of the Defendant.

But the question which arises is, whether the evidence tendered on behalf of the Defendant ought to be accepted, or whether I ought, as the Plaintiffs submitted, to reject it and to find, instead, that the Defendant, by its officers, upon becoming aware of "Solo", deliberately set out to take advantage of the Plaintiffs efforts in creating a market for a soft drink of a lemon squash type.

Despite the fact that the answers to the Interrogatories to which I have referred above (which answers, I am satisfied, were drafted by Mr. Brooks, or by Mr. Brooks in conjunction with *his advisers - see Transcript p. 198; see also in answer to Interrogatory 17(a) the use of the phrase "our product") suggested that as early as October 1974 the Defendant's officers were aware of and from time to time discussed, "Solo" and the advertising for "Solo", each of the witnesses who was an officer of the Defendant at the time displayed a singular reluctance to admit that he knew of or had been a party to any discussion of "Solo" or the advertising for

*See now page 228

"Solo"; this reluctance, tended, at times, to lead to quite tortuous attempts by witnesses to explain away their unawareness of "Solo" or of the advertising campaign for "Solo", some of which attempts produced completely irreconcile-able conflicts in the evidence.

Mr. Brooks provides a perfect example of the matters to which I have just referred. Thus, *he said (Transcript p. 184) that he did not see the "Solo" advertisement until February 1975; *that (Transcript p. 185) he was a party to a discussion about the advertisement in or about December 1974, a date which he fixes "because I don't think their advertising started until *December"; that (Transcript p. 191) "it was sometime towards the end of 1974 and 1975 that we started to hear a bit about 'Solo', that it had been launched towards the end of 1974; that *(Transcript p. 193) towards the end of December 1974 or January 1975 he had discussions with the advertising agency concerning the advertising *for "Solo"; that (Transcript p. 194) "You see I don't believe there was any advertising in October, so it is not possible to have

*See now pages 209, 210, 219, 221, 223 respectively

*discussions on advertising"; that (Transcript p. 195) in about October 1974 he discussed "Solo" with Mr. Harris, and showed Mr. Harris a can of "Solo" which he had in his possession.

Despite the fact that, according to the answers to the Interrogatories, discussions took place in October 1974, and according to Mr. Brooks, discussions took place in December 1974, as to the impact of the advertising for "Solo" on the proposed launch of "Pub Squash", and despite the fact that at that time, only Mr. Brooks, Mr. Mojsza and Mr. Robertson were supposed to be aware of the proposed launch of "Pub Squash",

**Mr. Mojsza says (Transcript p. 282) that the first "Solo" advertisement which he saw on television was one which involved horsebreaking (this advertisement was not prepared until March 1975 -

***Exhibit "F" p. 15) and that (Transcript p. 282), except for mentioning the advertisement to Mr. Brooks on the following day, he was never a party to any such discussion as the answers to

****Interrogatories suggest (Transcript p. 283); while Mr. Robertson, although admitting that he was aware of "Solo" being sold in Sydney in

*****October 1974 (Transcript p. 562) and of the "Solo" advertising campaign towards the end of

* See now page 224
** See now page 337
*** Not reproduced, see now page 337
**** See now page 338
*****Not reproduced

Reasons for Judgment of his
Honour Mr. Justice Powell

*1974 (Transcript p. 563) in his own, inimitable way, in answer to the question "Do you say at these informal meetings with after-work drinks that there was never any mention of 'Solo' or *its advertising campaign?" said (Transcript p. 575) "I cannot recall specifically, there may have been, but I cannot recall specifically any Solo advertising being discussued (see also *Transcript p. 543 (foot) - p. 544 (top)).

Examples of the difficulties into which the Defendant's witnesses fell over this issue can be found at many places in the Transcript; but there seems little purpose in recording them all; if corroboration of this statement be needed it is, so it seems to me, sufficient to direct attention to the further (in my view, unsuccessful) attempts of Mr. Brooks (Transcript **pp. 204-6) and of Mr. Robertson (Transcript *pp. 544, 571/3-6, 581-2) to escape from the answers to Interrogatories 17, 18 and 26-29.

Not only am I not satisfied by the evidence that the officers of the Defendant remained in ignorance of the existence of "Solo" and of the advertising for "Solo" until the Defendant was committed to marketing "Pub Squash" by that name, but I am not satisfied that they remained in

* Not reproduced
**See now pages 235-8

ignorance until October 1974. Rather, I am persuaded that, by no later than August 1974, and, in all probability by an earlier date, officers of the Defendant (such officers including Mr. Brooks), were aware of the "launch" of "Solo" into Victoria and Southern New South Wales and of the advertising associated with the "launch" (see, for example, in relation to Mr. Robertson, who could have been so aware by March 1974, *Transcript pp. 554-5, 557, 706-7, and, generally, **Transcript pp. 362-5).

(iv) the formula for "Pub Squash"

The Defendant's case on this aspect of the matter was that the production of a soft drink of a lemon squash type was high on its list of priorities, that experimental work directed towards producing a suitable formula was commenced almost as soon as the Defendant commenced operations, and that the formula was determined upon long before "Solo" was launched in Sydney, and independently of "Solo".

*** Mr. Brooks gave evidence (Transcript p. 156) that within two weeks of commencing operations he gave instructions to Mr. Newell to develop a lemon squash. Mr. Brooks said his intention being to release "Pub Squash" on to the market

* Not reproduced
** See now pages 392-7
***See now page 174

in February 1975 (Transcript p. 157), but whether that was alleged to have been his intention from the outset, or became his intention after the formula for "Pub Squash" was finalised is by *no means clear on the evidence (Transcript p. 157). The proposed launch of "Pub Squash" was, according to Mr. Brooks, delayed for a variety of reasons, some, at least of which, cannot be accepted in the light of the other evidence. One such reason was that because the marketing programme was "built around the release of a large plastishield bottle", supplies of which were unavailable "we went into the December period, which no one would release a product in December"; this reason is totally unacceptable in the light of the evidence that the artwork was not commissioned until late November or early December, and was not finalised **until the end of January 1975 (Transcript p. 442). Another such reason was that because of "power strikes" in January 1975 cans could not be obtained; a reason which is hard to reconcile, firstly, with the evidence as to the art work, and, secondly, with the evidence that the order for cans was not placed until February 1975 ***(Transcript p. 218).

*See now page 175
**Not reproduced
***See now page 253

Mr. Allman was, as I have said, the technical director of the Defendant. His evidence was to the effect one of the Cottees products which the Defendant took over was "Cottees Sparkling Lemon Drink". This was "a lemon squash type of beverage .... it had lemon juice in it ...." *(Transcript p. 293), but seems not to have been regarded as particularly satisfactory. According to Mr. Allman, during 1974 "we had to review some products, the lemonade and orange drink and we wanted to develop the concept of the lemon *drink further" (Transcript p. 293).

Development work on "C-Time" (to replace the Cottees orange drink "Tango") and on "7-Time" (the new lemonade), according to Mr. Allman, took priority over work on "Pub Squash", the work on the latter product, he thought, commencing about August, continuing through August, September and October, "and then we came to the summer period and we had to drop it for a while .... (because) we didn't have sufficient production capacity to proceed with developmental work at that stage .... (and) we would not have been able to secure quantities of the (lemon) juice we were requiring for this product in time to relase it during the 1974 summer season"

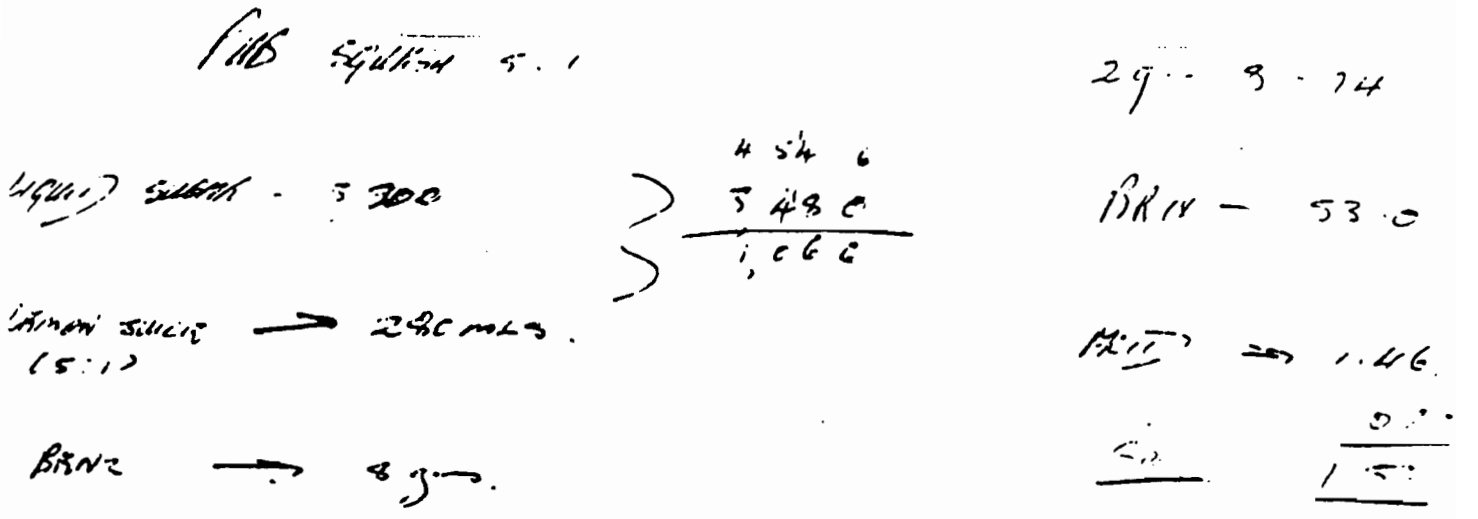
*See now pages 352

*(Transcript p. 294). The reference to lemon juice is a little difficult to understand as the new product was to replace a product which itself was based on lemon juice.

According to Mr. Allman, the "power strikes" occurred in February (not January) 1975, and affected production capacity (not supplies of bottles or cans).

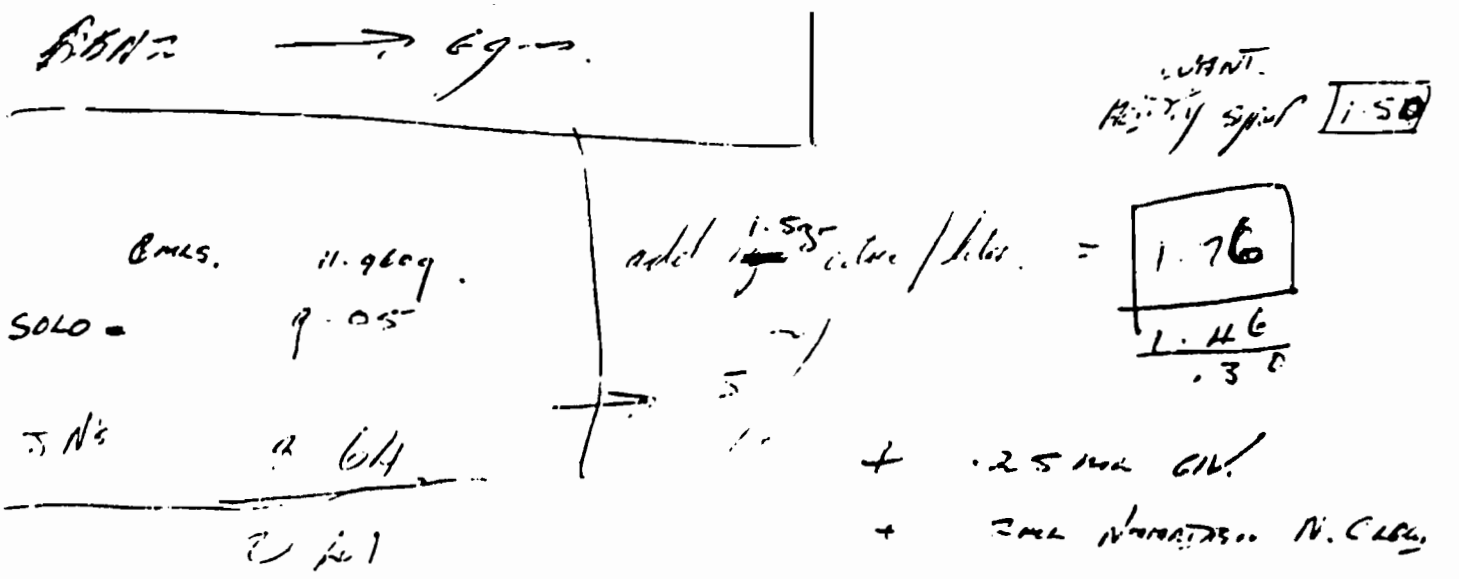
The principal witness on this issue was, however, Mr. Newell, the Defendant's food technologist. His evidence was that he commenced work on "the formulation for a lemon drink, May 1974" **(Transcript p. 309) and that he worked on that formulation until August 1974. He was shown the working papers and notes which had been tendered as Exhibit "27" and identified them as work sheets and notes made and kept by him during the course of his experiments. In this Exhibit is a sheet (identified in the evidence as sheet "A") at the top of which is written "PUB SQUASH 5:1 29-8-74", this, according to Mr. Newell having been written by him on 29th August 1974, and representing the earliest date on which he ***had recorded the words "Pub Squash" (Transcript p. 310). The same sheet bears (inter alia) the following notation:

* See now page 354
** Not reproduced
***Not reproduced



which notation, insofar, as it relates to "Solo", *was, according to Mr. Newell (Transcript p. 311) made when, in November 1977, at the request of the Defendant's solicitor, Mr. Duffield, he analysed "Solo" (for reasons upon which I will later elaborate, this evidence is demonstrably wrong). The Exhibit also contains a further sheet (identified in the evidence as sheet "B") at the top of which is written "PUB SQUASH 5:1". This sheet bears (inter alia) the following notation:-

*Not reproduced



which notation, insofar as it relates to "Solo", *was, according to Mr. Newell (Transcript p. 311) made at the time of his analysing "Solo" in November 1977 (this evidence, too, is demonstrably wrong).

Mr. Newell said that the final formula for "Pub Squash" was determined upon in September *1974 (Transcript pp. 312, 312A-B, Exhibit "28"), and that the reasons for the product not being launched then, i.e. in September 1974, were "the availability of lemon juice in commercial quantities; the equipment problems in the plant, the machinery had to be renovated .... it was very run down, in a run down condition .... it was not economic to run .... there was also

*Not reproduced

*trouble with can supplies at that time" (Transcript p. 312).

Mr. Newell said that he was not instructed to, nor did he, when formulating "Pub Squash", attempt to copy the flavour of any other product *then on the market (Transcript p. 312), that he did not become aware of "Solo" until some time *in 1975 (Transcript pp. 311, 312A), that upon becoming aware of "Solo" he made some tests *(for "BRIX", carbonation and taste - Transcript pp. 312A, 326, 327) of it, that the notes on sheets "A" and "B" do not relate to the tests which he then made, and that he retained no *written record of those tests (Transcript p. 312A).

I have said that Mr. Newell's evidence as to the notations on sheets "A" and "B" which I have set out above is demonstrably wrong. Later *evidence (Transcript pp. 321 et seq., Affidavit I.E. Duffield sworn 28th February 1978, Exhibits "X" and "Y") make it abundantly clear that the notations were made no later than 16th August 1977, a fact which Mr. Newell was ultimately *obliged reluctantly to concede (Transcript p. 326).

The question then is, when were the notations in fact made? I am satisfied that in the

*Not reproduced

case of the notation on sheet "A", it was made on 29th August 1974, the date which that sheet bears, and in the case of the notation on sheet "B", it was made on or after 29th August and on or before 3rd September 1974. My reasons for this conclusion are as follows:-

(A) as I have previously indicated, Mr. Newell identified the various sheets of paper in Exhibit "27" as being working papers and notes made and kept by him in the course of his experi-*ments (Transcript pp. 311, 312C);

(B) the documents themselves provide evidence (apart from the mere fact of the notations themselves) to suggest that the notations were made in the course of the experiments. Thus -

(I) although, in its present form, Exhibit "27" does not have the sheets in sequential order, it is possible to discern, in the various sheets a sequence of development. Thus, sheet "A" appears to antedate sheet "B", sheet "B" appears to antedate the fourth quarto sheet in the Exhibit, the latter page appears to antedate the first sheet of the Exhibit, and the first page of the Exhibit appears to provide the formula ultimately adopted as the formula

*Not reproduced

for "Pub Squash" (Exhibit "28") (see Trans-
*cript p. 299 et seq; pp. 330 et seq;
pp. 691 et seq.);

(II) upon the fourth quarto sheet of Exhibit "27" can be seen the impression of some of the notations on sheet "B". In particular, one can observe most, if not all of the notations on sheet "B" which I have set out above. This suggests, firstly, that the sheets were all, originally, in a pad, and, secondly, that the notations were made prior to the notations on the fourth quarto sheet in Exhibit "27";

(III) since the notations on the fourth quarto sheet in Exhibit "27" appear to follow the notations on sheets "A" and "B" but to precede the final formula (Exhibit "28") they appear to have been made in the period 29th August 1974 (sheet "A") to 3rd September 1974 (Exhibit "28");

(IV) insofar as they relate to "Solo" the notations on sheets "A" and "B" record acidity; they are thus in no way a record of the tests ("BRIX" (which is the percentage of dissolved solids by weight expressed
**as sugar - Transcript p. 301), carbonation

*See now page 361, not reproduced respectively
**See now page 351

*and taste) alleged by Mr. Newell (Transcript pp. 312A, 326, 327) to have been carried out by him at some time in 1975.

Since it appears to be clear that "Solo" was, at the relevant point of time, being used by Mr. Newell as a point of reference, and since the acidity of the final formula for "Pub Squash" is 1.55% W.V., it seems to be inescapable that, at least with respect to acidity, Mr. Newell was attempting to copy or to approximate one of the characteristics of "Solo".

Notwithstanding that Mr. Bannon has submitted that, even if I were to come to the conclusion which I have set out above, I could not treat Mr. Newell's activities as reflecting the "mind" of the Defendant (he referred to H.L. Bolton (Engineering) Co. Limited v. T.J. Graham & Sons Limited (1957) 1 Q.B. 159, 172-3, to what was said to be the uncontradicted evidence of Mr. Allman that, if Mr. Newell did any comparative work it was "off his own bat" - Trans-
**cript p. 306 - and to such decisions as Holman v. Holman (1964) 81 W.N. (Pt. I) 374) I believe that I am justified in concluding, as I do, that Mr. Newell's later activities were but part of a wider plan on the part of the Defendant to take

* Not reproduced
**See now page 370

advantage of the efforts of the Plaintiffs in developing a new product and a market for it. I say "Mr. Newell's later activities" since it seems to me that, at an earlier stage, his efforts may, in fact, have been directed towards formulating an acceptable replacement for "Cottees' Sparkling Lemon Drink" (the fact that those sheets in Exhibit "27" which are relevant to this issue, and which are earlier in point of time to sheet "A" bearing the heading "Lemon Drink" or "Lemon Squash" support this view). Nonetheless, it seems to me that it was no mere coincidence that, on the day when the words "Pub Squash" were first recorded by Mr. Newell, he was indulging in an exercise attempt to copy or to approximate one of the characteristics of "Solo". Nor should it go unremarked that the experiments which had thitherto been going on for three months were brought to a conclusion within four working days of the comparison being first made. The inference to which these facts give rise is, in my view, strengthened by the inference available upon the rejection of Mr. Brooks' evidence as to the origin of the name "Pub Squash", the rejection of the evidence of Mr. Brooks and of Mr. Mojsza as to Exhibits "20" and

"25, and finally, by the abject collapse of Mr. Bannon's valiant attempt to restore some credibility to Mr. Newell's evidence as to his *testing of "Solo" (Transcript pp. 344 et seq, esp. pp. 347-8, Exhibit "29"). I am satisfied that, whatever may thitherto have been the Defendant's intentions, the 29th August 1974 represented a conscious change of direction on the part of the Defendant - and I am satisfied that no significant decisions concerning the Defendant were ever taken except by, or, at the least, with the knowledge and acquiescence of, Mr. Brooks.

(v) the artwork for "Pub Squash"

Although I have earlier dealt in outline with the history of the development of the art-**work for "Pub Squash" (pp. 29-30) and, as well, have earlier dealt with some of the evidence as to then common practices of packaging soft **drinks (pp. 27, 53-55), it is necessary, at this stage, to examine, in a little more detail, the evidence relevant to this issue.

The principal witness on this issue was Mr. Harris, who had, earlier in 1974, been associated with the promotion by the Defendant of "Pepsi-Cola", "7-Time" and "C-Time"

* Not reproduced
**See now pages 636-7, 633-4 & 669-73 respectively

*(Transcript p. 436). He was approached by Mr. Robertson in, he thought, late November or early December 1974, and given instructions to commence work on a can design for "Pub Squash". He was given "the normal brief that he regularly gave us for commencing new products", that is, product name, product type ("he said it was to be a lemon squash") technical details ("such as preservative added") and the dimensions of the *can (Transcript p. 438).

Work commenced on the can design, a number of concepts ("one of which used lemons, naturally enough .... one was using historical hotels ....") being developed. Although it did not appear in chief, there is a suggestion, in the course of cross-examination, that the back-*ground colour was to be yellow (Transcript p. 446). Development work was still proceeding when, in about mid-December, Mr. Brooks went to Mr. Harris' office to see what progress had been made.

Although Mr. Brooks was not, rather, Mr. Robertson was, the person accustomed to deal with *Mr. Harris (Transcript p. 447), although Mr. Robertson had given Mr. Harris his instructions to develop the artwork for "Pub Squash", and

*Not reproduced

although Mr. Brooks had no artistic flair

*(Transcript p. 439) while Mr. Harris was the

expert, Mr. Brooks disapproved of what had been

done for "that wasn't what he had in mind, not

what he required for 'Pub Squash'" (Transcript

*p. 438). The discussion, according to the

*Transcript (p. 339), then proceeds as follows:

> "Q. Did he tell you what he did have in mind? A. Yes.
>
> Q. What did he say, as if he is speaking? A. He criticised the progress on two points: one, in particular, was the lettering that we were experimenting with for Pub Squash and he wanted the early American field for it and he had -
>
> Q. What exactly does that mean, an early American feel? A. Well, his words that he described it, were something like a wild west American 1830 type feel and, indeed, that was not the type of type-face that we were working on.
>
> HIS HONOUR: A. I take it you mean feel rather than background? A. Promotional feel for the lettering, for the style. The other thing that he did criticize was the lemons and historical hotel type concept that we had and he said very clearly that he wanted the barn door type design, which was not in our sketches and not in our original thinking.
>
> Q. What did you say about that? A. Well, I disagreed with him on both points. I should point out that we subsequently went through endless type books and endless searches to try and clarify what was in his mind, as he cannot draw and he had -
>
> Q. In your opinion? A. He cannot draw and he, however, was describing what he wanted and we had endless searches through

*Not reproduced

type books and type faces and styles of things to arrive at what he wanted till we finally got down to what exists today. The second point was that we did disagree very heavily on the barn door type approach.

Q. Bar door or bar door? A. The doors. He, again, had this swinging door concept in his mind. I argued against it, but he was very adamant that is what he wanted.

Q. What did you say against it? A. Well, I didn't think the doors typified lemons very much and he said he didn't particularly want that, he wanted the doors. I also argued on the type face because the face that was finally to his satisfaction I felt would be very to reproduce.

Q. (Witness shown Exhibit B2) Is that the sort of lettering that he finally approved? A. Yes.

Q. A bit scrolley and ornamental? A. Yes, very ornamental, very difficult.

Q. And the bar doors the way he approved them, too? A. Yes, they were the way he described them and that is the way they -

Q. This is the wild west concept? A. Yes.

Q. Did he designate that period? A. Yes, early American period.

Q. 1830, is that of any special significance? A. That was the year of the wild west.

Q. You had this discussion with him about the doors and the type? A. Yes.

Q. When did you have that design completed, can you tell me that? A. Yes, early in 1975, during January that concept was then changed into art work."

In the result, one ends with the curious situation in which, notwithstanding the strong

protests of Mr. Harris, the expert retained by the Defendant, it was Mr. Brooks, the amateur who cannot draw, who dictated the final form of the artwork, with the expert being relegated to the role of a mere draftsman.

The Defendant, however, would say that there is nothing sinister to be discerned in this. Perhaps, if one could look at the matter in isolation that might be so. But one cannot, in my view, overlook the following:-

(A) although "Pepsi-Cola", "C-Time" and "7-Time", the latter two being new products, were, according to the evidence, far more important, in the order of things, than "Pub Squash", there is no evidence to suggest that Mr. Brooks took so active an interest, in the case of the latter two, in the artwork adopted, or in the case of any of the three, in their promotion; all that appears to have been left to Mr. *Robertson and to Mr. Harris (Transcript p. 447) and his staff;

**(B) as I have earlier pointed out, (p. 83) by about October 1974, at least, Mr. Brooks had in ***his possession a "Solo" can (Transcript p. 195), and, according to him (although Mr. Harris is ****not disposed to agree - Transcript p. 455)

* Not reproduced
** See now page 711
*** See now page 244
****Not reproduced

showed it to, and discussed it with, Mr. Harris *(Transcript p. 195), although not, so he would have it, with a view to giving Mr. Harris ideas for the "Pub Squash" artwork;

(C) I have previously rejected the evidence tendered on behalf of the Defendant as to the origin of the mark "Pub Squash", the choice of "Pub Squash" as a product name, the extent of the knowledge of the Defendant's officers as to "Solo", and as to the independent development of the formula for "Pub Squash";

**(D) I have previously (p. 54) rejected the submission that, in late 1974 and early 1975 the practice of "colour coding" soft drinks was prevalent in the industry, and the further submission that, at that time, the colour yellow was a commonly used device for denoting a soft drink with a lemon flavour.

I am satisfied that the artwork for "Pub Squash" which, at the insistence of Mr. Brooks, was ultimately adopted, represented a deliberate and calculating attempt by Mr. Brooks, in which attempt, for the reasons which I have set out above, he succeeded, to approximate the get-up of "Solo" without crossing the dividing line which would lead to a "passing-off" of

* See now page 224
**See now page 672

"Pub Squash" as "Solo".

(vi) the advertising of "Pub Squash"

* I have earlier (Transcript pp. 31, 32, 33, 40-41, 42-43) described the form and extent of the television commercials screened on behalf of the Defendant, and, in doing so, have pointed to the features, or intended features, of "The Million Dollar Man", "Furnace" and "Kneeboard" relied upon by the Plaintiffs in support of their submission that the Defendant attempted to copy their (the Plaintiffs') form of advertising.

After much consideration I have come to the conclusion that this charge is not made out against the Defendant. So far as the evidence goes (see, for example, as to "The Million

**Dollar Man", Transcript pp. 452-3), the concept of, and the scripts for the various advertisements, were the product of the efforts of Mr. Harris and his staff, none of the officers of the Defendant being involved beyond the giving of instructions. Although I did not find Mr. Harris to be an entirely satisfactory witness (see, for example, his discussion of "nostalgia" -

**Transcript pp. 451-2; see also the somewhat extraordinary lengths to which he appeared to be prepared to go to deny any association between

* See now pages 58, 59, 60, 71-2, 72-4
** Not reproduced

the words "pub" and "pub squash" and a lemon squash such as used to be served in hotels - *Transcript pp. 451, 467, 472), nonetheless I am disposed to accept that he did not, nor did his staff, consciously set out to copy the "Solo" advertisements. The suggested similarities with the "Solo" advertisements, as for example, "ripping off" the top of a can of "Pub Squash", "the spurt of mist" (both in "The Million Dollar Man") and the reference to "the local" (in "Furnace") are, in my view, naturally suggested by, and would be hard to avoid, in a commercial for a canned soft drink named "Pub Squash"; while the proposed incident in "Kneeboard" was, in my view, not unnatural and was different, in its context, from the incident of the canoeist, in the "Solo" advertisements, spilling "Solo" down his chin.

(vii) conclusion

From what I have written above it will appear that it is my view that, as from a time being no later than the later part of August 1974, the Defendant, having by means of one or more of its officers become aware of the successful launch of "Solo" in Victoria and of the sale of "Solo" in Southern New South Wales, and, thus,

*Not reproduced

appreciating that in all probability the Victorian "launch" would be followed by a large scale "launch" of "Solo" upon the New South Wales market, set out in a deliberate and calculated fashion to take advantage of the Plaintiffs' past efforts in developing "Solo" and of the Plaintiffs' past and anticipated future efforts in developing a market for a product such as "Solo", and that, in particular the Defendant, by its officers, sought to copy or to approximate the formula for "Solo", and chose a product name and package for the Defendant's proposed product derived from the intended to gain the benefit of the Plaintiffs' past and anticipated advertising campaign, and the Plaintiffs' package for their product.

Notwithstanding these findings, it is my view, as I have earlier indicated, that, as the facts, as I have earlier found them, do not reveal any relevant misrepresentation on the part of the Defendant as to its goods, the Plaintiffs have not made out a case for relief based upon the expanded concept of "passing-off" or upon "unfair trading".

9. DISCRETIONARY DEFENCES

In the light of the conclusions to which I have come it is

unnecessary for me to consider the various discretionary defences which were argued before me. I have, however, endeavoured to record above the facts, as I have found them upon which the Defendant sought to base the discretionary defences upon which it ultimately relied.

Although the Defendant ultimately did not seek to rely upon the defence based upon the provisions of the Trade Practices Act 1974 (Cth), it is, perhaps, desirable to record my findings as to the relevant facts so that, if the Plaintiffs are minded to appeal, and if, in that event, the Defendant wishes to revive this defence, any appellate court will have the facts before it and will not be faced with the necessity for remitting the matter to me for any further findings.

The evidence would seem to demonstrate that, prior to the introduction into hotels of "post-mix" machines, and, as well, since that time, in hotels in which "post-mix" machines have not been installed, an order to a barman for "a squash" or "a lemon squash" would normally be filled by the barman mixing a drink consisting of ice blocks or crushed ice, a quantity, not necessarily measured, of lemon syrup or lemon cordial, which lemon syrup or lemon cordial may have been, but was not necessarily, purchased from Cadbury-Schweppes (there being other manufacturers of such syrups or cordials which supplied the hotel trade) and a quantity of lemonade or soda water, again, not necessarily purchased from Cadbury-Schweppes, the customer sometimes, but not always, being given the option of

nominating whether or not he wished to have the drink mixed with lemonade or soda water.

The evidence would further seem to demonstrate that "a squash" or "a lemon squash" served from a "post-mix" machine is produced by mechanically mixing together and carbonating in the "post-mix" machine a concentrated syrup or cordial, manufactured by any one of a number of manufacturers, including Cadbury-Schweppes, and water. The evidence would further demonstrate, in my view, that while there may never have been any universally accepted formula used in hotels for making "a squash" or "a lemon squash", each of "Solo" and "Pub Squash" would generally be accepted as being of the same general "style", although, perhaps, differing in taste, from any particular consumer's recollection of "a squash" or "a lemon squash" which, in the past, he had drunk in an hotel.

10. COSTS

While costs are a matter for the discretion of the Court, that discretion is not untrammelled; it must be exercised in accordance with established principle. The generally accepted principle is that costs follow the event. For the purposes of the application of this principle, "the event" should not, in my view, be limited to the ultimate result of proceedings; rather it should, in my judgment be regarded as extending to include the fate of individual issues which have been litigated in the course of proceedings. So much, so it seems to me is inherent in the oft stated proposition that it is not a proper

exercise of discretion to deprive a wholly successful defendant of his costs unless either the defendant brought about the litigation, or, has done something connected with the institution or conduct of the litigation calculated to occasion unnecessary litigation or expense, or, has done some wrongful act in the course of the transaction of which the plaintiff complains.

If this be so, then, in my view, the Defendant cannot, in the light of the various issues of fact which have been litigated, be regarded as a wholly successful defendant, for it has failed on most of the factual issues raised in relation to the claim for relief based upon unfair trading. The consequence of this view is that, while the Defendant has succeeded on the issue of "passing-off" and upon the legal issue of "the tort of unfair trading" and is thus, prima facie, entitled to the general costs of the proceedings, and to the costs of those issues, the Plaintiff is to be regarded as the successful party upon the factual issue upon which the Defendant failed, and, as well, upon the issue based upon the provisions of the Trade Practices Act 1974 (Cth) which was not ultimately pressed.

While I have, in the course of this Judgment been extremely critical of the course of action adopted by the Defendant, and, as well, have been extremely critical of many of the Defendant's officers who were called as witnesses, I do not think that, consistently with the authorities, I would be justified in depriving the Defendant of the costs to which, prima facie, it is entitled; for, whatever view I may have about the commercial

morality of the Defendant's actions, the fact is that I have held that, in law, it was entitled to do what it did.

I could, of course, content myself with making general Orders for costs giving effect to the result which I have shortly expressed above. However, it seems to me that, when a case has assumed the dimensions and complexity attained in the present proceedings, to require the preparation of two Bills of Costs is to put the parties to unwarranted expense and to impose upon the taxing master a task of almost monumental proportions. This being so, it seems to me that a special Order is called for. I have endeavoured, as best I might, to calculate the amount of time which has been devoted to the various issues which have been debated before me. Having done so, I have come to the conclusion that justice between the parties would best be served if, while preserving any prior special Orders as to costs, I were to order that the Plaintiffs pay one half of the costs of the Defendant of the proceedings.

11. CONCLUSION

As will be apparent from what I have written, the resolution of the factual and legal issues in the present proceedings has been a lengthy and difficult task. I think it proper, however, to record the debt which I owe to all Counsel for their assistance, for, without the very helpful summaries and analyses of the evidence which they provided for me, and without the careful and exhaustive examination of the authorities which they undertook, my task would have been far more protracted

than it has been. For those to whom it may be of assistance I attach as an Appendix to this Judgment a list of all the authorities referred to in argument and/or in this Judgment.

12. ORDERS

For the reasons which I set out above I make the following formal Orders:-

1. ORDER that the proceedings be dismissed;
2. ORDER that except to the extent that any costs are the subject of an Order made before this day, the Plaintiff pay one half of the Defendant's costs of these proceedings, such latter costs to include any reserved costs;
3. ORDER that unless within 28 days an appeal is lodged, Exhibits may be handed out; in the event of an appeal being lodged Exhibits to be retained until the disposition of the appeal;
4. LIBERTY to apply.

* * * * *

APPENDIX TO JUDGMENT

AUTHORITIES REFERRED TO IN ARGUMENT AND/OR IN JUDGMENT

(those referred to in Judgment marked *)

Ford v. Foster (1872) L.R. 7 Ch. App. 611

Erlanger v. The New Sombrero Phosphate Co. (1878) L.R. 3 App. Cas. 1218

* Civil Service Supply Association v. Dean (1878) 13 Ch. D. 512

* Singer Manufacturing Co. v. Loog (1880) 18 Ch. D. 395 (Court of Appeal); (1882) L.R. 8 App. Cas. 15 (H.L.)

* Borthwick v. The Evening Post (1888) 37 Ch. D. 449

Thompson v. Montgomery (1888-9) 6 R.P.C. 404 (Chitty J.) 409 (Court of Appeal); sub nom Montgomery v. Thompson (1891) A.C. 217

* Slazenger & Sons v. Feltham (1888-9) 6 R.P.C. 531 (Kekewich J.) 535 (Court of Appeal)

* Leahy, Kelly and Leahy v. Glover (1891-3) 10 R.P.C. 141, 153 et seq (H.L.)

* Hollis v. Burton (1892) 3 Ch. 226

* Reddaway v. Banham (1896) 13 R.P.C. 218

* Powell v. The Birmingham Vinegar Brewery Company Limited (1896) 13 R.P.C. 235

* The Cellular Clothing Co. Limited v. Maxton & Murray (1899) A.C. 326

* S. Chivers & Sons v. S. Chivers & Company Limited (1900) 17 R.P.C. 420

S.T. Midgley & Sons Limited v. Morris and Cowdrey (1904) 21 R.P.C. 314

* W.H. Burford & Sons Limited v. G. Mowling & Son (1908) 8 C.L.R. 212

* William Edge & Sons Limited v. William Niccolls & Sons Limited (1911) A.C. 693

* Claudius Ash, Sons & Co. Limited v. Invicta Manufacturing Co. Limited (1911) 28 R.P.C. 597

* W & G Du Cros Limited v. Gold (1912) 30 R.P.C. 117

Nocton v. Lord Ashburton (1914) A.C. 932

A.G. Spalding & Bros. v. A.W. Gamage Limited (1915) 32 R.P.C. 273

* International News Service v. The Associated Press (1918) 248 U.S. 215

Harrods Limited v. R. Harrod Limited (1923) 41 R.P.C. 74, 80 (Court of Appeal)

* Edward Young & Co. Limited v. Grierson, Oldham & Co. Limited (1924) 41 R.P.C. 548

* Chaplin v. Amador (1928) 269 p. 544

* Turner v. General Motors (Australia) Pty. Limited (1929) 42 C.L.R. 352

Samuelson v. Producers Distributing Company Limited (1932) 1 Ch. 201

* Patten v. Superior Talking Pictures Inc. (1934) 8 F. Supp. 196

* A.L.A. Schecter Poultry Corporation v. United States (1935) 295 U.S. 495

* Helton v. Allen (1940) 63 C.L.R. 691

* Saville Perfumery Limited v. June Perfect Limited (1941) 58 R.P.C. 147

* Lone Ranger Inc. v. Curry (1948) 79 F. Supp. 190

Copydex Limited v. Noso Products Limited (1952) 69 R.P.C. 38

* Gor-Ray Limited v. Gilray Skirts Limited (1952) 69 R.P.C. 99 (Harman J.); 199 (Court of Appeal)

* Goya Limited v. Gala of London Limited (1952) 69 R.P.C. 188

W.D. & H.O. Wills (Australia) Limited v. Rothmans Limited (1956) 94 C.L.R. 182

* H.L. Bolton (Engineering) Co. Limited v. T.J. Graham & Sons Limited (1957) 1 Q.B. 159

Appendix to Reasons for
Judgment of his Honour
Mr. Justice Powell

* T. Oertli A.G. v. R.J. Bowman (London) Limited (1957) R.P.C. 388 (Court of Appeal); (1959) R.P.C. 1 (H.L.)

Mayfair Trading Co. Pty. Limited v. Dreyer (1958) 101 C.L.R. 428

* Tavener Rutledge Limited v. Specters Limited (1959) R.P.C. 83 (Danckwerts J.); 355 (Court of Appeal)

* Samuel Taylor Pty. Limited v. Registrar of Trade Marks (1959) 102 C.L.R. 650

* J. Bollinger v. Costa Brava Wine Co. Limited (No. 1) (1960) Ch. 262; (1960) R.P.C. 16

* Henderson v. Radio Corporation Pty. Limited 60 S.R. 576

* J. Bollinger v. Costa Brava Wine Co. Limited (No. 2) (1961) R.P.C. 116

* Chemical Corporation of America v. Anheuser-Busch Inc. (1962) 306 F. 2d. 433

Clark Equipment Company v. Registrar of Trade Marks (1964) 111 C.L.R. 511

* Holman v. Holman (1964) 81 W.N. (Pt. I) 374

* Rejfek v. McElroy (1965) 112 C.L.R. 517; (1966) A.L.R. 270

* Lee Kar Choo v. Lee Lian Choon (1967) A.C. 602

Alain Bernardin et Cie v. Pavilion Properties Limited (1967) R.P.C. 581

* Vine Products Limited v. McKenzie & Co. Limited (1969) R.P.C. 1

Con-Stan Industries Pty. Limited v. Satinique Corporation Pty. Limited (1969) 91 W.N. 563

* John Walker & Sons Limited v. Henry Ost & Co. Limited (1970) R.P.C. 489

* Willard King Organisation Pty. Limited v. United Telecasters Sydney Limited (12th January 1970 Else-Mitchell J. (unreported)

* Shaw Brothers (Hong Kong) Limited v. Golden Harvest (H.K.) Limited (1971) H.K.L.R. 167; (1972) R.P.C. 559

* Gannon v. Gannon (1971) 125 C.L.R. 629

* Steinberg v. Commissioner of Taxation (1974-5) 134 C.L.R. 640; 50 A.L.J.R. 41

* Hexagon Pty. Limited v. Australian Broadcasting Commission (1975) 7 A.L.R. 233

* H.P. Bulmer Limited v. J. Bollinger S.A. (1976) R.P.C. 97 (Whitford J.); (1978) R.P.C. 79; (1977) 2 C.M.L.R. 625 (Court of Appeal)

* B.M. Auto Sales Pty. Limited v. Budget Rent A Car System (1976) 12 A.L.R. 363

Tavener Rutledge Limited v. Trexapalm Limited (1977) R.P.C. 275

Jarman & Platt Limited v. I. Barget Limited (1977) Fleet Street Patent Law Reports 260

* Erven Warnink B.V. v. J. Townend & Sons (Hull) (1978) Fleet Street Patent Law Reports 1

* Morny Limited v. Ball & Rodgers (1975) Limited (1978) Fleet Street Reports 91

Hornsby Building Information Centre Pty. Limited v. Sydney Building Information Centre Limited (1977-8) 18 A.L.R. 639

Revlon Overseas Corporation v. Bristol Myers (27th January 1978 Cantor J. (unreported)

Heydon: Economic Torts (1973) Ch. 5

Kerly's Law of Trade Marks and Trade Names 10 Ed. (1972) Ch. 16

Libling: The Concept of Property : Property in Intangibles (1978) 94 L.Q.R. 103

Morison: Unfair Competition (1956-8) 2 Syd. L.R. 50

* * * * *

I certify that this and the preceding pages are a true copy of the reasons for judgment herein of his Honour Mr. Justice Powell

Patricia Hoot
ASSOCIATE

Date: Tuesday, 8th August, 1978

IN THE SUPREME COURT OF NEW SOUTH WALES

1682 of 1977

EQUITY DIVISION

CADBURY SCHWEPPES PTY. LIMITED
TARAX DRINKS HOLDINGS LIMITED
TARAX DRINKS PTY. LIMITED
TARAX PTY. LIMITED

Plaintiffs

THE PUB SQUASH CO. PTY. LIMITED

Defendant

ORDER

THE COURT ORDERS that -

1. The proceedings be dismissed.

2. Except to the extent that any costs are the subject of an Order made before this day, the Plaintiff pay one-half of the Defendant's costs of these proceedings, such latter costs to include any reserved costs.

3. Both parties are at liberty to apply.

ORDERED 8 August, 1978 AND ENTERED 24 Nov 1978

By the Court

A.G. Nevill (L.S.)
REGISTRAR IN EQUITY

IN THE SUPREME COURT OF NEW SOUTH WALES)
) 1682 of 1977
EQUITY DIVISION)

CADBURY SCHWEPPES PTY. LIMITED
TARAX DRINKS HOLDINGS LIMITED
TARAX DRINKS PTY. LIMITED
TARAX PTY. LIMITED

Plaintiffs

THE PUB SQUASH CO. PTY. LIMITED

ORDER

THE COURT ORDERS that -

1. Final Leave to appeal to Her Majesty in Council from the Judgment of this Court given and made herein on 8 August, 1978 be granted to the Plaintiffs.

2. Upon payment by the Plaintiffs of the costs of preparation of the transcript record and despatch thereof to England, the sum of Fifty Dollars ($50.00) deposited in Court by the Plaintiffs as security for and towards the costs thereof be paid out of Court to the Plaintiffs.

ORDERED 24 November, 1978
AND ENTERED 8 November, 1979.

By the Court,

A.G. NEVILL, (L.S.)
Registrar in Equity

IN THE SUPREME COURT)
OF NEW SOUTH WALES) 1682 of 1977
EQUITY DIVISION)

CADBURY SCHWEPPES PTY. LIMITED
TARAX DRINKS HOLDINGS LIMITED
TARAX DRINKS PTY. LIMITED
TARAX PTY. LIMITED
Appellants (Defendants)

THE PUB SQUASH CO. PTY. LIMITED
Respondent (Plaintiff)

CERTIFICATE OF REGISTRAR IN EQUITY VERIFYING TRANSCRIPT RECORD

I, ANTHONY GEORGE NEVILL of the City of Sydney in the State of New South Wales, Commonwealth of Australia, Registrar in Equity of the Supreme Court of the said State DO HEREBY CERTIFY that the sheets contained in Volumes 1, 11, 111 and 1V of the Appeal Book herein being pages numbered 1 to 858 inclusive contain a true copy of all the documents relevant to the Appeal by the Appellants, CADBURY SCHWEPPES PTY. LIMITED, TARAX DRINKS HOLDINGS LIMITED, TARAX DRINKS PTY. LIMITED and TARAX PTY. LIMITED to Her Majesty in Her Majesty's Privy Council from the Judgment and Order given and made in the abovementioned proceedings by The Honourable Mr. Justice Philip Ernest Powell, a Judge of the Supreme Court sitting in the Equity Division of the said Supreme Court on 8th August, 1978 and that the said sheets so far as the same have relation to the matters of the said Appeal together with the reasons for the said Judgment given by the said Judge and an Index of all the papers, documents and exhibits in the said Suit are included in the said Transcript Record which true copy is remitted to the Privy Council pursuant to the Order of His Majesty in Council on the Second day of May in the year of Our Lord One thousand nine hundred and twenty five.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the Seal of the said Supreme Court, Equity Division to be affixed this twentieth day of December in the year of Our Lord One thousand nine hundred and seventy nine.

A.G. Nevill (L.S.)
A.G. NEVILL
REGISTRAR IN EQUITY.
SUPREME COURT OF NEW SOUTH WALES

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
EQUITY DIVISION)

1682 of 1977

CADBURY SCHWEPPES PTY. LIMITED
TARAX DRINKS HOLDINGS LIMITED
TARAX DRINKS PTY. LIMITED
TARAX PTY. LIMITED
Appellants (Defendants)

THE PUB SQUASH CO. PTY. LIMITED
Respondent (Plaintiff)

CERTIFICATE OF CHIEF JUSTICE

I, THE HONOURABLE SIR LAURENCE WHISTLER STREET, K.C.M.G.K.St.J. Chief Justice of the Supreme Court of New South Wales DO HEREBY CERTIFY that ANTHONY GEORGE NEVILL who has signed the Certificate verifying the Transcript Record relating to the Appeal by CADBURY SCHWEPPES PTY. LIMITED, TARAX DRINKS HOLDINGS LIMITED, TARAX DRINKS PTY. LIMITED and TARAX PTY. LIMITED to Her Majesty in Her Majesty's Privy Council in the proceedings therein is the Registrar in Equity of the said Supreme Court and that he has the custody of the records of the Equity Division of the said Supreme Court.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this twentieth day of December in the year of Our Lord One thousand nine hundred and seventy nine.

(L.S.)

L.W. Street C.J.
L.W. Street.
CHIEF JUSTICE OF THE SUPREME COURT OF NEW SOUTH WALES