

30, 1980

IN THE PRIVY COUNCIL

No. 5 of 1980.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

EQUITY DIVISION IN PROCEEDINGS NO. 1682 OF 1977

CADBURY-SCHWEPPE'S PTY. LIMITED

TARAX DRINKS HOLDINGS LIMITED

TARAX DRINKS PTY. LIMITED

TARAX PTY. LIMITED

Appellants (Plaintiffs)

THE PUB SQUASH CO. PTY. LIMITED

Respondent (Defendant)

CASE FOR THE RESPONDENT

SOLICITORS FOR THE APPELLANTS

Sly & Russell,
60 Margaret Street,
SYDNEY.

By their Agents:

Stephenson and Harwood,
Saddlers' Hall,
Gutter Lane,
LONDON, DC 2V 5BS 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.

vary the orders made. Nevertheless it submits that his Honour fell into error in some of his findings of fact and of law.

3. Passing off is a single question, but in these proceedings the plaintiffs by their re-amended Statement of Claim make two claims as to modes of passing off and one claim of unfair trading treating this as if it were a distinct wrong.

These claims are

- (a) Passing off based upon an alleged distinctive get up for goods
- (b) Passing off based upon an alleged distinctive slogan used in relation to goods
- (c) Unfair trading by taking for itself the alleged goodwill reputation and selling slogan of the plaintiff allegedly by:-
 - (1) a false representation that the defendant's goods are the same as the lemon squash made by or at one time made by hotels.
 - (2) a representation that the defendant's goods have the characteristics of lemon squash made by hotels which they do not possess.
 - (3) engaging in conduct liable to mislead the public as to the nature or

characteristics of the defendant's goods.

4. (a) Unfair trading has been the subject of detailed elaboration in the House of Lords in the case of Erven Warnink B.V. v. John Townend & Sons (Hull) Ltd. (1979) A.C.731; (1979) 3 W.L.R.68. The decision shows that there is no separate tort of unfair trading but that it is a species of passing off based upon interference with goodwill possessed by a plaintiff or plaintiffs.
- (b) In these proceedings the re-amended Statement of Claim does not allege facts essential to success in a claim for passing off based upon the so called "new fangled tort of unfair trading" and the plaintiffs did not conduct their case on such a basis, nor did they succeed in establishing facts necessary to succeed on such a basis. Further, the findings of the learned trial judge negative any finding of passing off based upon such concepts.
- (c) The ratio decidendi of the case of Erven Warnink B.V. v. John Townend & Sons (Hull) Ltd. (1979) A.C.731; (1979) 3 W.L.R.68 does not assist the plaintiffs in this appeal.

5. (a) The judge's findings negative the application to this case of any principle of passing off based upon the proposition that the plaintiffs or any of them are entitled to goodwill or reputation in a product possessing recognisable and distinctive qualities of which a particular word or words (other than the word "Solo") has become so distinctive as to make their right to use it truthfully as descriptive of their product a valuable part of the goodwill of the plaintiffs or any of them.
- (b) The said findings negative any view that the defendant has misrepresented its product as being a product possessing recognisable and distinctive qualities in which the plaintiffs or any of them own the goodwill.
- (c) The said findings negative any view that the phrase "a lemon squash just like the pubs used to make" or variants thereof has become so distinctive as to make their right to use it truthfully as descriptive of their product a valuable part of the goodwill of the plaintiffs or any of them.
- (d) The said findings negative any view that the phrase "a lemon squash just like the pubs used to make" or any variant thereof

distinguishes in the minds of the relevant public the goods of the plaintiffs or any of them from other similar goods.

- (e) The said findings negative any view that the plaintiffs or any of them is the owner of goodwill in the phrase "a lemon squash just like the pubs used to make" or any variant thereof either because of the reputation of their goods or at all.
- (f) The said findings negative any view that the defendant was or is selling goods falsely described by the name "Pub Squash" or any trade name.
- (g) The judge's findings most particularly relevant to the above matters are to be found in Part I Vol. III of the Record at p. 667 LL. 15 to 19, p. 735 LL. 10 to 17, p. 680 LL. 7 to 19 and p. 733 LL. 6 to 13.

6. The respondent also urges that far from making a finding that the defendant passed off an inferior or differently formulated drink for those of the plaintiffs the learned Judge decided that the soft drink sold by the defendant as Pub Squash had the same characteristics as "Solo" at least as to acidity and this finding differentiates this case from the facts found in Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd. (1979) A.C. 731;

723

(1979) 3 W.L.R. 68.

7. (a) The evidence does not justify any departure from the findings above referred or to any establishment of propositions contrary to those above enunciated.
- (b) The evidence did not establish that the public or any substantial section thereof at or prior to mid 1975 or at all regarded the slogan "a lemon squash just like the pubs used to make" or any variant thereof as distinctive of the products of the plaintiffs or any of them.
- (c) The evidence did not establish that the defendant misrepresented its product as being a product possessing recognisable and distinctive qualities similar to the qualities of a product having recognisable and distinctive qualities marketed by the plaintiffs or any of them.
- (d) The public regard the phrase "a lemon squash just like the pubs used to make" and alleged variants thereof as purely descriptive of lemon squashes for which the ingredients used to be and are specially mixed in an hotel and sold to a customer (some members of the public regard the slogan as referable to the defendant's product).

- (e) The firstnamed plaintiff by its answers to interrogatories (No. 47) affirmed that it is correct to say that the product Solo Lemon Drink is a squash "like the pubs used to make".
- (f) Mr. C.J. Lowe, the chief witness called by the plaintiffs, an executive and director of the firstnamed plaintiff in his evidence in Part 1 Vol. 1 of the Record at p. 83 LL. 16 & 17 stated that "lemon squash" to his understanding had no technical connotation but denoted a "taste style" and at p. 88 LL. 25 to 29 that Solo Lemon Drink was a drink which "delivers an end product taste in our opinion identical to that which you would expect if you bought a lemon squash at a counter" (meaning thereby in an hotel).
- (g) The evidence of reputation and passing off presented for the plaintiffs consisted mainly of law students, with the exception of one R. Bell an accountant, one R. Calderara operations controller in a computer firm, D. Glanville an accounts clerk, who had worked in a supermarket selling products of the plaintiffs, M. Beech a secretary, P.L. Ginn, Council employee, and two ladies M. Burke and

A.L. Mason who both originated from the border between New South Wales and Victoria.

(h) The evidence called by the defendant on the other hand comprised executives of Franklins, Davids and Woolworths three large food and drink wholesalers (two of them also large-scale retailers) in New South Wales, large and small retailers of soft drinks, hotel-keepers and bar employees, and ordinary purchasers of soft drinks and also two rival lemon squash drink manufacturers.

8. (a) The evidence established that the product of the defendant possessed the style and recognisable characteristics of a pub squash.

(b) There was no evidence that the plaintiffs' drink had achieved a particular character by reason of its ingredients or had gained a public reputation under a descriptive name which distinguished it from competing products of a different composition.

(c) There was no evidence and no finding that the phrase "those great old squashes like the pubs used to make" or any variant thereof or the phrase "pub squash" had become distinctive of the products of the plaintiffs or any of them so as to make the right to use such

phrases truthfully a valuable part of their goodwill or of the goodwill of the plaintiffs or any of them.

9. The weight and effect of the evidence in totality is submitted to be as follows:-
- (a) The slogan was a secondary advertising phrase used by the plaintiffs.
 - (b) The slogan never became solely associated in the minds of the public or any substantial section thereof with the goods of the plaintiffs or any of them.
 - (c) Solo was and is the name advanced by the plaintiffs as identifying their products and the only name (or slogan) which in fact did so in the minds of the public or any substantial section thereof.
 - (d) The main advertising of the plaintiffs centred around the slogan "a man's drink".
 - (e) The lemon squash drink of the plaintiffs was a lightly aerated lemon squash style of soft drink as alleged in the Statement of Claim.
 - (f) The defendant's lemon squash drink was also a lightly aerated lemon squash style of soft drink as alleged in the Statement of Claim.
 - (g) Both drinks bore substantial similarities to

522
LL 20-24

lemon squashes sold in the past in hotels (or pubs as they are called in the Statement of Claim).

- (h) Lemon squashes as sold in hotels -
Hotel squashes differed from hotel to hotel and from time to time depending upon e.g.
 - . type of lemon cordial e.g. Schweppes or Tooths Blue Bow.
 - . Quantity of lemon cordial used.
 - . Whether made with soda or lemonade.
- (i) Both Pub Squash and Solo are basically lemon drinks.
- (j) Evidence not sufficient to show public associated slogan with Solo at relevant date.
- (k) Many regarded slogan as simply descriptive.
- (l) Some regarded it as deceptive.
- (m) No evidence that the public associated slogan with a lemon squash having distinctive or unique qualities.
- (n) Some associate slogan with defendant's products.

10. The allegation in the re-amended Statement of Claim of passing off of a distinctive get up belonging to the plaintiffs was correctly dismissed by the trial judge. This is for the following reasons:-

- (a) The plaintiffs' goods were sold in standard size and type soft drink cans and bottles

common to the trade.

- (b) The labels on the cans and bottles of the plaintiffs were completely different from those of the defendant and such as no reasonable person would confuse.
- (c) The yellow colour of the can used by the plaintiffs was not proved to be distinctive solely of their lemon drinks and the Judge correctly decided this point.
- (d) No question of enabling passing off arises where resemblances in the get up lie in features which are not distinctive of the plaintiffs or any of them.

11. The allegation in the re-amended Statement of Claim of passing off based upon the claim that following upon extensive advertising of Solo as having certain qualities of, or as being like "those great lemon squashes the pubs used to make" and otherwise, the public associated "Solo Lemon Drink" with a lemon squash "just like the pubs used to make", and that the expression became and remained distinctive of the "Solo Lemon Drink" were correctly dismissed by the trial judge.

DEFENDANT'S REGISTERED TRADE MARK

12. It was established on the pleadings and the evidence

that the defendant had registered a trade mark incorporating the words "Pub Squash" for goods in Class 32 and consisting principally of those words "Pub Squash" on a label together with the device of public bar doors pursuant to an application made on or about 6th May, 1975 and registered No. B. 286, 989 on the 6th September, 1976.

13. Class 32 of the Prescribed Classification of Goods at all relevant times was "Beer, ale and porter; mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages See Reg. 6 and Fourth Schedule to Trade Mark Regulations, Commonwealth Statutory Rules etc. No. 48 of 1958. and No. 36 of 1961.
14. By Sec. 4A of the Commonwealth Evidence Act 1905 1964, judicial notice is to be taken of such regulations and of proclamations.
15. The plaintiffs by their Statement of Claim (dated 1.6.77) and the amended and re-amended Statements of Claim sought an order that the same be removed from the register as a deceptive mark and as an entry wrongly made and invalid. The Court had power to do this because it was a prescribed court invested with Federal jurisdiction by virtue of the Trade Marks Amendment Act. No. 163 of 1976.

16. The defendant by its Statement of Defence denied that its registered trade mark was invalid and in addition raised pleas of laches acquiescence and delay which relied amongst other matters upon its registration of the said trade mark and upon proceedings taken by it against the firstnamed plaintiff in reliance thereon and the consequences of such proceedings.
17. The judgment does not deal with the matters raised by the plaintiffs or the defendant with respect to the registered trade mark or with its validity.
18. It is provided in Section 58(1) of the Commonwealth Trade Marks Act 1955 that the registration of a trade mark in Part B of the Register, if valid, gives to the registered proprietor of the trade mark the right to the exclusive use of the mark in relation to the goods in respect of which the trade mark is registered.
19. Such a right as aforesaid and the provisions of Part VII and XIII of the said Act are inconsistent with the rights possessed by the owner of an unregistered trade mark and in particular with the claims by the plaintiffs of distinctiveness of the slogan in Paragraph 7 and to passing off in Paragraphs 12, 12A, 12C and 13 of the re-amended Statement of Claim. The plaintiffs' claims of passing off arise inter alia out of the use by the defendant of its registered trade mark.
20. The registration of the trade mark of the defendant, if valid, is inconsistent with the claims of the

plaintiff of ownership or use of any slogan substantially identical with or deceptively similar to the registered trade mark of the defendant and excludes the plaintiffs from making any claim or proving that the said registered trade mark at any time did not comply with Section 28 of the Trade Marks Act, 1955.

21. The defendant respectfully submits that the present appeal is incompetent insofar as it relates to passing off by the use of the name or mark "Pub Squash" by the defendant because questions arise as to the constitutional powers inter se of the Commonwealth of Australia and the States, especially the State of New South Wales, and that Your Lordships will not further entertain this appeal on such questions without the certificate of the High Court of Australia pursuant to Section 74 of the Australian Constitution.
22. The judge by his findings has negatived the existence of any trade mark belonging to the plaintiffs to which the trade mark used by the defendant is deceptively similar or to which it is identical.
23. The only courts competent to grant relief in proceedings involving the matter of the making of a decision relating to the defendant's registered trade mark or to remove the same from the Register of Trade Marks at first instance are prescribed courts exercising Federal jurisdiction being the Supreme Courts of Australian States and Territories, or appellate courts

being the Federal Court of Australia and the High Court of Australia. Reference is made to the Trade Marks Act 1955 - 1976 Sec. 114 and to Secs. 3 and 4 of the Privy Council (Limitation of Appeals) Act, 1968.

24. There is no provision in the Australian Trade Marks Act comparable to Section 2 of the United Kingdom's Trade Marks Act, 1938.

GENERAL SUBMISSIONS

25. Judgment dismissing the proceedings was correct and should not be disturbed.
26. Even if the learned Judge's conclusion be accepted for 733 the purposes of argument as correct, viz:- that the defendant sought in a deliberate and calculated fashion to take advantage of the efforts of the plaintiffs in developing its product sold as "Solo" and to copy or approximate the formula for "Solo" and to choose a product name and package for the defendant's proposed product derived from and intended to gain the benefit of the past and anticipated advertising campaign and packaging of the plaintiffs, the learned Judge's other conclusions should not be reversed, namely:-
- (a) There was no relevant misrepresentation on the part of the defendant as to its goods 733
 - (b) The plaintiffs did not make out a case for relief based upon the expanded concept of passing off or upon unfair trading. 733
 - (c) That none of the variants alleged upon the

phrase "those great old squashes like the pubs used to make" and "a man's drink" was generally associated with "Solo".

667

- (d) That no matter what variation be worked upon it, the phrase "those great old squashes like the pubs used to make" is essentially descriptive of the type of product being advertised - it does not, of itself, identify, or denote the origin of, the product being advertised.

668

- (e) The defendant sufficiently differentiated its product from those of the plaintiffs.

673

- (f) The defendant, in its advertising of "Pub Squash" did not consciously set out to copy the "Solo" advertisements, and suggested similarities with the Solo advertisements are "in my view naturally suggested, by, and, would be hard to avoid, in a commercial for a can of soft drink named "Pub Squash". "

732

- (g) "The evidence, while demonstrating, ... 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".

671

(h) "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'".

673

(i) That with regard to any claim that the defendant had made a false representation about its goods namely that the defendant's goods are the goods of the plaintiffs, or are, or have the characteristics of, the goods of a group or class of persons with whom the plaintiffs were numbered, "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".

680

27. The learned judge was in error in deciding that 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, but having said that "more often than not that question will be concluded by ascertaining whether or not, at the date of commencement of the conduct on the part of the defendant complained of,

the plaintiff had acquired the necessary goodwill or reputation", he was correct in finding that the plaintiffs did not enjoy the necessary reputation or goodwill claimed in the re-amended Statement of Claim.

28. The question was not academic and the learned Judge failed to determine the question as at the commencement of the conduct on the part of the defendant complained of. This of course would have imposed a higher onus of proof on the plaintiffs. It was also a date to which the evidence of alleged reputation was largely not directed, the witnesses called to establish the alleged reputation not being directed on the whole to that date and the reputation or distinctiveness claimed was never established at either date.
29. In Australia, passing off is a matter for State and not for Federal Law (leaving aside questions of deceptive trading under the Trade Practices Act 1974 which are not relevant to these proceedings).
30. Although the re-amended Statement of Claim alleged passing off in New South Wales and elsewhere in Australia, the evidence of witnesses was largely confined to New South Wales and evidence was not given sufficient to justify a finding of reputation

elsewhere.

31. The learned Judge found 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 buying soft drinks but later analysed in what respects that reputation existed. The defendant's product was first sold on 8th April 1975 (a small scale production) with full scale production occurring in June or July, 1975. 666 640
32. For the plaintiff evidence was given of large scale advertising and of large volume sales of the product labelled "Solo" prior to 1975 in Victoria, but sales of a product and advertising do not establish reputation in a trade name, get up or formula unless there is evidence that the advertising or marketing with the name had an effect on the public so as to lead the public to identify the product with the trade name, get up or formula in Victoria let alone New South Wales.
33. In the absence of the plaintiffs establishing reputation, distinctiveness and goodwill in a particular name, formula, or get up it is lawful for a trade rival to imitate his rival's products in those respects and this is not fraud.

34. His Honour appreciated that even if fraud is established it is a step but not an obligatory step to infer passing off and correctly applied the law in this respect.

35. The universal nature of the reputation which a plaintiff must establish with the trade and the public of each Australian State in question and the substantial area over which such reputation must be proved was not established or proved in this case.

36. Where the words for which distinctive reputation is claimed are descriptive, the burden on the plaintiff is extremely heavy.

37. In this case his Honour has found the advertising phrase used by the plaintiffs "those great old squashes the pubs used to make" to be essentially descriptive of the type of product advertised.

668

38. Further the principal name and mark used by the plaintiffs being the word "Solo", it is most unlikely that secondary advertising used mainly to describe or to puff the product sold as "Solo" would ever become distinctive of the plaintiffs.

39. The learned judge erred in admitting the evidence of Dr. Glaser who claimed to give expert opinion of the effect of advertising upon the public. It is

submitted that this was not a matter the nature of which required any peculiar habits or study in order to qualify a person to understand it and was a matter on which the Court was equally qualified to form an opinion and was the very question which the Court itself was called upon to decide in relation to reputation. Such evidence should not be used so as to draw any conclusion favourable to the plaintiffs upon reputation, distinctiveness or at all. The Judge never indicated what effect if any it had upon his decision.

FRAUD

40. The findings of the learned Judge concerning the following matters were erroneous and should not be accepted for the detailed reasons set out in the Appendix to this Case.
- (a) The origin of the name "Pub Squash" as a trade name for a soft drink.
 - (b) The adoption of "Pub Squash" as a product name, and the decision by Mr. Brooks to call the defendant "The Pub Squash Company Pty. Limited".
 - (c) The rejection of the evidence by Mr. Brooks and Mr. Mojsza concerning Exhibits 20 and 25.
 - (d) The adoption of the formula for the soft drink sold as "Pub Squash".

41. The Judge wrongly decided or inferred that the defendant company by itself its servants or agents consciously or deliberately copied the formula or part of the formula of Solo for its Pub Squash lemon drink so as to copy or to approximate one of the characteristics of "Solo" as part of a plan to take advantage of the efforts of the plaintiffs in developing a new product and a market for it.

42. (a) Such finding is contrary to the principle that one cannot combine the independent and unrelated acts and knowledge of a principal and a servant to produce a finding of the elements of fraud and dishonesty.

(b) Especially is this so when the superiors of Mr. Newell were never cross-examined to put to them distinctly -

(1) That they knew of or acquiesced in or gave instruction for Mr. Newell to simulate or imitate a distinctive formulation or style of the product sold as "Solo".

(2) That the formula of Solo was imitated to enable passing off.

43. The learned judge was not entitled by disbelieving evidence of Mr. Brooks and Mr. Mojsza to derive contrary inferences to support such findings of deliberate copying and a "wider plan".
44. Similarly the learned Judge was in error in disbelieving Mr. Brooks or Mr. Mojsza re Exhibits 20 and 25 when it was never clearly or by direct inference put to them that such documents were fabrications or concoctions for the purposes of the proceedings.
45. (a) The learned Judge rejected the evidence of Miss Johnson, Mr. Goodall and Mr. Fugger. Each of these persons had a clear recollection of a conversation with Mr. Brooks during which Mr. Brooks had referred to "Pub" or "Pub Squash" as the name of a lemon-squash style of drink. On the evidence, the conversation with Miss Johnson was in 1971; the conversation with Mr. Goodall was on 12th March, 1972 (his birthday); and the conversation with Mr. Fugger was in November, 1973.
- (b) It was not suggested that any of these persons did not give their evidence honestly, and none of them had any interest in the proceedings.
- (c) The reasons given by the learned Judge for rejecting the evidence of each of these persons

has been discussed in the Appendix hereto and it has been submitted that the learned Judge fell into error in rejecting this evidence.

46. It is further respectfully submitted that the evidence of each of Miss Johnson, Mr. Goodall and Mr. Fugger is reasonable and probable and in the case of Mr. Goodall and Mr. Fugger uncontradicted, and is conclusive of the issues of the origin of the name "Pub Squash" and the adoption of "Pub Squash" as a product name. Accordingly, it should be accepted.
47. It is respectfully submitted that Your Lordships will advise that the conclusions and findings of the learned Judge referred to in paragraphs 40 to 46 inclusive above should be reversed because the learned Judge in reaching those conclusions and making those findings was affected by unreasonable suspicion of officers and senior employees of the defendant and independent witnesses called by the defendant, misapprehension, oversight of fact and drew inferences which were not reasonably open and/or were clearly wrong. In addition to the authorities previously referred to, Reliance is placed upon Edwards v. Noble (1971) 125 C.L.R. 296; Warren v. Coombs (1979) 23 A.L.R. 405; Holman v. Holman (1964) 81 W.N. (N.S.W.) Pt. 1 374; Browne v. Dunn (1893) 6. R. 67 at p. 76-77. Reliance is also placed upon the statement of Sir H.H. Couzens - Hardy M.R. in Coleman & Co. Ltd. v. Stephen Smith & Co. (1912) 29 R.P.C. 81 at p.95 LL 45-46 that "when an atmosphere of suspicion gets about the conduct of a man, people see everything in black."

LACHES ACQUIESCENCE AND DELAY

48. It is respectively submitted that Your Lordships should advise that the relief sought by the plaintiffs be refused by reason of the laches, acquiescence and delay of the plaintiffs whereby the defendant was deceived and misled into the belief that the plaintiffs assented to the conduct and activities of the defendant of which they now complain: B.M. Auto Sales v. Budget Rent A Car (1977) 51 A.L.J.R. 254 at p. 259.

49. The defendant relies upon the following conduct of the plaintiffs (or one or other of them)

(a) (1) By application dated 10 March, 1977, the first plaintiff applied for registration in the State of South Australia of the business name "Pub Squash Company" in the knowledge that the defendant had or was about to commence business in that State under that name. The concise description of the true nature of the business was stated to be "manufacture - distribution of aerated waters" (Exhibit 3).

(2) Following legal proceedings brought by the defendant against the first plaintiff (Exhibit 1), the first plaintiff filed a Statement of Change in Certain Particulars

(in relation to the said business).

Particulars of the change included the true nature of the business (to be carried on under the said name) to "the sale of syrup concentrates including the sale of Lemon Syrups in place of and to the entire exclusion of the business of manufacture and sale of aerated waters". (Exhibit 2). Particulars of the change were advised to the defendant and the South Australian Supreme Court by the affidavit of John Francis Leonard.

821

The relevant transcript evidence is set out at pages 67 - 73 of the Record.

- (3) Pending the outcome of the proceedings in South Australia, the first plaintiff gave an undertaking not to manufacture or distribute aerated waters under the style "Pub Squash Company" and not to accept any orders for manufacture and distribution of aerated waters under that style.

(Affidavit of John Francis Leonard sworn 1st June, 1977 - part of Exhibit 1).

- (b) (1) The first plaintiff caused to be published in the Sydney "Daily Mirror" of 22nd December, 1975 an advertisement featuring cans of various lemon squash

style soft drinks including Solo and Pub Squash together with the words or caption "Solo separates the men from the boys" (Exhibit 13).

- (2) Following complaints by the defendant to the first plaintiff and the threat of legal proceedings against the first plaintiff (Exhibits 22 (a), 22 (b) the first plaintiff undertook that such conduct would not recur and removed posters based on the advertisement from various retail outlets (Exhibit 22 (c)).

140-142

- (c) The first plaintiff and the defendant exchanged and bought from each other soft drink bottles, crates and pallets (Exhibit 14).

144-145

- (d) The plaintiffs were aware of the activities of the defendant and that their trade was expanding from 7th May, 1975 onwards. They had formed the view, on 7th May, 1975 that the defendant's name was confusingly similar to their advertising slogan. But they wrote no letter about it to the defendant; nor did they take any proceedings for relief until the first plaintiff filed a reply and counter-claim in the South Australian proceedings and brought

the present proceedings.

SIGNED - Counsel for the Respondent

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APPENDIX TO CASE FOR RESPONDENT
REFERRED TO IN PARAGRAPH 40 THEREOF

RE PARAGRAPH 40 (a)

ORIGIN OF THE NAME "PUB SQUASH"

At p. 691 LL 10-20 the learned Judge said:

"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 the 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."

It is respectfully submitted that in making this finding the learned Judge fell into error. This is for the following reasons:

- (1) Other than the evidence of Mr. Brooks and Miss Johnson, there is no evidence as to the origin of the trade mark "Pub".
- (2) The evidence of Mr. Brooks as to the origin of the name "Pub Squash" is summarised by the learned Judge at p. 687 L 8.
- (3) The evidence of Miss Johnson corroborates that of

Mr. Brooks. At p. 290 LL 4-23, Miss Johnson gave evidence as follows:-

"Q. You remember any particular conversation in which he discussed anything he saw or heard or found in the United States?

A. Yes, we were going to launch a new product.

Q. Who was going to? A. The bottler at this stage.

Q. Coca-Cola Bottlers? A. Yes.

Q. What did he say? I want you to say it, not me. Can you just put it in as close as you can to his words? A. Well, because of the increase of the lemon market we were thinking of doing a lemon squash type product. Instead of just having it in post mix, we were going to put it in bottles and cans.

Q. And what did he say? A. He wanted to brand name the products. He wanted to call this one "Pub".

Q. Did he say anything to you about this term "Pub"?

A. Yes he found it in the States.

Q. Did you say anything when he said this or was anything else said or done about it? A. No, not really. It just went on the books as another research programme.

Q. He wanted to put out a brand product? A. Yes.

Q. A lemon squash which he was going to call "Pub".

A. Yes."

(4) The evidence given by Mr. Robertson, Mr. Tollis and Mr. Litchfield was that none of them recalled Mr. Brooks, after his return from the United States in 1971, referring to the "Pub" trade mark or to "Pub Squash".

(5) According to Mr. Brooks, he mentioned the names "Pub" and "Pub Squash" in passing when he was going through material that he had found overseas.

207
LL 20-35

The names were not mentioned in a context where they were being seriously put forward as the name for one of the products of the Coca-Cola company. The "Pub" mark just cropped up when Mr. Brooks was going through the material he had brought back from overseas and on that occasion he said:

"Fancy going overseas and getting a name like that".

There was laughter and the "Pub" mark was put back with the other material.

208
LL 38-43;
209
LL 1-20

(6) Mr. Brooks' evidence in this regard is corroborated by that of Miss Johnson. According to Miss Johnson, the meeting at which Mr. Brooks referred to "Pub Squash" was not a regular or formal meeting but was a get-together after lunch which occurred

292
LL 30-35

RECORD

frequently. The whole idea never got past the very tentative stage and only some preliminary research was done. "Pub" was a provisional name. Miss Johnson said that she did not have a lot of difficulty recalling the occasion that Mr. Brooks mentioned the names "Pub" and "Pub Squash". It stuck in her mind, she said, because it was going to be the first new product which the Bottler (Coca-Cola) had launched by itself and that she had ever worked on; for this reason it was important to her.

293
LL 19-20

292
LL 17-21
293
LL 17-18

291
LL 23-28

292
LL 38-42

(7) It is respectfully submitted that the failure of Messrs. Robertson, Tollis and Litchfield to recall Mr. Brooks mentioning the names "Pub" and "Pub Squash" is not sufficient reason not to accept the evidence of Miss Johnson. As Miss Johnson said, the reference to those names was a passing one, on an informal occasion and no importance was attached to it. In these circumstances, there is nothing "curious" or significant in the failure of these persons to recall the reference. The matter is clearly recalled by Miss Johnson because it was important to her and the failure of these other persons to recall the reference may be due to defective memory on their part, possibly because the matter was of less importance to them than to Miss Johnson.

(8) In rejecting the evidence of Mr. Brooks and Miss Johnson, the learned Judge placed weight upon the denial by Mr. Litchfield of the evidence of Mr. Brooks that in 1971 a lemon drink was tested for canning or bottling by the Coca-Cola organisation.

199
LL 8-15;
200
LL 4-9

However, this is contrary to the evidence of Mr. Allman.

690
LL 4-11
351
LL 17-40;
352
LL 3-11;
357
LL 28-32

The evidence given by Mr. Allman is that the Coca-Cola organisation went beyond what is referred to by the learned Judge as "possibly some market research, leading to the development of the lemon cordial for use in 'post-mix machines in hotels and clubs'.

(9) The learned Judge thought it "curious" that Mr. Brooks should say that the name "Pub" or "Pub Squash" was "not offered to anyone of the management people or discussed with any of the management people at Coca-Cola".

688
LL 22-25;
269
LL 21-25

Yet, it is respectfully submitted, this is explicable by Mr. Brooks' evidence that all brand names for drinks manufactured by the Coca-Cola organisation emanate from the United States.

269
LL 40-42

Accordingly, it is respectfully submitted, what Mr. Brooks thought was a good name was irrelevant and there was no point for him to discuss the matter with any of his superiors in Australia.

(10) At p. 690 LL 27-28 and p. 690 LL 1-11, the learned Judge said:

"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 the use in 'post-mix' machines in hotels and clubs."

But, it is respectfully submitted, the learned Judge's conclusion in no way explains or negates the fact that Miss Johnson clearly and distinctly recalled the conversation with Mr. Brooks during which Mr. Brooks had referred to the name "Pub". Nor was there any evidence entitling the learned Judge to conclude, as he did, that the recollection of the name "Pub" by Miss Johnson was a subconscious mis-interpretation of a different

discussion with Mr. Brooks and some market research; that is to say a figment of Miss Johnson's imagination.

RE PARAGRAPH 40 (b)

THE ADOPTION OF "PUB SQUASH" AS A PRODUCT NAME

At p. 708 LL 14-28 and p. 709 LL 1-3, the learned Judge said:

"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..."

It is respectfully submitted that in reaching this conclusion the learned Judge fell into error. This is for the following reasons:

A. Mr. Goodall

Mr. Goodall gave evidence that at his (Mr. Goodall's) birthday party on 12th March, 1972, Mr. Brooks asked Mr. Goodall what he thought of Pub Squash as the name of a lemon squash soft drink.

345
LL 1-35

The learned Judge did not accept the evidence of Mr. Goodall and noted what the learned Judge considered some curious features of Mr. Goodall's evidence. It is respectfully submitted that the learned Judge should have accepted the evidence of Mr. Goodall and erred in not doing so. This is for the following reasons:

699

(1) The fact that Mr. Brooks gave no evidence of the conversation with Mr. Goodall does not permit any inference to be drawn against the evidence given by Mr. Goodall; quite the contrary, and it was not suggested to Mr. Goodall that his evidence was a fabrication.

(2) The word "I" in the expression "It is in the same state as it was when I was in Coca-Cola" refers to Mr. Goodall not to Mr. Brooks. The transcript is not accurate insofar as it records that expression in quotation marks. The expression should not be in quotation marks. It is respectfully

345
LL 9-12

submitted that the note made by the learned Judge involves a misunderstanding of what was said by Mr. Goodall. This is for the following reasons:

- (i) Putting, for the moment, to one side the relevant expression, the whole of the answer (of which the relevant expression forms part) other than the words "Falling apart" (line 13) is not in direct speech. In the case of the words "Falling apart", Mr. Goodall specifically states that those were the exact words used by Mr. Brooks. It should be implied from this statement that the balance of the answer was not given by Mr. Goodall in direct speech.
- (ii) Immediately following the answer, Counsel for the plaintiff said to Mr. Goodall: "Can you say what Mr. Brooks said to you, as if he was saying it?" This implies that Counsel for the plaintiff formed the view that Mr. Goodall was not reciting the conversation which he had had with Mr. Brooks in the first person.
- (iii) As the learned Judge noted, the statement does not make sense if the word "I" is a reference to Mr. Brooks because at 12th March, 1972, Mr. Brooks was still with Coca-Cola. It does, however, make sense if, as is submitted, it refers to Mr. Goodall who left Coca-Cola in

1970. Moreover, in the same answer, Mr. Goodall refers to himself being "ex Coca-Cola" and this is consistent with the word "I" referring to Mr. Goodall, not to Mr. Brooks.

- (iv) If, as the learned Judge noted, the expression did not make sense, it would, it is submitted, have been followed up by Counsel for the plaintiff in cross-examination. But this was not the case for the reason, it is submitted, that it was assumed by Counsel for the plaintiff that it did make sense; and this could only be if it was taken as a reference to Mr. Goodall and not to Mr. Brooks.
- (v) Assuming, for the purpose of testing the proposition, that the word "I" is a reference to Mr. Brooks, the statement still does not make sense if it was made on the occasion of Mr. Goodall's birthday in 1973 (i.e. 12th March, 1973) because, at that time, Mr. Brooks was still an employee of Coca-Cola. Nor does it make sense if it was made on the occasion of Mr. Goodall's birthday in 1974. (i.e. 12th March, 1974). This is because, according to Mr. Goodall, Mr. Brooks said that he (Mr. Brooks) "was interested in going into business himself" but by this time Mr. Brooks had virtually completed negotiations with Cottees General Foods. According to Mr. Brooks' evidence, the draft purchase

200
LL 34-35

agreement came into existence probably early in 1974 and during the three months prior to May 1974 (when the defendant commenced business) Mr. Brooks was approaching finality in those agreements.

201
LL 29-31

In these circumstances, it is submitted, Mr.

174
LL 3-5

Brooks would not have said to Mr. Goodall that he was interested in going into business himself. He would have said, it is submitted, that he had virtually finalised his negotiations with Cottees General Foods. This is particularly so if, as Mr. Goodall said, Mr. Brooks was offering him a position.

- (3) Contrary to the finding of the learned Judge, there is evidence that in 1972 Mr. Brooks was contemplating going into business on his own behalf.

170
LL 3-12;
201
LL 1-11

The evidence shows that in 1972, Mr. Brooks formed the view of forming a soft drink company and acquiring a company that was in the Sydney market which had lost considerable market share over a period of years mainly due to management problems and union difficulties. Also, according to the evidence, in 1972, Mr. Brooks had discussions with Mr. Lazzley (the Managing Director of Cottees General Foods Australia) with a view to the acquisition by Mr. Brooks of the soft drink division of Cottees General Foods.

(4) There is, it is submitted, nothing "curious" about Mr. Brooks making a reference to "Pub Squash" as a name even if it was low in the order of priorities.

(5) The learned Judge also thought it "curious" that Mr. Brooks in his conversation with Mr. Goodall should refer to "Pub Squash" as the name for his company. This it is respectfully submitted, is contrary to the evidence of Mr. Goodall. According to Mr. Goodall, Mr. Brooks said: "What do you think of Pub Squash as a name?"

345
LL 24-25

Mr. Brooks was referring to the name of a product not to the name of a company as, at the time, Mr. Brooks and Mr. Goodall were discussing a "lemon cloudy drink".

346
LL 4-14

Accordingly, it is respectfully submitted, that any consideration given by the learned Judge as to whether "Pub Squash" was the contemplated name of a company, was irrelevant.

B. Mr. Fugger

Mr. Fugger gave evidence that he was telephoned by Mr. Brooks early in November 1973 and a few days later, he had lunch with Mr. Brooks. During this lunch Mr. Brooks told Mr. Fugger that he was going to market "Pub Squash"; generally see p. 405 LL 32-40; p. 406 LL 1-42.

404
L 5

406
LL 1-13

It appears that the learned Judge did not accept

the evidence of Mr. Fugger for the reasons set forth on p. 705 LL 18-34 and p. 706 LL 1-16.

It is respectfully submitted that the learned Judge should have accepted the evidence of Mr. Fugger and erred in not doing so. This is for the following reasons:

- (1) The fact that Mr. Brooks gave no evidence of his conversation with Mr. Fugger, and the fact that it was only after Mr. Brooks had completed his evidence and on the tenth hearing day that the defendant's solicitor telephoned Mr. Fugger is entirely consistent with Mr. Brooks, at the time that he gave his evidence, not having recalled his conversation with Mr. Fugger. It does not permit, it is respectfully submitted, any adverse inference to be drawn; quite the contrary, and it was not suggested to Mr. Fugger that his evidence was a fabrication.
- (2) Mr. Fugger was definite in his recollection that the conversation with Mr. Brooks at which Pub Squash was mentioned was in November 1973, notwithstanding that it was suggested to him in cross-examination that the conversation occurred after he returned from his 1974 overseas trip. Mr. Fugger recalled that the conversation took place at the time that he commenced to make investments in the Park Gallery and in property development.

(3) Mr. Fugger's evidence does not support a finding that Mr. Brooks placed stress upon the product "Pub Squash". Mr. Fugger's evidence was that Mr. Brooks referred to a number of names for soft drinks which he was going to market. Mr. Fugger did not recall the names other than Pub Squash because he wasn't really interested in the whole subject at that time. He recalled "Pub Squash" because he thought it was a good marketing name.

406
LL 10-21

RE PARAGRAPH 40 (c)

C. EXHIBITS 20 AND 25

The learned Judge rejected the evidence of Mr. Brooks and Mr. Mojsza as to exhibits 20 and 25. The reasons of the learned Judge are set out at p. 696-8.

It is respectfully submitted that the learned Judge should have accepted the evidence of Mr. Brooks and Mr. Mojsza and erred in not so doing.

This is for the following reasons:

(1) The learned Judge noted that the evidence given by Mr. Mojsza and Mr. Brooks as to the time when Mr. Brooks offered Mr. Mojsza employment is not in accord. The evidence given by Mr. Brooks is that he offered Mr. Mojsza employment when he first met Mr. Mojsza in April/May 1973.

697
LL 9-13

171
LL 20-30;
202
LL 20-38

The evidence of Mr. Mojsza is that Mr. Brooks did not offer his employment until "I had made the volume product sales". This appears to have been during June 1973.

298
LL 20-30

It is respectfully submitted that this discrepancy is not significant in all the circumstances.

- (2) The learned Judge also noted that according to Mr. Mojsza, exhibit 25 was prepared by him in June 1973 but according to Mr. Brooks, it was prepared in late 1973 or early 1974. According to Mr. Northey, a bundle of documents in the form of exhibit 25 (budget projections) came in to Cottees General Foods in September/October, 1973.

697
LL 14-17

385
LL 20-40;
386
LL 1-11

In cross-examination, Mr. Northey recalled that the last budget projection submitted by Mr. Brooks to Cottees General Foods commenced in July, 1974. He was asked whether it was a possibility that that projection came into Cottees hands some time after the first batch of projections (i.e. after September/October, 1973) and he answered "no". Further, Mr. Northey was shown exhibit 25 and he recognised it as being of the same sort of style as the various budget projections that were submitted by Mr. Brooks to Cottees General Foods.

399
LL 10-41

400

- (3) It is respectfully submitted that the evidence of Mr. Northey supports that of Mr. Brooks and the fact that, according to Mr. Mojsza, the documents were prepared in June, 1973, does not lead to the necessary inference that the evidence of Mr. Brooks, as supported by Mr. Northey, should not be accepted. Moreover, in reply, the plaintiffs did not call Mr. Lazzley to refute the evidence given by Mr. Brooks and Mr. Mojsza.
- (4) It was never distinctly put to Mr. Brooks that the notes which both Mr. Brooks and Mr. Mojsza said were made by Mr. Mojsza on exhibits 20(a) and (b) were not made at the time that Mr. Brooks said they were, namely May or June, 1973. Nor was it distinctly put either to Mr. Brooks or to Mr. Mojsza that the references to Pub Squash in exhibits 20(a) and (b) or the preparation of exhibit 25 were fabrications or concoctions for the purposes of the proceedings.
- (5) It is not reasonable to disbelieve a witness or party or to draw an inference of fraud or deliberate concoction or of an attempt deliberately to mislead the Court with respect to or by virtue of a document in evidence which is corroborative of the witness or party's case, where it has never been suggested to the relevant witnesses in examination or

cross-examination that the document is a concoction, fabrication or forgery made by or on behalf of that witness or party.

RE PARAGRAPH 40 (d)

THE FORMULA FOR PUB SQUASH

At p. 723 LL 25-28 and p. 724 LL 1-2, the learned Judge said:

"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 advantage of the efforts of the plaintiffs in developing a new product and a market for it."

And at p. 725 LL 5-15, the learned Judge said:

"I am satisfied that, whatever may hitherto 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."

It is respectfully submitted that the evidence, properly considered did not permit the learned Judge to make these findings and in making them, the learned Judge fell into error. This is for the following reasons:

(1) The following evidence by Mr. Allman should be noted:

"Q. Was there a Mr. Newell working for the company as a food technologist? A. Yes, he was.

354
LL 39-41

Q. Was he working under your directions?

A. Yes, he was."

"Q. You were in charge of the work that was being done by Mr. Newell during August, September and October of 1974? A. I was directing him in a broad sense.

367
LL 23-30

Q. I am not suggesting you knew intimately from day to day what he was doing, but he was under your supervision in regard to that work?

A. Yes.

Q. You do recognise these documents as being documents of The Pub Squash Company produced from your section? A. Yes."

"HIS HONOUR: Q. Having seen the documents and bearing in mind your knowledge of what Mr. Newell was doing, do you not agree that at some stage during the course of the experiment Mr. Newell obtained samples of Solo or a sample of Solo and analysed it?

370
LL 1-11

A. It could have been during or later.

MR. PRIESTLEY: Q. Have you got any direct knowledge of that yourself? A. No, I haven't. As I said, I had given him a certain style I wanted him to work

to. If he off his own bat chose to do some comparative work during or later that was not to my definite knowledge."

"Q. So far as Mr. Newell's activities in August, September and October, 1974 were concerned, did any instructions that were given to him pass always through you? A. Largely.

371
LL 4-11

Q. On technical matters it would not have been the situation, would it, that either Mr. Brooks or Mr. Mojsza would have given him any instructions without your knowing about it? A. Unlikely."

(2) Mr. Newell worked under the direction and control of Mr. Allman. In cross-examination, it was not put to Mr. Allman that:

- (i) He knew that the plaintiffs enjoyed a distinctive reputation in the formulation of the aerated lemon drink sold as "Solo";
- (ii) He knew of or acquiesced in or gave instructions for Mr. Newell to simulate approximate or imitate such a distinctive formulation;
- (iii) The formula of Solo was imitated to enable passing-off.

(3) On the contrary, Mr. Allman's unchallenged evidence was that he gave Mr. Newell a "certain style he wanted him to work to" and that any

comparable work which Mr. Newell chose to do, was "off his own bat."

- (4) Mr. Mojsza gave evidence that Mr. Brooks tried to give instructions to Mr. Newell to have a look at the quality of existing drinks and research new drinks for presentation in the future. This was in May, 1974, when the defendant took over the Cottees operation. According to Mr. Mojsza, Cottees soft drinks were rejected by the public because of their low quality and because something was always wrong with them.

303
LL 1-4

- (5) Mr. Brooks gave evidence that within two weeks of the defendant commencing operations, he gave instructions to Mr. Newell to develop a lemon squash that he proposed to market.

302
LL 35-39

- (6) None of the matters referred to in (2) (i)-(iii) inclusive were distinctly put either to Mr. Brooks or to Mr. Mojsza. Moreover, Mr. Allman's uncontradicted evidence was that on technical matters it would be most unlikely that Mr. Brooks or Mr. Mojsza would have given Mr. Newell any instructions without Mr. Allman knowing about it.

174
LL 29-32

- (7) It is respectfully submitted that upon the evidence, it was not open to the learned Judge to be satisfied that Mr. Newell was "indulging in an exercise attempt to copy or approximate one of the characteristics

of Solo" with the knowledge of acquiescence of Mr. Brooks.

- (8) The learned Judge drew certain inferences from his rejection of Mr. Brooks' evidence as to the origin of the name "Pub Squash" and from his rejection of the evidence of Mr. Brooks and of Mr. Mojsza as to exhibits 20 and 25.

724
LL 23-28;
725
LL 1-5

However, disbelief of evidence does not provide a proper basis for drawing an inference the opposite of what is disbelieved. Gauci v. Federal Commissioner of Taxation (1975) 135 C.L.R. 81 at p. 87 per Barwick C.J.; Steinberg v. Federal Commissioner of Taxation (1972-1975) 134 C.L.R. 640 at p. 694 per Gibbs J. Accordingly, it is respectfully submitted, that the learned Judge was not entitled by disbelieving the evidence of Mr. Brooks and Mr. Mojsza to derive contrary inferences to support a finding of deliberate copying of the formula for Solo and what the learned Judge referred to as "a wider plan on the part of the defendant to take advantage of the efforts of the plaintiffs in developing a new product and a market for it."

- (9) It is respectfully submitted that the learned Judge erred in law to combine the words and actions of the defendant company and those of its employee,

Mr. Newell, so as to arrive at a conclusion of deliberate and dishonest conduct on the part of the defendant.

SIGNED - Counsel for the Respondent

C.J. Dannon, DC.

S.M. Reeves