

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 I

SOLICITORS FOR THE APPELLANTS

Sly & Russell,
68 Pitt Street,
SYDNEY.

By their Agents:

Stephenson and Harwood,
Saddlers' Hall,
Gutter Lane,
LONDON. EC 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.

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TRANSCRIPT RECORD OF PROCEEDINGS

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10.	Certificate of Registrar in Equity verifying Transcript Record	20 December,	1979 745
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PART 2

LIST OF EXHIBITS INCLUDED IN THE RECORD

OR SENT WITH RECORD

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"A"	Solo Can 370ml of the kind first marketed (not included in printed record)		
"B.1"	Pub Soda Squash Can (not included in printed record)		
"B.2"	Pub Squash Label	Undated	778
"C"	Pub Squash Can adopted after change of Defendant's name (not included in printed record)		
"D"	Questions 26-29 inclusive of the Interrogatories administered to the Defendant pursuant to Notice filed on 18th August, 1977 and answers thereto. (Not included in printed record)	Undated	
"E.1"	Part Schedule of Plaintiff's advertising expenditure for 1973-1977 inclusive entitled "Cadbury Schweppes Australia Limited Solo Radio Press Outdoor Theatre 1973-1977" (Not included in printed record)	Undated	
"E.2"	Balance of Schedule of Plaintiff's advertising expenditure for 1973-1977 inclusive entitled "Cadbury Schweppes Australia Limited Solo Radio Press Out-Door Theatre 1973-1977" (Not included in printed record)	Undated	
"F"	Bundle of forms of confirmation of approval by the Federation of Australian Commercial Television Stations to the telecasting of the commercials specified therein (Not included in printed record)	Various dates	

Exhibit No.	Description of Document	Date	Page
"G"	Solo Can adopted after the Tarax Group of Companies ceased to market the product (Not included in printed record)		
"H"	Sample non-returnable bottle (Not included in printed record)		
"J"	Later version of non-returnable bottle (not included in printed record)		
"K"	Table recording sales of Solo by the thousand dozen in several States of Australia for the years 1973 to and including the year 1976. (Not included in printed record)	Undated	
"L"	1½ litre of Pub Squash (not included in printed record)		
"M"	Signed entry in the Hoover Awards for Marketing, and subject to certain deletions, a brochure relating thereto	Undated	747
"N"	Video-tape of television commercials for Solo (Not included in printed record)		
"O"	Tape recording and transcript thereof relating to Solo radio advertising 1973 to date of hearing (Tape not included in printed record)	10 November,	1977
"P"	First style of Defendant's can to go onto market (Not included in printed record)		
"Q"	Short Minutes of Order made by the Supreme Court of New South Wales in proceedings in the Equity Division by the Plaintiff against The Coca-Cola Export Corporation	6 May,	1977 849
"R"	Report entitled "State Manager's Report - New South Wales - Period 13-1973". (Not included in printed record)	Undated	

Exhibit No.	Description of Document	Date	Page
"S"	Report entitled "Status Report on New Tarax Labels" (Not included in printed record)	Undated	
"T"	Inward goods receipts form for Friday, 14 December, 1973. (Not included in printed record)	14 December,	1973
"U.1"	Cash Sales Invoice (Not included in printed record)	14 January,	1974
"U.2"	Cash Sales Invoice (Not included in printed record)	5 February,	1974
"V.1"	Extracts from Register of Members and other statutory information relating to Tarax Drinks Holdings Limited. (Not included in printed record)	Undated	
"V.2"	Extracts from Register of Members and other statutory information relating to Tarax Pty. Limited (Not included in printed record)	Undated	
"V.3"	Extracts from Register of Members and other statutory information relating to Tarax Drinks Pty. Limited (Not included in printed record)	Undated	
"V.4"	Extracts from Register of Members and other statutory information relating to MacRobertson Pty. Limited (Not included in printed record)	Undated	
"W.1"	Document addressed to Passiona Marketers Pty. Limited entitled "Production Pub Squash - PM032/034. (Not included in printed record)	26 March,	1975
"W.2"	Document addressed to Passiona Marketers Pty. Limited entitled "Production PM040". (Not included in printed record)	30 April,	1975
"W.3"	Document entitled Passiona Marketers - PM034 Pub Squash - Bottle Label Design together with sample Labels and notes attached thereto (Not included in printed record)	Undated	

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"W.4"	Document entitled Passiona Marketers Pty. Limited - PM032 Pub Squash Label design together with sample Labels and notes attached thereto (Not included in printed record)	Undated	
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"Y"	Further document entitled "Pub Squash" (Not included in printed record)	29 August,	1974
"Z"	Document entitled "Reconciliation Tarax Lemon Cans" together with tables attached thereto. (Not included in printed record)	Undated	
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"BB"	Leaflet depicting cans of Tarax Maxi-Can - 370 ml Tarax Midi-Can 300ml and Tarax Mini-Can 200 ml (Not included in printed record)	Undated	
"CC"	Schedule from Harris Whitburn & Associates entitled "Passiona Marketers Pub Squash" (Not included in printed record)	22 April,	1975
"DD"	Schedule of Passages in Evidence to which Dr. Glaser's attention was directed	24 April,	1978 857
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8(b)	Document entitled "Radio Copy Cadbury Schweppes Australia Limited - Solo No. TRX 417" (Not included in printed record)	18 January,	1977
9	Document entitled "Tarax Drinks Limited - Solo winter campaign radio details" (Not included in printed record)	Undated	
10	Document entitled "Tarax Drinks Limited - January/May, 1975 - Melbourne Solo" (Not included in printed record)	20 December,	1974
11	Document entitled "Tarax Drinks Holdings Limited - Media Summary Solo - January/May 1975" (not included in printed record)	9 December,	1974
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2.	Notice of Appearance by the Defendant	7 June,	1977
3.	Defence	21 June,	1977
4.	Notice of Motion for Order that Hearing be Expedited	21 June,	1977
5.	Affidavit sworn by Peter Robert Brooks in Support of Notice of Motion for Order that Hearing be Expedited	23 June,	1977
6.	Notice of Motion for Directions	29 June,	1977
7.	Judge's Notes relating to Notice of Motion for Order that Hearing be Expedited	1 July,	1977
8.	Notice by Plaintiff to Defendant for Discovery	4 July,	1977
9.	Notice by Defendant to Plaintiff for Discovery	8 July,	1977
10.	Plaintiff's List of Documents	12 August,	1977
11.	Affidavit sworn by Andrew Dymock Forsyth in support of application by Plaintiff for leave to serve Subpoena outside State of New South Wales	12 August,	1977
12.	Order of Court granting Leave to Plaintiff to serve Subpoena outside State of New South Wales	15 August,	1977
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14.	Notice by Plaintiff to Defendant to Answer Interrogatories	18 August,	1977
15.	Notice by Defendant to Plaintiff to Answer Interrogatories	19 August,	1977
16.	Statement by Defendant in Answer to Interrogatories	22 August,	1977
17.	Statement by Plaintiff in Answer to Interrogatories	23 August,	1977

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18.	Transcript of Oral Evidence given by <u>DELBRIDGE</u> - Noel Rex Examined Cross-Examined Re-Examined	25 August,	1977
19.	Transcript of Oral Evidence given by <u>DEACON</u> - Daria Examined Cross-Examined	26 August,	1977
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28.	Further Amended Defence	23 December,	1977
29.	Transcript of Oral Evidence given by <u>MILNE</u> - Colin George Examined Cross-Examined Re-Examined	31 January,	1978
30.	Transcript of Oral Evidence given by <u>ALEXANDER</u> - John Ross Examined	31 January,	1978

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31.	Transcript of Oral Evidence given by <u>ALEXANDER</u> - John Ross Recalled, Further Examined Cross-Examined	1 February, 1978
32.	Plaintiff's Supplementary List of Documents	6 February, 1978
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34.	Transcript of Oral Evidence given by <u>MILNE</u> - Colin George Recalled, Further Examined Further Cross-Examined Further Re-Examined Further Cross-Examined (by leave)	10 February, 1978
35.	Transcript of Oral Evidence given by <u>NEWELL</u> - John Mason Examined Cross-Examined Recalled, further Cross-Examined Re-Examined	8 February, 1978 9 February, 1978
36.	Transcript of Oral Evidence given by <u>HARRIS</u> - Phillip Ivan Examined Cross-Examined Re-Examined	13 February, 1978 14 February, 1978
37.	Transcript of Oral Evidence given by <u>ROBERTSON</u> - Douglas Ian Examined Cross-Examined Re-Examined	16 February, 1978 27 February, 1978
38.	Transcript of Oral Evidence given by <u>FINDLAY</u> - Gordon Ian Examined Cross-Examined Re-Examined	28 February, 1978

No.	Description	Date	
39.	Transcript of Oral Evidence given by <u>BAXTER</u> - John Newton Examined Cross-Examined Re-Examined	28 February,	1978
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41.	Affidavit sworn by Charles Hodgkins	9 June,	1978
42.	Transcript of Oral Evidence given by <u>McLEAY</u> - Alan Campbell Examined Cross-Examined Re-Examined	12 June,	1978
43.	Transcript of Oral Evidence given by <u>LITCHFIELD</u> - Stuart Examined Cross-Examined Re-Examined	12 June,	1978
44.	Transcript of Oral Evidence given by <u>TOLLIS</u> - Stephen John Examined Cross-Examined	12 June,	1978
45.	Affidavit sworn by Andrew Dymock Forsyth	16 June,	1978
46.	Notice of Motion for Conditional Leave to Appeal to Her Majesty in Privy Council	21 August,	1978
47.	Affidavit sworn by John Ross Alexander in support of Notice of Motion for Conditional Leave to Appeal to Her Majesty in Privy Council	23 August,	1978
48.	Affidavit sworn by Andrew Dymock Forsyth in support of Notice of Motion for Conditional Leave to Appeal to Her Majesty in Privy Council	24 August,	1978
49.	Order granting Conditional Leave to Appeal to Her Majesty in Privy Council	25 August,	1978
50.	Notice of Motion for Final Leave to Appeal to Her Majesty in Privy Council	21 November,	1978

No.	Description	Date
51.	Affidavit sworn by Andrew Dymock Forsyth in support of Notice of Motion for Final Leave to Appeal to Her Majesty in Privy Council	20 November, 1978
52.	Certificate by Registrar in Equity of Compliance with Conditional Order Granting Leave to Appeal	17 November, 1978

This Statement of Claim was amended in accordance with leave granted by his Honour Mr. Justice Powell on the 26th August, 1977.

DATED the 14th day of December, 1977.

J.E. THOMSON by his Partner Andrew Forsyth
A.D. FORSYTH. (Solicitor for the Plaintiffs.)

Re-amended this 31st day of January, 1978 pursuant to leave granted by the Honourable Mr. Justice Powell.

DATED this 31st day of January, 1978.

J.E. THOMSON by his Partner
Andrew Forsyth (Solicitor for the Plaintiffs.)

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IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CADBURY SCHWEPPEES PTY. LIMITED

TARAX DRINKS HOLDINGS LIMITED

TARAX DRINKS PTY. LIMITED

TARAX PTY. LIMITED

Plaintiffs

THE PUB SQUASH CO. PTY. LTD.

20

Defendant

RE-AMENDED STATEMENT OF CLAIM

1. The Plaintiffs and the Defendant are companies duly incorporated.

1A. TARAX DRINKS PTY. LIMITED is and at all material times has been a wholly owned subsidiary of CADBURY SCHWEPPEES PTY. LIMITED. TARAX PTY. LIMITED is and at all material times has been a wholly owned subsidiary of TARAX DRINKS HOLDINGS LIMITED.

2. Since October of 1973, one or some of the Plaintiffs have carried on, and still carry on the business of (inter alia) the 30

Re-Amended Statement of
Claim

production and sale of a lemon drink under the name of "Solo Lemon Drink".

3. "Solo Lemon Drink" was and is a lightly aerated lemon squash style of soft drink which was and is produced and sold by one or some of the Plaintiffs in cans having a capacity of 370 ml and 250 ml respectively, and in bottles having a capacity of 1.25 litres.

4. The physical appearance and get up of the cans and bottles 10 in which "Solo Lemon Drink" is sold and offered for sale was devised by or for one or some of the Plaintiffs.

5. From October, 1973 and thereafter until the middle of 1975, one or some of the Plaintiffs advertised "Solo Lemon Drink" very widely and at great expense, and in particular:-

(a) advertised the physical appearance, colour and get up of the cans and bottles in which the same is sold and offered for sale by one or some of the Plaintiffs:

(b) advertised "Solo Lemon Drink" as having certain of the qualities of, or as being like "those great lemon 20 squashes the Pubs used to make" and otherwise associated "Solo Lemon Drink" with a lemon squash drink "like the Pubs used to make",

and continued so to advertise its or their said product in the manner hereinbefore particularised after the middle of 1975.

6. The physical appearance or get up of the cans and bottles and the advertising of "Solo Lemon Drink" and slogans used in promoting it had prior to and at the middle of 1975 become and

Re-Amended Statement of
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thereafter remained associated in the minds of the Public with the lemon drink produced and sold by one or some of the Plaintiffs and as signifying the lemon drink produced and sold by one or some of the Plaintiffs.

7. Prior to and at the middle of 1975 "Solo Lemon Drink" became and thereafter remained associated in the minds of the Public with a lemon squash just like the Pubs used to make, and the expression "a lemon squash just like the Pubs used to make" 10 signified in the minds of the Public the lemon drink produced and sold by one or some of the Plaintiffs, and that expression became and remained distinctive of the "Solo Lemon Drink".

8. One or some of the Plaintiffs had prior to and as at the middle of 1975 acquired and still has, a substantial reputation in "Solo Lemon Drink" and the physical appearance and get up of the cans and bottles in which the same is sold and offered for sale and the advertising and slogans used in promoting it had prior to the middle of 1975 become and remains distinctive of the lemon drink produced and sold by one or some of the 20 Plaintiffs.

9. The Defendant in or about the middle of 1975 began to produce and sell lemon drink called "Pub Squash", the name of which was changed in or about November, 1975 to "Pub Soda Squash".

10. "Pub Squash" and "Pub Soda Squash" was and is a lightly aerated lemon squash style of soft drink which was and is produced and sold by the Defendant in cans having a capacity of

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Claim

370 ml. and in bottles having a capacity of 1.25 litres.

11. The physical appearance or get up of the cans and bottles of lemon drink produced and sold by the Defendant from the commencement of such production and sale so nearly resembled and has at all times since, and still so nearly resembles the physical appearance or get up of the cans of lemon drink produced and sold by one or some of the Plaintiffs as at all relevant times to have been calculated and is still calculated to deceive and to lead to the Defendant's lemon drink being passed off on persons who wish to buy "Solo Lemon Drink". 10

12. The Defendant, by calling its lemon drink "Pub Squash" or "Pub Soda Squash" and by depicting bar room doors on the cans and bottles in which the same was sold and offered for sale and otherwise causing the cans and bottles to resemble those produced and sold by one or some of the Plaintiffs intended to appropriate for itself the reputation which one or some of the Plaintiffs had acquired in relation to its or their product, and intended so to deceive, and in fact so deceived members of the Public that they believed that the Defendant's lemon drink was "Solo Lemon Drink" or otherwise associated with one or some of the Plaintiffs. 20

12.A. The Defendant has been and is engaging in conduct of the type referred to in paragraph 12 hereof for the purpose, or with a purpose of dishonestly and unfairly taking for itself the goodwill and reputation and selling slogan of the Plaintiff,

Re-Amended Statement of
Claim

and such conduct constitutes dishonest and unfair and unlawful trading.

12.B. The Defendant's conduct referred to in paragraph 12 hereof is misleading or deceptive or likely to be so.

12.C. The Defendant's conduct as set out in Paragraph 12 hereof

(i) falsely represents that its goods are the same as Lemon Squash made by or which was at one time made by Pubs:

(ii) Represents that its goods have the characteristics of Lemon Squash made by Pubs, which they do not have: 10

(iii) The Defendant is engaging in conduct that is liable to mislead the Public as to the nature or characteristics of its goods:

12.D. The Defendant, in describing its goods as "Pub Soda Squash" is appending thereto a false trade description and is selling the same in that state.

13. The Defendant has in fact passed off and enabled others to pass off its product as the product produced and sold by one or some of the Plaintiffs throughout the very extensive market for that product within New South Wales and elsewhere in Australia. 20

14. The Plaintiffs or one or some of them have been injured in its or their reputation by the aforesaid conduct of the Defendant and have suffered and will suffer loss and damage, and have lost and will lose profits which it or they otherwise

Re-Amended Statement of
Claim

could and would have earned from the sale of "Solo Lemon Drink".

15. On or about 6th May, 1975 the Defendant applied for and subsequently obtained registration pursuant to the Trade Marks Act, 1955 (as amended) of a trade mark in the form set forth in the Schedule hereto.

16. The registration of the Defendant's alleged trade mark is and was at all material times wrongly made and invalid because 10
the use of the mark would by reason of the matters hereinbefore alleged be likely to deceive or cause confusion and by reason of those matters and otherwise, was not entitled to protection in a Court of Justice.

PARTICULARS

The Plaintiffs estimate their loss or damage as a result of the wrongful acts complained of at FOUR MILLION DOLLARS (\$4,000,000.00).

The Plaintiffs are unable to give precise particulars prior to Discovery but will do so after Discovery. 20

THE PLAINTIFFS CLAIM:

1. Damages for the passing off by the Defendant of lemon drink not produced by the Plaintiffs or any of them as and for "Solo Lemon Drink".
2. At the option of the Plaintiffs, an account of profits.
3. An Order that the Register of Trade Marks may be rectified by the expungement therefrom of the entry in respect of the Defendant's said trade mark.

Re-Amended Statement of
Claim

4. An Injunction to restrain the Defendant from using the name "Pub Squash" as the name of any soft drink produced or sold by it.

TO: The Defendant, THE PUB SQUASH CO. PTY. LIMITED, having its registered office at 15 Percy Street, Auburn, 2144. You are liable to suffer Judgment or an Order against you unless the prescribed form of notice of your appearance is received in the Registry within fourteen (14) days after service of this State- 10
ment of Claim upon you, and you comply with the Rules of Court relating to your Defence.

Plaintiffs: CADBURY SCHWEPPE PTY. LIMITED,
19 Mars Road,
LANE COVE. N.S.W.

TARAX DRINKS HOLDINGS LIMITED,
636 St. Kilda Road,
MELBOURNE. Victoria.

TARAX DRINKS PTY. LIMITED,
636 St. Kilda Road,
MELBOURNE. Victoria. 20

TARAX PTY. LIMITED,
636 St. Kilda Road,
MELBOURNE. Victoria.

Plaintiffs'
Solicitor: JOHN EBENEZER THOMSON,
C/o Messrs. Sly & Russell,
68 Pitt Street,
SYDNEY.

Telephone: 233 6722. 30

Plaintiffs
Address for
Service: C/o Messrs. Sly & Russell,
68 Pitt Street,
SYDNEY. C.D.E. 368

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Claim

Address of
Registry:

Common Law Division,
Queen's Square,
SYDNEY.

J.E. THOMSON by his Partner.

Andrew Forsyth

Plaintiffs' Solicitor.

FILED 31st January, 1978

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IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CADBURY SCHWEPPE'S PTY. LIMITED

TARAX DRINKS HOLDINGS LIMITED

TARAX DRINKS PTY. LIMITED

TARAX PTY. LIMITED

Plaintiffs

THE PUB SQUASH CO. PTY. LIMITED

Defendant 10

RE-AMENDED DEFENCE

Allowed subject to deletion of Para 18.

P.E.P. 16.VI.78

1. Paragraph 1 of the Re-Amended Statement of Claim is admitted.

2. Paragraph 1A of the Re-Amended Statement of Claim is not admitted.

3. Paragraphs 2, 3, 4 and 5 of the Re-Amended Statement of Claim are not admitted.

4. Paragraphs 6 and 7 of the Re-Amended Statement of Claim are denied. 20

5. Paragraph 8 of the Re-Amended Statement of Claim is not admitted.

5A. In answer to paragraph 9 of the Re-Amended Statement of Claim the defendant says that it began to sell the lemon drink "Pub Squash" in April 1975.

6. In answer to paragraph 10 of the Re-Amended Statement of Claim, the defendant says:-

Re-Amended Defence

- (a) It admits that Pub Squash and Pub Soda Squash was an aerated lemon drink.
- (b) The Pure Foods Act, 1908 (as amended) provides that a squash must contain a very high juice content and it was for this reason that the defendant's product is now styled "Pub Soda Squash".
- (c) Pub Squash and Pub Soda Squash is produced in bottles and cans of various capacities including 370 ml cans and 1.25 litre bottles. 10
- (d) It does not admit that the drink is "lightly" aerated but says that the drink is different in character from Solo Lemon Drink in that (inter alia) it is more heavily aerated than Solo Lemon Drink.

7. Paragraphs 11, 12, 12A, 12B, 12C, 12D, 13 and 14 of the Re-Amended Statement of Claim are denied.

8. In answer to paragraph 15 of the Re-Amended Statement of Claim, the defendant says:-

- (a) It admits the application for and the obtaining of registration of the trade mark the subject of certificate of registration of trade mark No. B286,987 dated the 6th September, 1976. 20
- (b) It says that no Schedule was contained in the Re-Amended Statement of Claim as alleged.

9. Paragraph 16 of the Re-Amended Statement of Claim is denied.

10. In answer to the whole of the Re-Amended Statement of Claim, the defendant says that this Honourable Court should, in

Re-Amended Defence

the exercise of its discretion, refuse the plaintiffs the relief sought by them by reason of their respective and joint laches, acquiescence and delay.

11. In further answer to paragraphs 1 to 14 inclusive of the Re-Amended Statement of Claim, the defendant says that, if contrary to its contention, it be held that the defendant has committed a passing-off of the product of the plaintiffs or one or some of them, nonetheless, any such passing-off was innocent and, this Honourable Court should, in the exercise of its discretion, refuse the plaintiffs the relief sought by them. 10

12. In further answer to the whole of the Re-Amended Statement of Claim, the defendant says that this Honourable Court should, in the exercise of its discretion, refuse the plaintiffs the relief sought by them by reason of certain misconduct and unconscionable conduct on the part of the plaintiffs, particulars whereof are set forth below.

PARTICULARS

- (a) On or about the tenth day of March, 1977 the first plaintiff applied for and subsequently obtained, registration of the business name "Pub Squash Company" under the laws of the State of South Australia; 20
- (b) Upon applying for such registration, the first plaintiff was aware of the reputation of the defendant in the names "Pub Squash" and "Pub Squash Company" in the States of South Australia, New South Wales and elsewhere in Australia and was aware of the entitlement of the defendant to

Re-Amended Defence

seek registration in the State of South Australia of the business name "Pub Squash Company";

- (c) In the premises, the defendant charges and the facts are that the said application made by the first plaintiff was not made bona fide but was made in bad faith with a view to deliberately violating the rights of the defendant to such registration.

13. In further answer to the whole of the Re-Amended Statement of Claim the defendant says:-

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- (a) By proceedings instituted in the Supreme Court of South Australia by the defendant as plaintiff and against the first plaintiff as defendant, the defendant has claimed the following relief:-

1. An injunction to restrain the defendant whether by its directors, officers, servants or agents or any of them or otherwise howsoever from doing the following act, that is to say, infringing the plaintiff's registered Trade Mark No. B286,987 Class 32.

2. Obliteration upon oath of all marks and words or any colourable imitation thereof upon all articles, the use of which being the marks or words to be obliterated would be a breach of the first injunction prayed for, and verification upon oath that the defendant no longer has in its possession, custody or control any articles so marked.

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3. An injunction to restrain the defendant whether by its directors, officers, servants or agents or

Re-Amended Defence

otherwise howsoever from passing-off or attempting to pass off the business of the defendant as manufacturers and distributors of aerated waters as the business of the plaintiff by the use in connection therewith of the business name "Pub Squash Company" or any colourable imitation thereof or by any other means.

4. Obliteration upon oath of all marks and words or any colourable imitation thereof upon all articles produced by or on behalf of the defendant or in its possession, custody or control, which would be in breach of the second injunction prayed for and verification upon oath that the defendant no longer has in its possession custody or control any articles so marked. 10
5. An injunction to restrain the defendant whether by its directors, officers, servants or agents or otherwise howsoever from doing the following acts or any of them, that is to say, passing off or attempting to pass off or causing, enabling or assisting others to pass off any product not the goods of the plaintiff as and for the plaintiff's product "Pub Soda Squash Lemon Drink". 20
6. An enquiry as to damages or at the plaintiff's option an account of profits and payments of all sums found due upon taking such enquiry or account.
7. Further or other relief.
8. Costs.

Re-Amended Defence

(b) On the 26th April, 1977 the Supreme Court of South Australia, granted an Interlocutory Injunction against the first plaintiff in this proceeding, and after further hearings on the 10th and 15th June the matter has been adjourned until the 22nd June for further consideration.

(c) In the premises, the defendant submits that the institution of this proceeding was vexatious and frivolous and an abuse of the process of the Court and that an order ought to be made staying perpetually this proceeding.

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14. In further answer to the whole of the Re-Amended Statement of Claim the defendant says that the plaintiffs do not come into Court with clean hands and that this Honourable Court should in the exercise of its discretion refuse the plaintiffs the relief sought by reason of unconscionable and also illegal conduct on the part of the plaintiffs particulars of which are set forth below.

PARTICULARS

(a) In breach of the Section 52 of the Trade Practices Act, 1974 (as amended):

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(i) the plaintiffs or one or some of them have inaccurately and misleadingly described the lemon drink known as Solo to the trade and to the public as being a lemon squash like the pubs used to make and as having qualities and a composition similar to the lemon squash which pubs used to make.

(ii) the plaintiffs or one or some of them have deceptively and misleadingly described the lemon drink known

Re-Amended Defence

as Solo to the trade and to the public as being a lemon squash like the pubs used to make and as having qualities and a composition similar to the lemon squash which pubs used to make.

(b) In using the phrase "a squash like the pubs used to make" and the phrase "with all the tang of the great lemon squashes that pubs used to make" the plaintiffs or one or some of them were in breach of Section 53(a) of the Trade Practices Act in that in the case of each phrase this amounted to a false representation that the goods in respect of which the phrase was used, namely Solo Lemon Drink, was of a particular style or model. 10

15. In further answer to the whole of the Re-Amended Statement of Claim the defendant says that the plaintiffs are not entitled to the relief sought by reason that the plaintiffs' cause of action is founded upon illegality in that the conduct of the plaintiffs or one or some of them referred to in subparagraphs (a) and (b) of paragraph 14 hereof, and each of them is illegal being in breach of the respective laws referred to therein. 20

16. The plaintiffs or one or some of them have no right of action at law based upon the alleged identification of the expression "a lemon squash just like the pubs used to make" with the goods of the plaintiffs or one or some of them by reason of the fact that the use of such expression by the plaintiffs or one or some of them in relation to their said goods was deceptive as to the nature and quality of the said goods.

Re-Amended Defence

17. In further answer to paragraph 12A. of the Re-Amended Statement of Claim, the defendant says that in so far as that paragraph alleges unfair trading by the defendant, which allegation is denied, this is not a tort known to law.

18. (Deleted) P.E.P. 16.VI.78

DATED the 12th day of June, 1978.

Solicitor for the Defendant

FILED the day of June, 1978.

NOTICE OF RE-AMENDMENT

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The Defence was Re-Amended on the day of June, 1978 pursuant to an Order made on the 31st day of January, 1978, consequential upon the Amended Statement of Claim filed on behalf of the plaintiffs on the 31st day of January, 1978.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CADBURY SCHWEPPE'S PTY. LIMITED
Plaintiff

THE PUB SQUASH CO. PTY. LIMITED
Defendant

R E P L Y

1. In answer to paragraph 13 of the defence the plaintiff admits the institution of the proceedings therein referred to but denies that the nature of the said proceedings or the course thereof is fully or sufficiently set forth in the said paragraph. The plaintiff will refer to the record of the said proceedings when produced as if the same had been set forth herein. 10

2. Subject as aforesaid, and except insofar as the same contains admissions the plaintiff joins issue on the defence.

DATED: 23rd August 1977.

John Ebenezer Thomson
by his partner Andrew Forsyth

Solicitor for the Plaintiff 20

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

TUESDAY, 23RD AUGUST, 1977.

CADBURY-SCHWEPPE PTY. LIMITED

v.

THE PUB SQUASH CO. PTY. LIMITED

MR. PRIESTLEY, Q.C., with MR. NORTON, Q.C., and MR. HELY
appeared for the plaintiff.

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MR. BANNON, Q.C., with MR. REEVES appeared for the defendant.

(Registrar of Trade Marks called on subpoena duces tecum
by Mr. Priestley. Miss Lynette Bradey appeared in answer
to the subpoena. Miss Bradey produced two bundles of
documents in answer to the subpoena and in respect of one
bundle stated that it was preferred that it not be made
available for public inspection. The documents were left
in the custody of the court, with the issue of inspection
to be determined later.)

(Cottees General Food Limited called on subpoena duces
tecum by Mr. Priestley. Mr. Border, solicitor, appeared
in answer to the subpoena and stated that due to service
yesterday evening of the subpoena the documents called
for were not yet available; it was hoped that production
could be made at 2 p.m.)

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(Harris Robinson & Associates Pty. Limited called on sub-
poena duces tecum by Mr. Priestley. Phillip Harris, a
representative of the company, appeared in answer to the
subpoena. Mr. Harris stated that the original documents
in answer thereto had already been supplied, but that he
produced a duplicate set of such documents.)

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(Bush, Boake, Allen Pty. Limited called on subpoena duces
tecum by Mr. Priestley. No answer.)

(Defendant called on subpoena duces tecum by Mr. Priestley.
Mr. Bannon answered the subpoena, produced the documents
called for under the terms of the subpoena and stated that
he had no objection to the documents so produced being
made available for inspection.)

(Peter Brooks called on subpoena duces tecum by Mr. Priestley. Mr. Bannon answered the subpoena and produced the documents called for under the terms of the subpoena.)

(Arthur S. Cave called on subpoena duces tecum by Mr. Priestley. Mr. Bannon answered the subpoena and produced the documents called for under the terms of the subpoena.)

(Federation of Australian Radio Broadcasters called on subpoena duces tecum by Mr. Bannon. Mr. Carson (Solicitor) answered the subpoena and produced the documents called for under the terms of the subpoena.)

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(Radio 2UE Sydney Pty. Limited called on subpoena duces tecum by Mr. Bannon. No answer.)

(United Telecasters Sydney Pty. Limited called on subpoena duces tecum by Mr. Bannon. Mr. Cooper (Solicitor) answered the subpoena and produced certain documents in answer thereto. Mr. Cooper stated that to produce all the documents called for under the terms of the subpoena would require the use of a pantehnicon, and in his opinion they would serve no useful purpose. Documents so produced were made available for inspection, with leave to Mr. Bannon to make a further call on the subpoena if necessary.)

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(Amalgamated Television Services Pty. Limited called on subpoena duces tecum by Mr. Bannon. No answer.)

(Television Corporation Limited called on subpoena duces tecum by Mr. Bannon. Mr. Border (Solicitor) answered the subpoena and produced a summary of the documents called for under its terms. This summary of documents was left in the custody of the court.)

(Masius Wynne-Williams & D'Arcy MacManus (Australia) Pty. Limited called on subpoena duces tecum by Mr. Bannon. Mr. Thorley (Solicitor) answered the subpoena and produced certain documents in answer thereto. He stated that other material required under the terms of the subpoena would be available at 2 o'clock.)

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(Tarax Pty. Limited, Tarax Drinks (Sydney) Pty. Limited and Cadbury-Schweppes Pty. Limited called on subpoena duces tecum by Mr. Bannon. Mr. Priestley stated that the documents called for under the terms of the subpoena would be answered later in the day.)

HIS HONOUR: I grant leave to the plaintiff to amend the statement of claim by adding additional paragraphs to be numbered 12A and 12B referred to in par.1 of the letter from the plaintiff's solicitors to the defendant's solicitors of 20th August 1977.

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I order that plaintiff pay the defendant's costs of any necessary amendment to its pleadings. I grant leave to the defendant to amend its statement of defence in consequence of the plaintiff's amendment.

(Mr. Bannon sought leave to amend the statement of defence in terms of a document which he handed up in court. The amendment was opposed by Mr. Priestley.)

(Short adjournment.)

ON RESUMPTION:

(Mr. Priestley stated that if the amendment were pressed and allowed he felt compelled to seek an adjournment in order to meet the issues raised thereby.) 10

HIS HONOUR: I note that at this stage Mr. Bannon indicates that in the light of the application for an adjournment he does not press the application to amend the statement of defence. Mr. Bannon, however, indicates that if the matter has not concluded by the end of this week he may well renew his application for leave to amend.

Mr. Priestley indicates that if such an application is made he would in all probability be obliged to apply for an adjournment. 20

(His Honour stated that he had inspected the documents from the Registrar of Trade Marks in respect of which a claim for limited inspection was sought, and considered that inspection of those documents should be restricted to counsel and their advisers.)

(Mr. Priestley opened to his Honour.)

(Solo can, 370 ml, of the kind first marketed tendered and admitted as Exhibit "A".)

(Pub Soda Squash can tendered and admitted as Exhibit "B".) 30

(Pub Squash label tendered and admitted as Exhibit "B2".)

(Pub Squash can adopted after the change of the defendant's name tendered and admitted as Exhibit "C".)

(Questions 26 to 29 inclusive in the interrogatories, and so much of the answer to those questions as terminated with the word "occur" tendered by Mr. Priestley; objected to on the basis that the whole answer was not made part of the tender.)

HIS HONOUR: Mr. Priestley has tendered questions 26 to 29 in the interrogatories administered to the defendant pursuant to 40

notice filed on 18th August 1977 and so much of the answer as commences "as stated ..." down and including "questions 26-29 did occur". Mr. Bannon has objected to the tender of part of the answer. Although such a course is open to a party it is subject to the discretion of the court to permit such course, and I am of the opinion that the whole of the answer ought to be tendered rather than part only of the answer.

Having indicated that view to Mr. Priestley, I have now been informed by him that he is content to tender the whole of the answer. I therefore mark questions 26 to 29, together with the answer to those questions, Exhibit "D".

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(Television screening and tape-recording of commercials conducted within the Court.)

(Luncheon adjournment.)

AT 2 P.M.:

(Mr. Priestley stated that he now produced the balance of the documents called for under the subpoena addressed to Messrs. Masius Wynne-Williams & D'Arcy MacManus (Australia) Pty. Limited.)

(Mr. Border (Solicitor) produced the balance of the documents called for under the subpoena directed to Cottees General Food Limited.)

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(Mr. Priestley produced the documents called for under the terms of the subpoena directed to Tarax Pty. Limited, Tarax Drinks (Sydney) Pty. Limited and Cadbury-Schweppes Pty. Limited. Mr. Priestley stated that all documents produced came from the possession of Cadbury-Schweppes Pty. Limited.)

CECIL JAMES LOWE
Sworn and Examined:

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MR. PRIESTLEY: Q. What is your full name, please, Mr. Lowe?

A. Cecil James Lowe.

Q. Where do you reside? A. 14 Fairway Avenue, Mt. Waverley, Victoria.

Q. Are you a director of the plaintiff company, Cadbury-Schweppes Pty. Limited? A. Yes.

Q. Is your particular function that of director, north-east region, drinks division? A. It is.

Q. During 1972, 1973 and 1974 were you a director of Tarax Drinks (Holdings) Limited? A. No, I was not a director. I was general manager, retail division of Tarax Drinks (Holdings).

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Q. In the course of promoting a drink prior to and different from the drink Solo had you come into contact with a firm of market researchers known as Quantum Market Researchers?

A. Yes.

Q. At some stage did you consult that firm in regard to ideas for promotion which eventually developed into the Solo promotion? A. We did.

Q. Can you give us the date when the Solo promotion commenced in Victoria? A. In October or November 1973.

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Q. When was the drink known as "Solo" first sold in Victoria? A. October or November 1973.

Q. At that stage what was the name of the company actually releasing the drink for sale to the public? A. It would have been Tarax Pty. Limited, ~~as-a-wholly-owned-subsiidiary~~ --- (Objected to; by direction portion indicated struck out.)

Q. At a later stage was there a change in the situation so far as the company actually selling the drink was concerned? A. Yes.

Q. When did the change come about? Approximately will do? A. In 1974 Cadbury-Schweppes Pty. Limited would have taken over the full operations formerly conducted by Tarax Pty. Limited.

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Q. Just going back to 1973, following consultation with the Quantum Market Research people was a decision made by the Tarax company which you named to embark upon the production of a lemon squash drink? A. It was.

Q. And in connection with that decision did the Tarax company consult with Masius Wynne-Williams? A. Yes.

Q. And did you take a personal part in the discussions with those advertising people? A. Yes.

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Q. Who was the person in that company in charge of the work that was done in relation to the proposed new drink? A. Noel Dalbridge, who was the creative director.

Q. Following consultations with that company was the particular style of advertising campaign decided upon? A. Yes.

Q. Can you recall approximately the date when the advertising campaign actually began? A. It began late November or early December 1973.

Q. Have you any documents with you which would enable you to be more precise about that? I am not suggesting you have to be

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very much more precise, but in case anyone wants precision can you be precise? A. Yes.

Q. Have you prepared a table of dates and the number of releases of the different kinds of advertisement and so-forth?

A. I have.

Q. From what material did you prepare that schedule? A. That was prepared from release dates for the issue of new television commercials to television stations as recorded by the media department of Masius Wynne-Williams. 10

Q. That material being available to you in your own company's files? A. No, that material was obtained from the media department of Masius Wynne-Williams.

Q. Would you tell us the date when the campaign actually began in Victoria? A. 9th December 1973.

Q. What had happened in relation to the production of the drink itself by that stage? What steps had been gone through and what point had been reached? A. We had issued a brief to our research and development people. They had consulted with Bush Boake Allen, as one of our major essence suppliers. They had worked together to develop a number of formulations in an endeavour to meet the instructions that had been given. They had been shown proposed television commercials and packaging and they finally produced a test product which met the brief we had given them, which, after testing and checking both internally and externally, was produced in late November 1973. 20

Q. What were the instructions that were given as to what should be produced? A. They were given instructions to produce a soft drink for canning and bottling which would be similar in taste, appearance and style to that which was generally known as lemon squash of the type you would buy in a club or hotel. 30

Q. Had any of that drink been produced by December 1973?
A. Yes.

Q. Was the commencement of the advertising campaign timed to be simultaneous with the first availability of the canned drink to the general public? A. Yes, to the general public. We would have commenced selling to the trade two or three weeks before the bottling commenced.

Q. What kind of advertising or communication to the trade took place prior to the general advertising campaign? A. The trade would have had a small brochure which would have highlighted the major - (Objected to.) 40

Q. A brochure had been circulated? A. A brochure was circulated by the sales representatives.

Q. Would you define just what you mean by "the trade"?

A. "The trade" meaning first of all some 6,000 to 7,000 small storekeepers, milk-bar owners, sandwich shops, delicatessens and the like, plus a number, but not all, of the hotels in Melbourne, plus all major supermarkets in Melbourne and throughout the provincial areas of Victoria.

Q. Are you able to identify to the court which of the various television commercials were shown from time to time after the commencement of the campaign, and which of the radio commercials were the first ones used? A. Yes I am. 10

Q. Can you tell us - before I ask you the detail of that - what was the overall method of using the campaigns? Was more than one used at a time, or were they done in sequence? What was the general approach? A. In the first year only one television commercial and I think two radio commercials were used. That was the original "canoe"-type commercial, and it was shown round about 70 to 80 times throughout that summer. 20

Q. Can we get a little more detail on that? (Objected to; admitted.)

Q. Are you able to say from which stations or through what networks the television commercials were broadcast? A. Yes.

Q. Would you give those details? A. Yes.

Q. This is the first year after commencing? A. I would need to refer to schedules.

Q. Can you put your hands on the necessary document? You now have before you a set of documents headed "Cadbury-Schweppes Australia Pty. Limited. Solo, Press, Outdoor, Radio, Theatre, 1973-77"? A. Yes. 30

Q. Does that contain the detail of all radio and television advertising? A. It does, although in the case of television it does not contain the specific number of spots per station; it is limited to dollars per station per month.

(Schedule of advertisement expenditure for 1973 to 1977 tendered admitted and marked Exhibit "E".)

MR. PRIESTLEY: Q. I notice the second sheet deals with radio expenditure during that period, is there a similar sheet summarising the situation concerning expenditure? A. There is. 40

Q. How far through the document is that? A. It should be after the radio.

MR. PRIESTLEY: What I propose to do is at four o'clock we will uplift the exhibit that has been put before you and put all the summary sheets at the front so that we can see at a glance the total figure expended and that may be what is required for the major purpose.

HIS HONOUR: I should indicate at this stage I have asked the list clerk to put the matter in the list at 9.30 tomorrow so that if we need the extra half hour we can use it but if we don't we can sit at ten. 10

MR. PRIESTLEY: Q. (Witness shown bundle of documents.) Is that bundle a collection of the scripts of the various television commercials so far as you have them at the moment in the order in which they were released and following them is there a collection of scripts of the radio? With them also in chronological order are there intermingled the radio scripts so far as you have them at the moment, is that right? A. That is correct. 20

Q. Is the top script there the script for the first television commercial which was used? A. It is.

Q. Do you have a tape which reproduces that commercial available for tender if required? A. We have.

Q. In fact that was the first one of the ones we saw this morning, was it not? A. That is so.

HIS HONOUR: Q. That is the script, is it, the shooting script? A. Yes, that would be right.

MR. PRIESTLEY: Q. Are you in a position to tell us whether the scripts which are there are scripts which were in each case prepared before the commercial itself was made or if you are not aware of the answer to that question is that a question which Mr. Dalbridge would be readily able to answer? A. It would be a question which Mr. Dalbridge could more expertly answer. 30

Q. I think you have been endeavouring to get together a complete collection of the scripts? A. Yes.

Q. You will be able to complete that shortly as you understand it? A. There will still be one or two minor exceptions in that the scripts are, in fact, lost. 40

Q. Looking at that first script for the moment which you have identified as the one for the first commercial which was

shown to the court this morning, which was also the first commercial shown in Victoria starting at about November, 1973?

A. Yes.

Q. Is that the commercial which you were referring to earlier when you said that only one was shown during the first twelve months? A. That is the commercial.

Q. What happened in relation to that commercial after the first twelve months? Was it thereupon discarded or was it used further? A. No, it was used in Sydney - I might perhaps correct, I did say the first summer, it was used in the first summer.

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Q. Approximately how long was there between the launching of the product and the television campaign in Victoria and in New South Wales? A. Eleven months.

Q. When the product began to be sold in New South Wales the commercial we have been speaking of was still in use in Victoria, was it? A. No, its use had ceased in Victoria.

Q. About when? A. About September, 1974.

Q. When the campaign began in New South Wales were there any other television commercial prepared in addition to that one? A. Yes, there were.

20

Q. Was more than one used simultaneously at the commencement of the New South Wales campaign? A. The New South Wales campaign commenced with the original one that was used in Victoria and then two others were phased in about one to two months after the actual launch date.

Q. Are you able to identify the scripts of those two others that you have just mentioned? A. I am.

(Bundle of scripts tendered, admitted without objection and marked Exhibit "F".)

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Q. Would you mark the first script we have been speaking of, the one for the commercial shown in Victoria from approximately November, 1973, to September, 1974, with a figure 1 in some reasonably prominent but not defacing position? A. Yes.

Q. Would you tell us the date on the top lefthand corner? A. 14th September, 1973.

Q. On the question of the dating are you able to say how accurate the dates are? A. No, the date signifies its final approval.

40

Q. As a script? A. As a script.

Q. We have got forward to New South Wales in late 1974 and you have mentioned that the second and third scripts there were used or are the scripts of commercials which are shown some time after the commencement of the New South Wales campaign? A. That is correct.

Q. Was the second one in the file there shown before the third one? A. Yes.

Q. Would you mark the second and the third ones with a 2 and a 3 in a similar place? A. Yes.

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Q. Reverting to No. 1 again for the moment, are you able to say how often that was shown in New South Wales? A. Only an estimate or an approximate.

Q. What is your approximation based on? A. It is based on dividing the amount of dollars spent over a given period by the approximate average rate for a television commercial.

Q. On that approach approximately how many times was it shown? A. That is in 1974?

Q. Yes, it began to be shown in 1974, did it? A. That is right.

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Q. In 1974 and then in 1975, how often was that particular commercial shown? A. The first one would have been shown about 100 times in 1974. In 1975 not at all, that is the first one.

Q. Who were the companies telecasting that particular commercial? Was it each of the companies owning television stations or did you confine it to particular stations? A. I think you might have some of my papers from that file relating to New South Wales Television.

Q. (Documents given to witness.) Are these the ones you are speaking of? A. Yes, in 1974 it was shown from ATN 7 Sydney, 10 Sydney, TCN 9 Sydney, NBN 3 Newcastle, AMV 4 Albury.

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Q. Turning to the second script which you have marked?
A. Yes.

Q. What approximately was the date when that began to be shown? A. 27th October, 1974.

Q. Through all these stations was that shown? A. It would be the same stations.

Q. How many times was that shown in 1974-1975? A. About the same, 100 times in 1974 and over 100 times in 1975.

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Q. Was that script turned into one of the commercials that was shown to the court this morning? A. It was.

Q. Do you recall whether it was the second one in the order of showing it? A. Yes, it was the man in the surf cap.

Q. Similarly in regard to the third script, what was the date when that was first shown? A. The third script is a 30-second version of the previous one and was shown on 10th November, 1974.

Q. Through what stations? A. Through the same stations. 10

Q. During that year in 1975 how many times? A. In excess of fifty in New South Wales in 1974 and fifty to 100 in 1975.

Q. After the New South Wales campaign began was the first script used again in Victoria at any stage. You have said it terminated in September, 1974, was that the last time it was ever shown in Victoria? A. Yes.

Q. In regard to scripts 2 and 3 were they shown in Victoria at all? A. Yes, they were.

Q. Have you got the details there of how often and when they were shown in Victoria? A. They were shown in both 1974 and 1975, the frequency would be about the same, about over 100 of the sixty seconds and 50 to 100 of the 30-seconds. 20

Q. Can you give us the same details in regard to the next script as you have already done in regard to the other three in New South Wales, when it was first shown, what stations and how often in 1974-1975? A. It would be three and four. Four is Squash at the same time as the other two. On the same stations, with the same frequency through 1974 and 1975.

Q. You had those four scripts all running at one stage at any rate within the same time period? A. Within the summer of 1974-1975, yes. 30

Q. Were there any other scripts being used during that period, that summer of 1974-1975 television commercial scripts? A. No.

Q. Would you turn back to No. 4, turning to the next sheet do we there find a copy of a radio script? A. We do.

Q. Are the three sheets following that first radio script also radio scripts? A. They are.

Q. Were they each used during that summer of 1974-1975? A. They were. 40

Q. Would you mark them 5, 6, 7 and 8? A. Yes.

Q. Whereabouts were they broadcast from? A. They were broadcast in Sydney over Stations 2SM, 2UW, 2UE, 2NX and 2KO.

Q. Where is 2NX? A. Newcastle, and the other States.

Q. What other States? A. Victoria, Queensland and South Australia.

Q. What relation did they have to the television commercials that were being used in that summer? A. They were based around the theme of the television commercial and the theme of the lemon squash as country pubs used to make. 10

Q. When was it that they were first used? A. First used in Sydney in October, 1974.

Q. Is there any one of those four, that is those four numbered 5, 6, 7 and 8 which was used in Victoria at the time of the original commencement of the campaign in Victoria? A. No.

Q. In relation to that Victorian situation are there television stations in the north of Victoria whose programmes can be received in southern New South Wales? A. Yes.

Q. What stations are they, do you know? A. GNV 6 in Shepparton and BCV 8 in Bendigo would extend into New South Wales. 20

Q. In the Victorian advertisement commencement in late 1973 was the commercial which was used in that Victorian campaign shown through either of those stations? A. Yes.

Q. One or both? A. Yes, shown through both Bendigo and Shepparton.

Q. Do the four television scripts and the four radio scripts cover the form of all the advertising that was done by radio and television up to the end of the summer which spanned 1974-1975? A. Yes. 30

Q. During that period what happened in relation to the sale of Solo? A. The initial sales in Victoria were well above expectations, they continued to climb way above expectations when the product was launched into New South Wales in October, 1974, again it achieved a result well above budgeted levels.

Q. (Witness shown Exhibit "A".) Are you able to tell the court if that can or a can in that form was used in the marketing of Solo at any stage? A. Yes it was.

Q. At what stage was that particular can used? A. That was

used from the launching of the product in Victoria until approximately October, 1974.

Q. That has Tarax written on it in various places, does it?

A. Yes, it does.

Q. Would you look at the can that I now show you and tell us whether that has been used as a standard can for the marketing of Solo and if so when the can in that precise form was first adopted? A. Yes, it has been used and it was adopted approximately October, 1974.

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Q. Is that can the first one that was used after the Tarax Company ceased to do the selling and the Cadbury-Schweppes company began the selling? A. Correct.

Q. Are the differences between this and Exhibit "A" the replacement of the words "Tarax" within the medallion in two places by the words "Premium Quality"? A. Correct.

Q. Are there any other differences? A. And the name of the packer has been changed from Tarax Pty. Limited to Solo Lemon Drinks.

(Solo can adopted after Tarax ceased to be the marketer tendered, admitted without objection and marked Exhibit "G".)

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Q. Going back to the commencement in Victoria of the sale of the drink was it sold in other packages apart from the can?

A. Yes, it was sold in returnable bottles and non-returnable bottles.

Q. Were they of the same size or different sizes? A. Different sizes.

Q. Is this a returnable or a non-returnable? A. That is non-returnable.

30

Q. Would you look at this bottle? Is that the size and shape of bottle which was used in selling in the non-returnable bottle when you began to sell in Victoria in late 1974?

A. No, it is that one (indicating).

Q. Would you look at this? Is that the one to which my last question correctly applied? A. That is the size and shape of the non-returnable bottles sold in Victoria initially.

Q. And the label on the bottle is as initially sold? A label similar to that one? A. Yes, except for the fact that Tarax, Tarax, Tarax would have been in place of the words "Premium Quality" and "Solo Lemon Products" in 1973 or early 1974.

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HIS HONOUR: I think perhaps to make the transcript a little more informative to me where Mr. Lowe first used the words "Tarax and Tarax" he pointed to the medallion, where the words now are "Premium Quality" appearing on the label on the bottle in question and is where Mr. Lowe used the word Tarax the third time. He pointed to the indication on the side of the label where the name of the bottler or packager now is Solo Lemon Products.

(Sample non-returnable bottle tendered, admitted without objection and marked Exhibit "H".) 10

Q. Was a bottle in this size and shape sold at the commencement of the Victorian Marketing campaign? A. No.

Q. When was the first time one of those sized and shaped bottles was sold? A. Sydney in October, 1975.

Q. About a year after you first began selling Solo in Sydney?
A. That is right.

Q. When that was first sold did it have a label the same as or different from this one? A. Different in respect to the deletion of the "Watch out for imitations" clause. 20

Q. You refer to the fact that there is a "watch out for imitations" above the medallion? A. Yes.

Q. In the one that was first produced and sold in October, 1975, was the only difference that that warning did not appear on an otherwise identical label? A. But there were some other words on the top.

Q. Which have been replaced by the "Watch out for imitations" clause? A. Which have been replaced but which I don't recall.

Q. It says at the bottom of this one "Please dispose of thoughtfully". I suppose that means that is also a non-returnable bottle? A. That is right. 30

(Later version of non-returnable bottle, tendered admitted without objection and marked Exhibit "J".)

Q. Amongst other preparations before the production of Solo and Solo packages began did you cause steps to be taken to ascertain what the position was concerning Solo as a trademark?
A. I did.

Q. Subsequent to those enquiries did the company, Tarax Drinks Holdings Pty. Limited, apply for a trademark in Solo? A. It did. 40

Q. Is that application still in the course of processing?

A. It is.

Q. Returning to the scripts, when was it that there was the addition or change to the four T.V. commercial advertisement that we have already dealt with? A. There were further new commercials produced in May, June, July, 1975.

Q. Do you have the scripts of those there? A. We have the scripts of these here.

Q. Do they follow next in sequence to the group you have given and if so would you mark them 9, 10 and 11? A. Yes. 10

Q. Can you tell us in relation to scripts 9, 10 and 11 when they were first shown, where and how often? A. 9 was shown in all States of Australia except Western Australia, an average frequency in excess of 100 exposures through 1975 and 1976, and on television shown on channels TCN 9 Sydney, Channel 10 Sydney, Channel 7 Sydney, Channel AMV 4 Albury, Channel NDN 3 Newcastle, and Channel WIN 4 Wollongong.

MR. PRIESTLEY: Q. Were the details you just gave applicable to commercially made script No. 9 or to all three? A. It was applicable to script No. 9, script 10 (30 second version of script No. 9) and script No. 11 which became two commercials in fact in the final execution. 20

Q. You said about a hundred times. Did you refer to one hundred times each for each of the three commercials, or one hundred times in total? A. It would be approximately one hundred times each, of the three commercials.

Q. No. 11 you said eventually became two commercials. How long was No. 11? A. No. 11 was a 60 seconds commercial, which then had two 30 second supporters, I would say, and the three would have been shown 100 times. 30

Q. To what point in 1976 did that take it? A. Those commercials, together with another commercial which recalled Horse lasted till about May 1976.

Q. Were 9, 10 and 11 amongst those shown to the Court this morning? A. 9, 10 and 11 were shown to the Court this morning.

Q. Was the one you called Horse one of those shown this morning? A. It was.

Q. When was it that Horse was first put to air? A. 26th October, 1975. 40

Q. Is that the next one in the sequence there? A. Yes, it is the next T.V. one.

Q. How many radio scripts intervened? A. Three.

Q. Would you mark them with the consecutive numbers 12, 13 and 14, and mark Horse 15?

In regard to 15, you have just told us when it was first shown. How many times was that shown, where and over what period? A. That was shown throughout Australia except W.A. It was shown from October 1975 to May 1976 and its total exposures would have been in excess of 100 in N.S.W.

Q. What about elsewhere? A. It was shown likewise in other markets with varying frequency, but in each case with at least 40 to 50 exposures. 10

Q. The radio scripts 12, 13 and 14 are scripts of commercials which were played this morning? A. I can't say that for certain. I don't remember each and every commercial that was played this morning.

Q. Can you tell us through what stations, what times, and how frequently those radio scripts were broadcast? A. They were broadcast between the months of May 1975, through till December 1975 and in the case of New South Wales they were shown through 2UW, Sydney, 2KO, Newcastle, 2NX Newcastle, 2NM Muswellbrook, 2SM, 2UW in Sydney. 20

Q. Were they broadcast in other States? A. They were broadcast in all other States except W.A.

Q. Have you prepared a table showing sales of Solo by the thousand dozen for the years 1973, 1974, 1975, and 1976? A. I have.

Q. Have you a spare? A. I have it in Forsyth's folder, front page of his black folder.

Q. Is that the table which has been prepared? A. That is the table. 30

Q. From what sources within the company did you prepare that? A. This is prepared from computer summaries of sales for each branch. The computer sales themselves are derived from road summaries and customer invoices. The number of documents, of paper, being in the millions.

Q. Under the heading year 1973, are the sales sales of the Tarax company? A. Yes.

Q. For the year 1974, do the sales consolidate the figures for Tarax company and Cadbury-Schweppes? A. Yes. 40

Q. For the years 1975 and 1976 are the figures entirely those of Cadbury-Schweppes? A. Yes.

ON VOIR DIRE:

MR. BANNON: Q. You say consolidate sales from each branch. Are you speaking of branches of the company Cadbury-Schweppes Pty. Limited, branches of other bottling franchise distributing companies? A. No, I am speaking of companies which are owned and operated branches of Cadbury-Schweppes Pty. Limited; I am not including sales of franchise bottlers.

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Q. Companies owned and operated - are they different companies, different corporations from Cadbury-Schweppes? A. I meant to say branches of Cadbury-Schweppes; they are not different corporations.

Q. There are other sales by other companies which are not included in bottling and distributing? A. Insofar as a bottling and distributing company purchased product from us for resale, the sale to them is included as a sale by us. Where the bottling or distributing company bottles the product under licence to us, the sales are not reported as sales by us.

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Q. So there are other companies which bottle products, not in cans, which are sold under the name Solo? A. Bottles, not in cans. There are other companies which bottle products, specifically Solo, under licence to us, but nobody cans under licence to us, everybody buys cans from us.

Q. These other companies sell their product as Solo? A. Only under an executed franchise agreement with us.

Q. They are not included in the schedule of sales? A. No.

MR. BANNON: No objection to the tender.

(Table recording sales of Solo by the thousand dozen in several States of Australia for the years 1973 to and including the year 1976 marked Exhibit "K".)

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MR. PRIESTLEY: Q. In 1976, did you supervise the preparation of, take part in the preparation of a document which was an entry in the Hoover awards for marketing competition, in which there was set out a detailed history of the preparation for and conduct of the marketing campaign in regard to Solo?

A. I did.

Q. Is the top sheet of the document I show you your signed entry form which accompanied the written material attached to it? A. Yes.

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Q. Is that the original which went in to the Hoover company?

A. Yes.

Q. To what extent did you participate in the preparation of the document? A. I was the original author. It was later edited by about three other people who contributed in putting the final material together.

Q. You were the last man to consider it? A. Yes.

Q. As a matter of history, did the campaign win an award?

A. The campaign won a silver medal at the Hoover marketing award functions.

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Q. When was it that you or somebody within the Cadbury-Schweppes group became aware of a product called Pub Squash?

A. Approximately March-April, 1975.

Q. I show you Exhibits "B1" and "B2". Are you able to say from recollection whether the can "B1" is the same or similar to the first of the Pub Squash cans that you became aware of?

A. It is similar except that it has the words "Pub Soda Squash" whereas the original cans, to my recollection, had the words "Pub Squash".

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Q. Does Exhibit "B2" depict that part of the can as you originally recollect it? A. It does.

Q. At some stage did you, or persons within your company, become aware that Pub Squash had produced a bottle in this shape and size? A. We did.

Q. Approximately when was it you became aware of that?

A. About December 1975.

Q. Was that before or after your company had put a bottle of the same shape and size on the market? A. It was about three months after.

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Q. Does that bottle you have in your hand resemble in its labelling as well as in its size and shape the one you first became aware of? A. I am not aware that the one I first saw had the details of the competition on the back, nor that it had the word "Unkola" on the top.

Q. Apart from that? A. It is a similar bottle.

(One and a quarter litre of Pub Squash tendered and marked Exhibit "L".)

Q. Turning to the Pub Squash can, when it first came to your attention that a drink was being marketed in that package, in

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what areas was it being marketed? A. Sydney only to my knowledge.

Q. I think you said that was in about March-April 1975?

A. Yes.

Q. When after that if at all did it come to your knowledge that the defendant's can was being sold elsewhere than in New South Wales? A. Progressively through 1975 and 1976, it extended into most other markets of the eastern States of Australia.

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Q. Can you recall which one it extended into first?

A. Victoria, early in 1976, South Australia late 1976 or early 1977, Queensland early 1977. We are talking of extending in significant volumes.

MR. PRIESTLEY: The file that was produced by my learned friend, the Arthur S. Cave and Company file, a letter of 7 May, 1976 which refers to one of 27th April, 1976 which, from the context, should be in the file, is not there. I ask my friend to take appropriate steps.

HIS HONOUR: I note that the entry in the marketing competition will be released to Mr. Bannon overnight so he can determine what his attitude will be.

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(Further hearing adjourned to 10.00 a.m. on Wednesday, 24th August, 1977.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPEES PTY. LIMITED

v.

THE PUB SQUASH CO. PTY. LIMITED

SECOND DAY: WEDNESDAY, 24TH AUGUST, 1977.

HIS HONOUR: I grant leave to the plaintiff to file in court a reply in the form initialled by me and placed with the papers. 10

MR. BANNON: Yesterday afternoon my friend tendered the Cadbury-Schweppes entry for the Hoover Marketing Award, and its admission as an exhibit was deferred until I had an opportunity to examine the document. I have now examined the document, and I object to its tender.

(Short adjournment whilst his Honour read the document sought to be tendered.)

(On resumption counsel addressed on the admissibility of the document.)

HIS HONOUR: I admit as Exhibit "M" the signed entry in the Hoover Awards for marketing, together with the brochure which formed the material in relation to that, subject to the following deletions: so much of the material as appears on p.7 of the entry under the title "Public Relations", and so much of the second sentence as appears under the title "Off-premise market" from the words "as on-premise ... to and including "in all circumstances". 20

I note in relation to p. 9 that the words "the traditional Schweppes mixer market" are to be read as the market in which the plaintiff traditionally sold soft drinks rather than as containing an assertion to the effect that that market belonged in some way to the plaintiff. 30

I reject from the tender the whole of the material appearing on pp. 10 and 11. I likewise reject from the tender the photostat of a newspaper article which appears to have been placed at the back of the booklet, and is in fact loose.

CECIL JAMES LOWE
On former oath:

HIS HONOUR: You are on the oath that you took yesterday, Mr. Lowe? You are aware that that is still binding on you?

WITNESS: Yes, your Honour.

(Bush, Boake Allen Pty. Limited called on subpoena duces tecum. John Charles Gough appeared in answer to the subpoena. Mr. Gough stated that he produced some documents in answer to the subpoena at this stage but there were other documents covered by the terms of the subpoena which were not immediately available but which would be available later in the day. Mr. Gough undertook that those documents would be brought to the court this afternoon.) 10

MR. PRIESTLEY: Q. (Exhibit "F" handed to witness.) Yesterday I asked you: "Q. Had any of that drink been produced by December 1973? A. Yes. Q. Was the commencement of the advertising campaign timed to be simultaneous with the first availability of the canned drink to the general public? A. Yes, to the general public. We would have commenced selling to the trade two or three weeks before" something "commenced". Do you remember what that was? A. "The advertising". 20

Q. Do you remember what you said? A. It would have been "advertising".

Q. Whatever you said, it would have been "advertising"?
A. Yes.

Q. We had got down to script 15, I think, had we not?
A. Yes, that is right.

Q. How many scripts are there after 15 in the bundle you have there? How many more are there? A. There are 3 more. 30

Q. Three more? A. Yes.

Q. How many of those are television and how many radio?
A. One of them is a television adaptation of one we had already screened.

Q. Is that the next one in the sequence? A. Yes, that is the next one in the sequence.

Q. Would you mark that with "16" and tell us when, where and how often it was shown? A. That was shown first of all on 13th July 1975. It was shown in all States except Western Australia, and it would have been shown on all the stations previously mentioned. 40

Q. How often was it shown? Did you say how often it was shown? A. It was shown in excess of 100 times.

Q. That leaves two radio scripts in that exhibit? A. That leaves one television commercial which is an adaptation of the arm wrestling commercial which we talked about earlier - the adaptation in relation to the introduction of the one and a quarter litre bottle. That would have been shown in November in Sydney only. It was shown in November in Sydney only with about 30 exposures.

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Q. When you say it was shown in Sydney only, on the three commercial stations in Sydney? A. Yes, on the 3 commercial stations in Sydney.

Q. And the final one that you have? A. The final one is a radio script dated 19th August 1975 which was broadcast on air in October 1975.

Q. Where was it broadcast? On what stations was it broadcast? A. It was broadcast on 2SM, 2UW and 2NX.

Q. Is there a reference on that document to "pinto"? A. No, there is no such reference.

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Q. In addition to advertising on television and radio was other advertising done? A. Yes, there was.

Q. In what areas was that done? A. In all -

Q. I'm sorry, I was avoiding the word "media" but I had better use it. In what media was that done? A. It was done in the press. Newspapers, magazines, and outdoor bill-boards.

Q. What about picture shows? Was any advertising done on picture shows? A. Yes, I'm sorry, the cinema.

Q. Dealing with that last one, first of all what sort of advertising was done at the picture houses, movie houses, cinemas, or whatever you call them these days? What sort of advertising was done there? A. Two-minute versions of some of the television commercials, notably the coloured canoe commercial and the horse breaking commercial. They were shown in theatres throughout the couple of cities of the eastern States through October, November, December, 1974, and again - no, I don't have a record of later exposure. We only have records of theatre advertising in October, November and December 1974.

Q. You said in the capital cities of which States? A. Queensland, N.S.W., Victoria and South Australia.

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Q. And I think details of the expenditure on that appeared

in the exhibit which we looked at yesterday which contains all the breakdown of figures is that right? A. Yes, that is correct.

Q. In regard to the billboard advertising, whereabouts did that take place? A. That took place in 1976 and 1977 throughout Sydney, Newcastle, Brisbane and Melbourne, and consisted of the use of 24-sheet posters, or, in other words, very large billboard-type posters, featuring the Solo man and the product itself.

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Q. So far as newspapers were concerned, can you tell us when the newspaper advertising took place and in what newspapers? Are you able to tell us that? A. Advertising in newspapers took place in 1975. The sum of \$80,000 was expended in N.S.W., Victoria, Queensland and South Australia, and the sum of \$5,500 was expended in national magazines. The papers used were largely the Australian, Sydney Daily Telegraph, Sydney Daily Sun, Sydney Morning Herald, Sydney Daily Mirror, the Melbourne Herald and Age, etc., representative of all available Australian newspapers.

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Q. I asked you yesterday about the commencement of the advertising campaign in Victoria in late 1973, and you gave us the details of that. Do you remember that evidence being given yesterday? A. Yes.

Q. Was there any advertising or sale of Solo anywhere else than in Victoria at that time? A. Yes, the product was introduced into the Brisbane Metropolitan area in November or December 1973, and was advertised in Brisbane in December 1973, with follow-up advertising early in 1974. It was introduced into the Canberra --

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Q. Just before leaving Queensland, you said it was advertised in what form of advertisement? What was the form of advertisement in Queensland? A. Television advertising only.

Q. Television only? A. Yes.

Q. And the same commercial that was being shown for the first 10 or 11 months in Victoria? A. It was the same commercial, yes.

Q. Have you got details there of the number of occasions on which that commercial was shown in Queensland? A. In 1973 it was shown in Queensland about 30 times.

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Q. And in 1974? Have you got the particulars for 1974?
A. In 1974 it was shown about 40 to 50 times.

Q. I'm sorry, I interrupted you earlier. You were going to

move to another area. What is the next place? A. It was also introduced into the A.C.T. in November-December 1973. No advertising was conducted in 1973 in the A.C.T., but advertising commenced on Canberra television in January 1974, and again the same commercial was used, and it would have been shown with a frequency of about 30 times in the first half of 1974.

Q. Was there any sale of Solo in Sydney in 1973? A. The product was sold, but not a full scale launching took place until October 1974.

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Q. Whereabouts was Solo available in Sydney in 1973? A. In 1973 it was available in most supermarkets, some industrial canteens, and available through a varied network of country distributors.

Q. Was any advertising at all conducted in Sydney or N.S.W. in 1973? A. In 1973 only in Albury.

Q. Was that done in Albury itself, or beamed in from Victoria? A. No, it was done on the Albury television station. It was shown on the Albury television station which would cover the Riverina.

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Q. Was that the first in sequence of the television commercial advertisements? A. Yes, that was the first in sequence.

(Short adjournment.)

ON RESUMPTION:

Q. Mr. Lowe, amongst the newspaper type of advertising, was there included some magazine advertising? A. Yes, there was.

Q. What magazines carried advertisements for Solo? A. The Family Circle in 1976 carried a full page advertisement, and assorted T.V. weeklies and souvenir booklets from time to time throughout the life of the product carried magazine advertisements.

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Q. That is from 1973 onwards? A. Yes. There was no magazine advertising in 1973.

Q. (Approaching witness.) Mr. Lowe, I have here a bundle of documents which were produced on subpoena by the plaintiff company, and, passing over to the first newspaper cutting, but in the hope of perhaps not having to go through all of the newspaper cuttings individually, does this bundle of material comprise a collection of clippings from newspapers and magazines with advertisements or articles in them referring to the Solo product? A. Yes, they do.

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Q. Were these clippings and cuttings kept by the company to record to some extent at least some of the advertising that was done for Solo? A. Not so much advertising. These clippings were written by assorted journalists in various newspapers which were not sought by us.

Q. Does that apply to all of the material? A. Most of the material - most of the press material - is not advertising. It is where the concept was written up by assorted newspapers and magazines as an editorial feature. They were not paid for or sought by the company. 10

Q. These clippings - this bundle of clippings represents newspaper comment on the product or the advertising campaign in which the product was sold? A. Yes, that is right. Not solicited by the company.

(Bundle of clippings tendered; objected to; decision on admissibility reserved until 2 p.m.)

CROSS-EXAMINATION:

MR. BANNON: Q. Mr. Lowe, how long have you been in the soft drink trade? A. I have been in the soft drink trade for 15 years and 6 months. 20

Q. On what side of the business have you been? A. I started on the accounting side and progressed to the general management side, and as part of that function I had major marketing responsibility.

Then I became marketing director for a period of 3 years, and I am currently a director of the company.

Q. In the course of your duties I take it that you are familiar with the products that you are marketing? A. Yes, I am familiar with the products we are marketing. 30

Q. And the contents? A. Yes.

Q. You have provided - and I am not criticising this - you have provided a number of press releases about products that you have been associated with haven't you? A. Yes, that is right.

Q. Including releases about Solo? A. Yes, that is correct.

Q. This name "Solo" - you told us that Tarax was marketing Solo in Victoria? A. Yes, that is right.

Q. Were they marketing other products under the name "Solo"? For example, orange drinks? A. No, they were not. 40

Q. Have any other products been put on the market under the name "Solo" to your knowledge? A. No.

Q. I don't think you have a mark in Western Australia, is that right? Someone else has got it over there? A. Yes, that is correct.

Q. When you thought of putting goods on the market under the name "Solo" were you aware of that fact? You were aware of that fact, weren't you? A. No.

Q. At all events, before any goods were put on the market you discovered that someone else had the name "Solo" in Western Australia? A. Yes, that is right. 10

Q. The application for the name "Solo" was made by the company Tarax. Which one was it? Tarax Holdings or Tarax Drinks?

A. I cannot answer that question to that degree of specificity. I think it is Tarax Pty. Limited.

Q. Tarax Drinks - there is a company called Tarax Drinks Holdings Pty. Limited, isn't there? A. It should not be "Pty. Limited".

Q. It is Tarax Drinks Holdings Limited? A. Yes. 20

Q. Do you think that is the company that sought the trademark? A. I cannot answer specifically.

Q. Has your company - Cadbury-Schweppes - made any application to be registered as a registered user of that trademark? A. No.

Q. You sought to obtain a transfer of it? A. It is in process now, but has not yet been finalised. It has not been finalised as at this stage.

Q. That is the application for a transfer? A. Of all trademarks. 30

Q. Including the trademark "Solo"? A. Yes.

Q. I think in one press release which you gave you said that you had begun with the concept of marketing Solo as an orange drink, isn't that right? A. Not Solo as an orange drink.

Q. Marketing an orange drink, is that correct? A. Yes, that is correct.

Q. Then, at a conference you had, you had been out to a golf course and seen people taking lemon squash as a thirst quencher is that right? A. Yes, that is right.

Q. At the 19th hole? A. Yes.

Q. In one press release you recorded that at a conference when it was proposed to launch a product - an orange drink - you suddenly announced that you would make it a lemon squash?

A. That is correct, with a minor correction. It was not in a press release.

Q. It was in an article published in the Australian newspaper? A. Yes, that is right.

Q. And no doubt they had consulted you about it before it was published? A. That is right. 10

Q. And it was decided to market that lemon squash drink under the name "Solo"? A. Yes.

Q. And you said in that article, or it was said in that article, that this decision was made because you thought of the squashes the hotels used to make? A. Yes.

Q. Your company has for many years - Schweppes for many years have marketed a lemon cordial haven't they? A. Yes, that is correct.

Q. When I say "Schweppes" in your position you are familiar with the different companies, I take it, in the Cadbury-Schweppes group? A. Yes, I am familiar with them. 20

Q. Is there a separate company still in existence called Schweppes Limited in Australia? A. No, not to my knowledge.

Q. But there was a company called Schweppes Limited, was there, in this country? A. Yes, there was.

Q. And it marketed this lemon cordial? A. Yes, that is right.

Q. And was that supplied to all the Tooheys hotels in N.S.W., or most of them? A. I would say it was supplied to most of them, yes. 30

Q. It was supplied to most of them? A. I would say so, yes.

Q. And a rival product called Blue Bow was provided by Tooth & Co. Limited, which mainly went to the Tooths hotels in N.S.W.? A. Yes, that is right.

Q. I think Schweppes Limited also provided their product in large measure in Victoria, didn't they, to the Carlton Group?
A. Yes.

Q. And also to the Courage Group? A. I think Courage only own three or four hotels.

Q. Most hotels in Victoria belong to Carlton? A. No, I think most hotels in Victoria are independently owned.

Q. Schweppes cordial was provided in other States as well, I take it? A. Yes.

Q. In the hotels that was mixed up, was it not, with lemonade and some ice? A. Or soda water.

Q. The hotels had a machine, didn't they, called a post-mix machine (Objected to; witness retired from court pending argument as to admissibility of this question, and then returned into court.) 10

Q. I was asking you about the introduction of these post-mix machines in hotels? A. Yes.

Q. When was that? Can you tell us when that occurred?

A. It started about 8 years ago.

Q. About 8 years ago? A. Yes.

Q. These machines have rapidly taken over in a great number of hotels, haven't they, for dispensing lemon squash? A. Yes, that is correct. 20

Q. Will you look at this bottle which I show you? Is that a bottle of the Schweppes lemon fruit juice cordial that your company has been marketing? A. It is a bottle. I cannot comment on the product inside.

Q. It appears to be? A. It appears to be the product.

Q. And it has your label on it? A. Yes. I should mention that this is a very old label.

(Bottle shown to Mr. Lowe, tendered; objected to; m.f.i. 1.)

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Q. I show you now another bottle. Will you have a look at that bottle please? Does that appear to be a bottle of Tooth & Company product Blue Bow lemon squash? A. It would appear to be, yes.

Q. Do you recognise the label? A. Yes, I recognise the label.

(Bottle bearing Blue Bow lemon squash label tendered; objected to; m.f.i. 2.)

WITNESS: I think the point should be made that that bottle has not been manufactured by Tooth & Co. to my knowledge for 4 to 5 years.

Q. The reason you say that is that your company took over all the stocks from Tooth & Company is that right? A. Yes, that is correct.

Q. And Tooth & Company went out of production? A. Yes.

Q. And you marketed the remaining stocks of Blue Bow lemon squash, and it has not been sold since? A. That is correct. 10

Q. That was a very concentrated and bitter drink, wasn't it?
A. Which one are we referring to now?

Q. I am referring to Blue Bow. That was a very concentrated and bitter drink wasn't it? A. I have never tasted it.

Q. Haven't you? A. No, I have not.

Q. I thought from material you gave to the Australian you said that was a common habit at the golf club? A. That is right.

Q. That people had these lemon squashes? A. Yes.

Q. Didn't you have any yourself? A. Yes. I live in Melbourne. 20

Q. You did not have the Tooth's one - you had the Schweppes one? A. There is no Tooth's in Melbourne.

Q. You know that the Tooth's product was practically pure lemon juice, don't you? A. No, I don't know that.

Q. When you took over the product didn't you know what was in it? A. At the time when Schweppes took over Blue Bow I was not involved in the Schweppes side of the business at all.

Q. You knew nothing about the take-over? A. No. It happened before Cadbury-Schweppes took over Tarax. 30

Q. I notice that whereas the Tooth's product is labelled "lemon squash" yours is labelled "lemon fruit juice cordial"?
A. Yes.

Q. There are good reasons for that aren't there? A. Yes.

Q. In relation to the Pure Foods Act? A. Yes, that is right.

Q. In N.S.W. at least if you are selling something as "lemon

squash" it must have a certain percentage of pure lemon juice in the product must it not? A. Yes, that is correct.

Q. You are aware there are regulations that require a certain percentage of lemon juice to be in the product before you can call it "lemon squash"? A. I am not aware of what the requirement is for lemon squash in N.S.W. I am aware of the requirement for lemon fruit juice cordial.

Q. But you do know that under various regulations - whether in N.S.W. or Victoria - there is a requirement of a certain percentage of lemon juice being in a drink before you can call it "lemon squash". You know that, don't you? A. I doubt that. I doubt that the words "lemon squash" are common to all States. 10

Q. Are you aware that there are certain reasons why you should not call a drink "lemon squash" unless it has a certain percentage of lemon juice in it? Are you aware of that?

A. No, I could not say that, without reference to the Pure Food Acts themselves in relation to the word "squash".

Q. In that event the product is not called "squash" - it is called "lemon drink", and also is labelled to accord, so far as you know, with regulations under the Pure Foods Acts? 20

A. Correct.

Q. Although you didn't have anything to do with the Schweppes lemon fruit juice cordial earlier on, you now do, isn't that correct? A. Yes, that is correct.

Q. And you supply the material to the hotels, is that right?

A. Yes, that is right.

Q. And that is sold in post-mix machines labelled "Schweppes"?

A. Not exclusively. ,

Q. Not exclusively? A. No. 30

Q. But often it is? A. Often. I'm sorry, would you repeat the question?

Q. That is sold in hotels from post-mix machines labelled "Schweppes"? A. Not exclusively.

Q. But in part? A. In part, yes.

Q. And these post-mix machines have got two cylinders, one containing water or carbonated water, if you like to call it that (objected to; question withdrawn).

Q. The material that is sold in hotels today as a squash is quite different from what used to be sold as a squash in the 40

days when Tooth's supplied Blue Bow and Blue Bow and Schweppes provided bottled material, is that right? It is a different thing (objected to; witness retired from court whilst argument on admissibility took place, and returned into court).

Q. These post-mix machines had a cylinder with water in it, is that right? A. No, that is not right. They are actually connected to mains water.

Q. One cylinder with carbon-dioxide? A. Yes.

Q. A cylinder containing an emulsified cordial product? 10
A. It was just called a syrup.

Q. But a product containing an emulsion of great fruit essences, amongst other things? A. For what product?

Q. For this Schweppes material sold in the hotels in the post-mix machine? A. I can't answer that without reference to the formula.

Q. You know, do you not, that the product contained an emulsion? A. No.

Q. You know that it was not a pure lemon juice? A. Nor is that bottle. 20

Q. Nor is which bottle? A. The bottle of Schweppes pure lemon drink.

Q. You agree that it is different from pure lemon drink?
A. No.

Q. The product in the cylinder sold by Schweppes? A. The end product is consistent with what you would get by taking that, and carbonating it. That would produce an end result from these post-mixers which would be similar to what you would get with that system.

Q. You agree that it was not a pure lemon juice - you agree that it was not pure lemon juice in the cylinder of material supplied by Schweppes as at 1st June, 1977? A. No, I can't agree to that, without reference. 30

Q. Don't you know? A. I can't say the degree - I can't say the quantity of lemon juice which is in the syrup.

Q. I'm not asking you that. I am asking is it pure lemon juice? A. It is not pure lemon juice.

Q. Is it different from the pure lemon juice that used to be supplied in hotels (objected to).

Q. Did the hotels in the past supply, as lemon squash, pure lemon juice (objected to).

Q. Did some hotels in the past supply a pure lemon juice?
A. Not a lemon juice.

Q. What was it? A. Lemon fruit juice cordial, which is not a lemon juice.

Q. Do you agree that the squashes that used to be sold in the hotels in the old days were different from the squashes that were supplied in hotels in 1977 (objected to; question withdrawn). 10

Q. In some hotels were the products different (objected to; question withdrawn).

Q. Do you know of any hotels which supplied as a lemon squash in 1977 a product different from the old squashes (objected to; rejected).

Q. Do you agree that over the years the content - do you agree that the proposition of the cordial supplied by Schweppes to hotels for squash has changed? A. I cannot answer that question, because I don't know what the composition was 10 years ago, say. 20

Q. Do you know of any changes that have occurred since you knew about the Schweppes cordial? A. In bottled cordial?

Q. Schweppes cordial sold in hotels in post-mix cylinders?
A. There have been changes, yes.

Q. What is the change that you know of? A. The change is that 3 years ago Schweppes sold products known as Schweppes lemon syrup for use from post-mix units. Following the introduction of Solo the syrup supplied to these hotels was changed to Solo syrup. 30

Q. And is that the same composition as Schweppes syrup, or different? A. It is different.

Q. You say it is different? A. Yes.

Q. In what respect do you say it is different? A. It is based on the Solo product taste.

Q. Is it the same as the Solo product in the cans, or is it different in composition? A. It will be different in its base composition but not different in the end product at all.

Q. You mean in the taste? A. In the taste.

Q. But it is a different chemical composition? It has a different chemical composition, does it? A. It could have. I cannot swear to that without reference to the formula.

(Luncheon adjournment.)

AT 2 P.M.:

(His Honour stated that he had examined the bundle of newspaper clippings which Mr. Priestley had sought to tender and the admissibility of which was deferred until 2 p.m. His Honour stated that he would reject the tender.) 10

MR. BANNON: Q. In Exhibit "M", which you wrote for the Hoover Award, you related in the document that "Coca-Cola has dominated the on-premise market for years, holding the majority of that segment almost unassailable"? A. Yes.

Q. You wrote that? A. Yes.

Q. That was your opinion? A. Yes, that is right.

Q. You said that a tight competitive situation had developed in which Cadbury-Schweppes held approximately 32% of the market, Coca-Cola 38% of the market and Amatil approximately 30%. When you said that a tight competitive situation had developed amongst bottlers and that the market had rationalised from small bottlers to a tight competitive situation did that mean that those three big companies to which you referred had been taking over the other smaller companies? By that did you mean that there had been take-overs? A. That is not exactly the position. There have been companies which over the years have merged with other companies and companies which have disappeared from the business because they have failed to keep up with modern developments, and there have been take-overs by some of the larger companies. 20 30

Q. When you spoke about the Cadbury-Schweppes group of companies recognising the need to change the philosophy so far as to close the marketing gap between themselves and Coca-Cola does that mean that your company was setting out to dominate the market, too? A. No.

Q. You have complained about the defendant passing-off. You have issued a writ against it. You have also issued writs against several other companies as well? A. No. We have one other writ outstanding at the moment.

Q. One other outstanding at the moment? A. Yes. 40

Q. Did you issue one against Coca-Cola? A. Yes.

Q. Did you issue one against Amatil? A. Yes.

Q. Is that also part of a marketing scheme to take a greater part of the market? A. No.

Q. Did you also try to set out to adopt the brand of strategy that Coca-Cola adopted? A. No, we set out to adopt a method of product development and marketing activity which was non-Coca-Cola.

Q. Like the word "Uncola"? A. "Uncola" is not our word.

Q. In America that is a trademark, is it not? A. Yes, it is a trademark. It is associated with the 7-Up Corporation. 10

Q. As part of your move into the market you took over the Schweppes production of the Blue Bow lemon squash? I mean the Tooth's production of the Blue Bow lemon squash? A. That was a private commercial arrangement between Tooth's and Schweppes whereby Tooth's wished to be relieved of the responsibility of providing a relatively small share of the business. They wanted the space facility which they had devoted to Blue Bow for their major product, which was beer, and wines and spirits.

In fact the space previously occupied by Blue Bow is now occupied by the wines and spirits division. It was a commercial arrangement which suited both parties. 20

Q. Did your company buy the goodwill of Tooth's? A. I don't know.

Q. But you know all these details of it? A. No.

Q. The details you have told his Honour? A. Yes, I know those details.

Q. You say that that was about 4 or 5 years ago? A. To my knowledge.

Q. That is just before the launching of the Solo lemon drink? A. Yes. 30

Q. You knew, of course, that Tooth's had supplied their lemon squash to a great number of hotels? A. It was never a conscious part of my mind at all.

Q. Never a conscious part of your mind? A. No.

Q. Didn't you know that? A. I would have known that Tooth's supplied lemon cordials, but at that time my interest in the Sydney soft drink market was very slight.

Q. It was immediately after that that your company adopted

the slogan about "Have a lemon squash just like the pubs used to make"? A. I could not agree with "immediately".

Q. Shortly after? Within the same year? A. No, I don't know.

Q. Was that an attempt to try and identify your product with the old Tooth's product? A. Absolutely not.

*Q. You said on p. 5 of the transcript, about the fifth question about the instructions you gave to your research and development programme as to what should be produced. You were asked "Q. What were the instructions that were given as to what should be produced? A. They were given instructions to produce a soft drink for canning and bottling which would be similar in taste, appearance and style to that which was generally known as lemon squash of the type that you would buy in a club or hotel". Do you remember being asked that? 10
A. Yes.

Q. And do you remember making that answer? A. Yes.

Q. What did you mean when you said "Of the type generally known as lemon squash of the type you would buy in a club or hotel"? A. In terms of what facet? 20

Q. What did you mean by the phrase? It is your statement. I am asking you what you meant - a drink of the type you would get in a club or a hotel? A. I meant by that a drink of the type that you would get when you walked to the bar of a club or a hotel and asked for a lemon squash and you would receive a drink which would consist of an ounce or so of an assorted number of lemon fruit juice cordials, to which would be added 2 or 3 blocks of ice, to which would be added an assorted quantity of lemonade or soda water, depending on the attitude on the barman in particular, the whole of which would then be mixed with a swizzle stick, and consumed immediately. 30

Q. When you say "an assorted number of cordials" do you mean to say that the type that you would buy in a club or hotel the barman would put in an assorted number of cordials? A. No, one cordial of a number of available brands.

Q. Did you intend to market this product nationally at any time in 1973? A. No.

Q. When did you first form the intention of marketing it nationally? A. After its success in Victoria. After its 1973 launching it became clear that the product had a very significant national opportunity. 40

*See now page 23.

Q. That was towards the end of 1973, was it? A. No, that was early in 1974, and the decision to market it nationally was taken some time - actually the decision was taken in either May or June 1974, after several months of consideration. It was subjected to several months of consideration before that decision was taken.

Q. When you gave this consideration to market one of the type "generally known as lemon squash of the type you would buy in a club or hotel". Which clubs and hotels did you have in mind? A. None in particular. 10

Q. None in particular? A. No.

Q. But you apparently knew of such a product when you gave consideration to it? A. I did.

Q. Whereabouts did you know of the product? A. In particular in 3 or 4 hotels which I had attended in Melbourne and a number of golf clubs in Melbourne and the same of Queensland.

Q. When you gave this instruction in regard to it your marketing and research people came back with the information, did they? A. They came back with a number of samples over a period of weeks. Each of the samples we rejected either on the basis of our judgment or - there was a small team who were working on the project. They were rejected on the basis of individual judgments, supported by one or two references back to market researchers. Finally the people who were in charge of the product development within the Tarax company, together with people from Bush, Boake, Allen, who were the leading essence suppliers, were taken to the advertising agency concerned. They were shown semi-finished commercials and the total concept was explained in visual detail rather than verbal detail, and they achieved a clear understanding of the type of product which we were seeking. 20 30

Q. Who were the members of the small team? A. Myself, a person called Ken Adcock, then the Victorian manager, Peter Lewis, then chief chemist and research manager, and ad-hoc persons.

Q. Who was the last man? A. I said ad-hoc persons.

Q. When you were doing this sample in your mind at least what was the style which you regarded as the lemon squash style generally known? A. The bench mark was Schweppes cordial together with lemonade and ice blocks. 40

Q. And that was the bench mark for all of you? A. I cannot add for all of us. I can only answer for myself.

Q. That was the bench mark you announced to members of the research group? A. Yes that is right.

Q. And it was against that bench mark that you found the product? A. That is correct.

Q. Were you originally with Marchants? A. Yes.

Q. And they were taken over? A. Yes, they were taken over by Amatil, and then by British Tobacco.

Q. Then you went to Tarax? A. Yes, that's correct.

Q. The first people to introduce canned lemon squash in Australia - a canned lemon squash style drink in Australia - I think were Cottees? A. I am not aware anyone introduced a canned lemon squash old drink in Australia.

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Q. Aren't you? A. No.

Q. Don't you claim your product is canned lemon squash styled drink? A. Yes.

Q. Are you aware that Cottees had a canned lemon drink? A. I would assume they had one, anyway.

Q. It was before your product came on the market? A. Yes. Tarax had a lemon drink, too.

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Q. Cottees was an aerated drink? A. It would have been.

Q. Was it in a yellow coloured can - Cottees drink? A. Not to my knowledge.

Q. Would you agree that all lemon drinks sold in Australia in cans are contained in a yellow coloured can? A. No, I would not agree with that.

Q. You have seen, for example, Shelley's Club Soda Squash? A. Yes, I have.

Q. And your company puts out another brand - Farmland? A. No. The Farmland contract was held by us until about 18 months ago, and it was then taken from us by Amatil, by which time, or shortly thereafter, designs were changed to incorporate their current yellow can.

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Q. You put it in a yellow can too, didn't you? A. No.

Q. It is true, is it not, that in Australia orange drink is usually in an orange coloured can? A. No, only in the last couple of years.

Q. Only in the last couple of years? A. Yes.

Q. When did canned drinks come on the market? A. They came on the market in 1961.

Q. Ever since that date people have tended to differentiate the product by a can with a colour which approximated the colour of the liquid contained therein? They tended to approximate it with the liquid content? A. Not so.

Q. In many instances, isn't that the case? A. Very few instances. 10

Q. Would you agree that a lot of orange drink is sold in cans of a general orange colour? A. No.

Q. Would you agree that a lot of lime drink is sold in cans, general green colour? A. I would agree with that.

Q. Different brands, different names? A. The green colour of the can is not associated with any particular brand. It is a colour that has had wide-spread use.

Q. You would agree yellow is another colour for a type of lemon drink? A. It is a natural colour. 20

Q. There are 4 or 5 different cans on the market in Australia with lemon drink? A. Four major sellers, yes.

Q. And the coke people - is their product also in a yellow can? A. It was until certain proceedings were taken about 3 months ago.

Q. You got them out of the yellow can, did you? A. They are still in a basic yellow, but with a marked design change.

Q. You would agree that the colour connotes the contents, doesn't it? A. That is the intention.

Q. And it is a natural colour to adopt for a lemon product, isn't it? A. Yes. 30

Q. I was asking you before about a drink being called lemon squash. To you that has a certain technical connotation, doesn't it? A. Within the limitations that I am not a technologist.

Q. You know that within the trade it has a technical connotation? A. Yes.

Q. And it means a drink with a certain percentage or parts per volume of lemon juice? A. No, I don't understand that.

Q. What do you understand to be the technical connotations of lemon squash? A. I regard the lemon fruit as a flavour base which historically has been treated as a bitter type drink A'la Schweppes bitter lemon. At the other end of the scale there are slightly less bitter drinks. The lemon squash drink has a fruitier sweeter note to it.

Q. I'm sorry? A. The lemon squash type of drink has a fruitier sweeter note than the bitter lemon type of drink.

Q. I notice in the pleadings in the statement of claim your product is not described as being lemon squash, but as being a lemon squash style of soft drink? A. That is correct. 10

Q. You know that? A. Yes, I know that.

Q. I take it you are not suggesting that your product is lemon squash? A. No, my impression of lemon squash is a flavoured sweetness characteristic without carbonisation.

Q. You understand there is a difference between a lemon squash drink and a lemon squash styled soft drink? A. Could I retract what I said before? I made a mistake earlier. I said before a lemon squash non-carbonate. Could I retract that? That is totally wrong. The lemon squash is a lemon squash styled drink with a high fruity characteristic in terms of the palate, and a satisfactory balance of sugar contents, lightly carbonated. 20

Q. When you say "high fruit content" what exactly do you mean by that? A. A fruity note.

Q. Does that refer to the content of lemon juice in it? A. And/or balance of flavouring.

Q. Other flavours? Other flavouring? A. Yes.

Q. Such as what? A. Various essences and tinctures of lemons which are developed from the natural fruit itself. 30

Q. Only from lemons? A. You are testing my technological depth.

Q. Maybe I am. But what is the answer? A. I can't answer.

Q. You don't know? A. I don't know.

Q. Is it right that from your understanding of the technology you do not suggest your product is a lemon squash? A. We do.

Q. You do? A. Yes.

Q. Do you agree that your product has a soda content in it?

A. In so far as it is carbonated, yes.

Q. It is not a lemonade base? It is soda based? A. Not a lemonade base?

Q. Is it? A. The answer to that is that the balance of the product which is being sought is provided by the interaction of all of the characteristics of the essences and the juice used.

Q. Do you agree that its flavour approximates the soda rather than lemonade? A. No, I don't think I can agree with that. 10

MR. BANNON: Q. I want to show you some documents which were produced on discovery. These are the original documents and I inadvertently wrote on one of them. That has been blanked out and a fresh copy made which leaves out my writing, so, it is the copy produced. When I say they are originals, they are the ones produced - they are obviously photostats - but I just show you those two documents.

Are those documents or originals of them setting forth the formula of Solo Lemon? A. Yes, that is the formula for Solo Lemon on the machines on which Solo Lemon is filled at the Alexandria plant. 20

Q. Have you seen those documents before? A. Only when I arranged for their collection for the discovery process.

Q. I take it there are similar documents for the Solo Lemon produced on the machines at all the other plants in Australia producing Solo Lemon? A. That is so.

Q. And has each one got a different or separate formula? A. The formulations would tend to vary according to the type of machinery. The end product is always the same. 30

(Formula for Solo Lemon tendered; objected to; rejected; m.f.i. 3.)

Q. You are aware of these formulations for the different factories making Solo Lemon. Without asking you what they are, you receive copies of these documents for each factory?

A. No, I do not.

Q. But they do send them into your office in Melbourne?

A. No.

Q. You are unaware of what they are putting in the drinks at the factories? A. The matter of manufacture, formulation and quality control is in the hands of our Research and Development Manager. 40

After a product is agreed as being the product, it is his job to implement its manufacture, not mine.

Q. What is his name? A. His name is Bell.

Q. Mr. Bell. What is his Christian name? A. Robert.

Q. And he is at Melbourne? A. Yes.

Q. At Cadbury-Schweppes? A. Yes.

Q. The people producing Solo in Australia, do they include a factory at Chullora? A. Yes.

Q. Is that a factory belonging to Tarax? A. It operates under the corporate umbrella of --- 10

Q. No, perhaps you might pardon me - I don't know what corporate umbrellas mean. Does the factory to your knowledge belong to Tarax? (Objected to.)

Q. What is your answer? A. The factory at Chullora operates within the administration of the Drinks Division of Cadbury-Schweppes Pty. Ltd. The person accountable for the operations of that factory is the Sydney Manager - Drinks Division of Cadbury-Schweppes Pty. Ltd. He reports to me.

Q. Do you know if the factory belongs to Tarax? A. I can't answer you in whose name that factory is registered at this stage. 20

Q. You know that in respect to Solo drinks that certain royalties are paid to Tarax? A. That is not correct.

Q. Was that the case at any stage? A. Never at any stage.

Q. You say that the trade mark was applied for by Tarax Holdings? A. Correct.

Q. In a document produced on discovery called "Marketing Plan for National Extension of Solo - June 1974" - you remember it - (Approached) there is a paragraph in it on p. 8 - it is a document issued with your signature on it, is that right? 30
A. Correct.

Q. There is a paragraph on p. 8 which was crossed out in the copy produced? A. Right.

Q. Which said that:

"The basis of the plan is that all manufacturing branches will buy the essence from the house who will invoice them at an agreed concentrate price. The differences between

that agreed concentrate price as shown on the invoice and the concentrate selling price will be repaid to Tarax Head Office each month."

Do you remember that? A. I remember that.

Q. Was that the original scheme? A. No, that was never put into effect, and it clearly says here "delete as shown on p. 8".

Q. It does say that, yes. Does it say on p. 3 in par. 3:

"Solo should be launched as a full range of a unique soft drink. Its relevance to either Tarax or Schweppes will not be apparent to the consumer."

10

Do you remember that? A. Yes.

Q. That was not deleted, was it? A. That was not deleted.

Q. In Victoria when the product was first launched it had on the can "Tarax", is that right? A. Correct.

Q. Was it part of your scheme to obscure to the public the trade source from which the goods came? A. No.

Q. Between Schweppes and Tarax? A. No.

Q. But Tarax at one stage was producing and marketing goods in Victoria, wasn't it? A. Correct.

20

Q. And receiving money for it? A. Correct.

Q. Has there been any document executed which shows a change of ownership from Tarax to Cadbury-Schweppes? A. Who do we mean by Cadbury-Schweppes?

Q. The company of which you say you are a director? A. There has been no document yet registered transferring trade marks from Tarax Pty. Ltd., to Cadbury-Schweppes Pty. Ltd.

Q. That was not the question I asked you. I did not ask you about trade marks; I asked you was there any document executed concerning the change of ownership from Tarax to Cadbury-Schweppes - ownership of the business.

30

HIS HONOUR: I understood you to mean, Mr. Bannon, I am afraid, the trade name or the trade mark.

MR. BANNON: I am sorry if I gave that impression.

HIS HONOUR: While we are there, I would like to clear up one other matter because I am not sure that I have the answer that

I think Mr. Lowe intended. The question asked about two or three questions ago was, as I recall it, something along the lines of whether or not Tarax was manufacturing Solo and receiving money for it.

MR. BANNON: "Royalties" I think I said.

HIS HONOUR: No, you did not.

Q. Were they royalties or receipts of money by way of sale of product? A. No royalties were paid within the group from Tarax to Schweppes. Tarax, in respect to the sales it made, would have received its cash, banked it to a Cadbury-Schweppes Drinks Division bank account and Schweppes, in respect to sales which its sales force had made, would have received cash and banked it to a Cadbury-Schweppes Drinks Division bank account, in each case identical bank accounts. 10

MR. BANNON: Q. When the business was started in Victoria, the product was marketed with the name of Tarax Ltd. on the side as the producer. Is that right? A. Correct.

Q. Was there any document executed between the company shown on the cans which were produced - I think it is Tarax Ltd. and I may be wrong in the details of the corporate name but was there any document executed between that company and the plaintiff company, Cadbury-Schweppes Pty. Ltd., concerning the change of ownership of the business of producing that Solo? A. No document was executed. 20

Q. And did that company, Tarax Ltd., file annual returns and produce balance sheets each year? A. It would have filed whatever annual returns are necessary for it to file as a subsidiary of Cadbury-Schweppes Pty. Ltd.

Q. And the company has not been wound up or placed in liquidation? A. That is which company? 30

Q. The company which was marked on the first cans as producing Solo? A. Not to my knowledge.

Q. In this same document at p. 11 you have listed sales forecasts for 1975. Do you see that heading? A. Certainly.

Q. And under the name Solo there appears a list of places: Sydney, Newcastle, Townsville, Adelaide, Perth and Hobart as franchisees? A. Yes, I see.

Q. And under the name Tarax there appears Huntingdale, Brunswick, Geelong, Shepparton, Wodonga, Canberra and Redcliff, agents and franchisees. Is that correct? A. Correct. 40

Q. Does that mean that in 1975 Tarax was still producing Solo

at the places listed on p. 11 of discovery document No. 4 of June 1974? A. No, that is in 1974.

Q. This is a forecast for 1975? A. Right.

Q. Does that mean that Tarax was still producing at the places mentioned under Tarax in 1975? A. No, it was producing canned product at Huntingdale, Canberra and - sorry, it was producing at Huntingdale, Brunswick, Canberra and Redcliff. It was producing canned product at Huntingdale only.

Q. According to this document on p. 11 it was projected to produce canned product at Huntingdale, Brunswick, Geelong, Shepparton, Wodonga, Canberra and Redcliff? A. That was projected to sell; not produce. 10

Q. But it was producing the canned product at Huntingdale in 1975? A. Right.

Q. And it still is - is that right? A. No. The Huntingdale plant is now closed.

Q. When did that close? A. Late. Probably mid-1975 it was closed; all five plants were closed.

Q. On p. 12 of the same document under heading 17 there is a reference to the test marketing of Solo in both Melbourne and Sydney. Then you go on to say: 20

"It is possible that Schweppes personnel will reject the Tarax product as inconsistent with their loyalty to Schweppes."

So, at the stage you wrote this document in June 1974 did you regard Solo as a Tarax product? A. No. Throughout the year of 1973 I was the General Manager - Retail Division of Tarax as a wholly owned subsidiary of Cadbury-Schweppes Pty. Ltd.

On January 1st, 1974, I was appointed the Marketing Director of the Drinks Division of Cadbury-Schweppes. One of the objectives which I had to do was to merge and rationalise the total selling and marketing activity of the separate Tarax organisation and the separate Schweppes organisation as far as is possible. As in all situations --- 30

Q. But, Mr. Lowe, the question I asked you was not what you were doing; the question was, did you when you wrote that regard the product as a Tarax product? A. No, I did not, but I did not write that; I approved it.

Q. Well, it is under your signature? A. Yes, it is approved by me but written by somebody else. 40

Q. You were adopting the statements in that document when you approved it and put your signature on it? A. I was approving the statements.

Q. And adopting them? A. Yes.

Q. When you adopted statement that "It is possible that Schweppes personnel will reject the Tarax product" what did you mean by that? A. That there was a risk factor there that had to be managed in advance.

Q. Didn't it mean that Solo was a Tarax product? A. No. 10

Q. So, that is not the plain meaning of those words in English? A. No, the plain meaning of those words ---

HIS HONOUR: I do not think you can have it in that form. It is a question of what he meant, not what they meant.

MR. BANNON: Q. But that is what it says in English, isn't it, that it is a Tarax product?

HIS HONOUR: That is the same question.

WITNESS: It says that some people could regard it as a Tarax product.

MR. BANNON: Q. You go on to say in this document you adopt: 20

"Alternatively, organisational difficulties will allow Solo and Schweppes Lemon to be treated as parity products. This would be disastrous."

Did you mean thereby to distinguish Solo as a Tarax product and Schweppes Lemon as a Cadbury-Schweppes product? A. No. What was meant thereby was to distinguish Solo as Solo.

Q. And did you go on to say or adopt a phrase which says:

"The risk here is not only of a function of inter-corporate jealousy and prejudice but also the fact that Lemon is a major seller for Schweppes in some markets and Solo will generate some attrition from this position. Field staff will be selling Solo against one of their stronger lines and some reaction is inevitable." 30

Did you not thereby in adopting that phrase mean to say that one is a Schweppes product and the other a Tarax product?

A. No, definitely not.

Q. Does this document on p. 9 of the heading name dealing with expenditure on advertising say:

"It must be clearly understood that this 555,000 is the total amount of advertising for Solo for the first six months after its launching including both Tarax and Schweppes."

Is that right? A. That's correct. That is what it says.

Q. The advertising figures that you gave his Honour yesterday of Cadbury-Schweppes - are they figures which include advertising for both Tarax and Schweppes? A. Yes, the joint advertising.

10

Q. That is for Tarax, Solo and Schweppes Lemon Cordial?
A. No.

Q. Or Schweppes? A. That is for Solo sold in Victoria by a sales force selling under a Tarax letterhead and any other markets where Solo was sold by a Schweppes sales force selling under a Schweppes invoice, both of them selling Solo as Solo.

Q. So, in Victoria Solo was sold under the letterhead of Tarax? A. On top of the invoices.

Q. And in other places it was sold under the letterhead of Cadbury-Schweppes? A. Not all.

20

Q. Some of it under Cadbury-Schweppes and some under the letterhead of Tarax? A. Not Cadbury-Schweppes. Some under Schweppes, some under Tarax; both owned by Cadbury-Schweppes Pty. Ltd.

Q. You are aware, of course, of the differences - that different companies have different corporate entities? A. Yes.

Q. And different assets of their own? A. Yes.

Q. And different goodwills and businesses? A. Yes.

Q. Is it right that in New South Wales by and large the marketing of Solo has been left in the hands of sales people employed by Cadbury-Schweppes Pty. Ltd? A. By Schweppes.

30

Q. Schweppes Ltd. So that the company, Schweppes Ltd. ---
A. No, there is no such company as Schweppes Ltd.

Q. When you say Schweppes, what do you mean by that? A. I think we had better be 100 per cent correct.

MR. BANNON: I have been hoping you would do that.

HIS HONOUR: I don't think we should have that, Mr. Bannon.

MR. BANNON: No, perhaps not.

WITNESS: Cadbury-Schweppes Pty. Ltd. has two operating divisions. One is a drinks division; the other is a confectionery division.

The salesmen employed by the Drinks Division of Cadbury-Schweppes Pty. Ltd. in Sydney sold Solo from about September to October 1974.

MR. BANNON: Q. Who sold it after that in New South Wales?

A. They still sell it.

10

Q. And in Queensland who are the salesmen employed there?

A. The salesmen now are salesmen employed by the Drinks Division of Cadbury-Schweppes Pty. Ltd.

Q. Were they formerly salesmen employed by Tarax in Queensland? A. There were two sales forces in Queensland.

Q. One was a Tarax force and the other a Cadbury-Schweppes force? A. Correct.

Q. Operating under their own separate letterheads? A. Yes.

Q. But both selling the same product? A. No. Up until April 1975 or - I am not sure - it could be April 1975 or 1976, Solo was sold by the Tarax sales force in Brisbane.

20

In April 1976 the two sales forces were merged into one sales force and that sales force consisting of the best of both sales forces then sold the full company range of product including Solo.

Q. Mr. Lowe, before April 1976 in Queensland were the Tarax salesmen in Queensland selling Solo Lemon Drink? A. Yes.

Q. Before April 1976 were the Schweppes salesmen in Queensland selling Solo Lemon Drink? A. No, with the proviso that I am not sure whether it was April 1976 or April 1975. I would have to check that.

30

Q. But subject to that, the products were marketed separately? A. Correct.

Q. And the products sold in Queensland were sold as a Tarax product under the Tarax letterhead? A. Yes.

Q. And in Victoria it was sold as a Tarax product under the Tarax letterhead? A. Yes.

Q. That is still the position in Victoria? A. Correct.

Q. In New South Wales the product has been sold by Cadbury-Schweppes under the Cadbury-Schweppes letterhead? A. Drinks Division.

Q. All sales in New South Wales have been or have some been under the Tarax letterhead? A. No, the initial sales from the date of launch to September October 1974 were under the Tarax letterhead.

Q. In New South Wales? A. In New South Wales.

Q. If I could just get this clear, you mentioned in your evidence earlier today that there had been some sales in New South Wales in 1973 and you said that was through supermarkets, amongst other places? A. Yes. 10

Q. And that was a product marketed through Tarax Ltd.? A. Yes.

Q. You have tendered in evidence or there has been tendered in evidence through you a can, Exhibit "A".

(Exhibit "A" shown to witness.) The product which you say was marketed by Tarax Ltd. in 1973 in New South Wales, was that in a can identical with the can Exhibit "A"? A. Except that the initial "E" preceding the 15069 weights and measures number would have been "G", the answer is yes. 20

Q. It would have had a different weights and measures number, is that right? A. A different prefix to the number; otherwise, yes.

Q. Did it have the name Solo on it, the product marketed by Tarax Ltd. in 1973 in New South Wales? A. Yes.

HIS HONOUR: Perhaps the transcript should record that at that stage Mr. Lowe pointed to the word Solo in the medallion on the can.

WITNESS: Let me make it clear. That is the can which was first sold in New South Wales. 30

MR. BANNON: Q. These supermarkets provide printouts of all sales they make, don't they? A. Yes.

Q. And the printouts show the type and name of commodity marketed, do they not? A. Yes.

Q. So that if there are any cans of Solo marketed by Tarax in 1973 in New South Wales under the name Solo, that information would appear in the supermarket printouts? A. If the supermarket printout was up to date.

Q. Which supermarkets were selling the Tarax Solo product in New South Wales in 1973? A. I can't say specifically.

Q. Well, where did you get the information from that they were selling it? A. From my recollection that the Tarax operation in Sydney produced and sold Solo at about the same time as it was sold in Victoria and Queensland and that it continued to sell Solo through 1974.

Q. If it comes from your recollection that they were selling it, can you give me the name of just one of the supermarkets that was selling it to your recollection? A. No, I can't. 10

Q. Do you know which supermarkets would have normally carried the Tarax products in New South Wales? A. Yes.

Q. Which ones were they? A. At that time, Woolworths, Franklins, Permewans, to name three.

Q. Could I suggest to you that any products that were sold in New South Wales by Tarax in 1973 were in small quantities by way of a trial run. Would that be correct? A. No.

Q. Large sales do you suggest? A. Relative to the size of the Tarax business in Sydney in 1973 and 1974 they were a modest but reasonable part of the business. 20

Q. From your recollection can you tell us the numbers of cans that were sold in this State in 1973? A. If we can refer back to the sales affidavit, we might be able to find it there. I cannot from my recollection.

Q. When you say the sales affidavit do you mean the document which was tendered and became Exhibit "K"? (Exhibit "K" shown to witness.) A. It shows sales of 72,000 dozen in 1973 in New South Wales and the Northern Territory.

Q. Is there any breakdown between New South Wales and the Northern Territory? A. No, because the sales from Sydney were direct to wholesalers in the Northern Territory. 30

Q. I think you told us that before you launched the product in Victoria the product was advertised in that State. Is that right? A. No. About 2 or 3 weeks after we launched the product we advertised it.

Q. But it was more or less geared to work simultaneously with the launch, is that right? A. Yes, correct.

Q. Did you do any advertising in New South Wales when you launched Solo under the heading of Tarax in this State in 1973? A. None. 40

Q. Did you follow the procedure of more or less simultaneous advertising when the product was launched in Queensland?

A. Yes.

Q. In South Australia? A. We did not launch it in South Australia in 1974.

Q. What was the reason for not launching the advertising in New South Wales in 1973 although you launched the product?

A. Well, in New South Wales distribution would be only through food stores and that would not be sufficient to sustain a major advertising campaign. 10

Q. Has your company ever intended to trade under the name The Pub Squash Company? A. We have considered it.

Q. Have you ever intended to do it? A. No final decision has been reached.

Q. You know, of course, that that is the registered business name of the defendant in New South Wales? A. We do.

Q. And has been back to 1973 to 1974, isn't that right?

A. With respect, that is not correct.

Q. But for some years? A. No, 1976. 20

HIS HONOUR: Business name or registered company name?

MR. BANNON: Business name I think. I am sorry, I think your Honour is correct.

Q. Yes, company name in New South Wales? A. Yes.

Q. Do you know that it is a name that is registered by the defendant in Victoria whether as a company name or as a business name? A. Yes.

Q. And also in Queensland? A. That is not my understanding.

Q. Did your company knowing that it was a registered company name of the defendant and knowing that its trade was expanding into other States and had already done so then apply for the name The Pub Squash Company in South Australia? (Objected to; question withdrawn.) 30

Q. Did your company apply to register the name The Pub Squash Company as a business name in South Australia? A. Yes.

Q. Was it aware at the time it applied to register that name as a business name in South Australia that the defendant company was selling its Pub Squash Soda Lemon Drink in South Australia? A. Either if not that we were aware that they were, we were aware that they were about to. 40

Q. Did you know that its product was extending throughout the country? A. Yes.

Q. Did your company register the business name The Pub Squash Company in South Australia in an attempt to circumvent the defendant trading under that name in South Australia?

A. Not directly.

Q. Was that its indirect purpose? A. It had an indirect purpose.

Q. Did it have any other purpose? A. It had as its main purpose the defence of our rights against The Pub Squash Company. 10

Q. In what respect, Mr. Lowe? A. In respect to the fact that we felt and believed that we were being infringed upon and that we ought to take every correct legal step that we could to restrict the growth of a product which we considered to be in breach of our rights.

Q. So, the registration was applied for to restrict the growth of the defendant's product - is that right - in South Australia? A. Partly, yes.

Q. Was there any other reason? A. We would as a part of that registration intend to set up a business under that name. 20

Q. Did you think that by doing that you might be passing off your business as being the business of the defendant? A. No.

Q. Did you take the same steps in Tasmania? A. Yes.

Q. Did your company lodge its application for the business name The Pub Squash Company in South Australia on 1st April, 1977? A. I can't be specific about the date. It would be about then.

Q. I show you copy of a document produced on discovery. (Approached.) You agree that that is a copy of the application lodged in South Australia by the plaintiff company? A. Yes. I have never seen the original but I have no reason to disbelieve that. 30

Q. That states the date of proposed commencement of business as 1st April, 1977. Is that right? A. Yes.

Q. I incorrectly told you the date. It is dated 10th March, 1977? A. Yes.

Q. Then, on 27th May, 1977 - I show you another document which is discovery document - the first one is discovery document 28 and the second one is discovery document 70? A. Yes. 40

Q. Is that copy of a document lodged on behalf of your company? A. Again, I have not seen the original. I have no reason to dispute it.

Q. You notice that it says that proposed changes in particulars under the Business Names Act, 1963, of South Australia are that the proposed date of commencement of business is postponed from 1st April, 1977 to 10th May, 1977? A. Yes.

Q. Do you notice that whereas in the first document I showed you a concise description of the true nature of the business is stated to be manufacture and distribution of aerated waters -- 10
A. Yes.

Q. In the second document of 27th May, 1977 the true nature of the business intended to be carried on under the abovenamed was changed to the sale of syrup concentrates? A. Yes.

Q. Including the sale of lemon syrups in place and to the entire exclusion of the business of the manufacture and sale of aerated waters? A. Yes.

Q. In the meantime, had the defendant sought and obtained an ex parte injunction against you in South Australia? A. They had taken proceedings. 20

Q. At the time of this change of name after you had filed evidence in regard to this matter, was that injunction discharged on an undertaking by your company being given to the Court? A. Yes.

Q. Do you know that? A. Yes.

Q. And is it not correct that your company never had any intention to manufacture and distribute aerated waters in South Australia under the business name of The Pub Squash Company? A. No, that is not correct. 30

Q. What provisions have you made for setting up a business under that name in South Australia when you filed that application? A. We had considered a number of ways in which we could use the name in order to better protect our own interests.

Q. Had you had any letterheads printed in the name of The Pub Squash Company? A. No.

Q. Had you had any business premises engaged under that name? A. No.

Q. Had you had any signs painted? A. No.

Q. What steps had you taken to use the name The Pub Squash 40

Company in South Australia? A. We had deferred all steps pending the result of the case in Adelaide.

Q. But the application of 10th March, 1977 for the name The Pub Squash Company was taken by your company before the case in Adelaide commenced, was it not? A. I am sorry, could you repeat that?

Q. The application to register the name The Pub Squash Company in South Australia, according to this document, is dated 10th March? A. Yes.

10

Q. And the writ in South Australia was issued against your company on 21st April, 1977. Isn't that right? A. Yes, right.

Q. So, this application was made before any case began in South Australia? A. Correct.

Q. So, what steps had your company taken between making the application for the name The Pub Squash Company in South Australia and the commencement of proceedings against your company in South Australia? A. We were still in the process of deliberation.

Q. Deliberation? A. We had taken no steps whatsoever.

20

Q. Is any written record of these deliberations in your company's possession? A. No.

Q. Is any written record anywhere of these deliberations before the application was made for the name in South Australia? A. No.

Q. Did you have any factory premises set up in South Australia for the company The Pub Squash Company? A. We have large and adequate facilities in South Australia for our existing business.

Q. Who has? A. Cadbury-Schweppes Pty. Ltd.

30

Q. What is your existing business in South Australia?
A. The manufacture and sale of aerated waters and the sale of confectionery.

Q. Under what brand names? A. Schweppes, Solo, Export Cola, Tarino, etc.

Q. Were any labels in aerated drinks prepared under the name The Pub Squash Company? A. No.

Q. Were any sales representatives sent out to people regarding your proposed business under the name The Pub Squash Company? A. No.

40

Q. I put it to you again, Mr. Lowe, that your purpose and the sole purpose of your company was to circumvent the defendant trading under that name in South Australia? A. No.

Q. In South Australia was your company served with an affidavit in support of a motion for an application for injunction, an affidavit by Mr. James Richard Northey? A. Yes.

Q. (Approached.) Is that the affidavit? I show you a copy of it. A. To the best of my knowledge, yes.

Q. That is an affidavit dated 21st April, 1977? A. Yes. 10

Q. And did that set out that the plaintiff - that was the present defendant - (Objected to).

Q. It made certain allegations, did it not, in that affidavit which you read? A. It made statements.

Q. And there was another affidavit also served on your company, was there not, by a Peter Prestwood Ballard of 21st April, 1977 and that also was received, was it? A. To the best of my knowledge, yes.

Q. In answer to these two affidavits, an affidavit was made on behalf of your company by John Francis Leonard? A. Yes. 20

Q. Of 1st June, 1977. Is that right? A. I have not seen that affidavit before.

Q. But you saw the affidavits filed on behalf of The Pub Squash Company? A. Yes.

Q. Did you give any instructions regarding the affidavit in reply to be made by Mr. Leonard? A. Not instructions. I was in a number of conferences with our Melbourne legal advisers. Arising from those conferences would have come the necessary action that took place.

Q. That affidavit of John Francis Leonard was made with the authority of your company, was it not? 30

HIS HONOUR: Well, can he give that evidence, Mr. Bannon?

MR. BANNON: Q. Well, you know, don't you, that your company authorised him to make that?

HIS HONOUR: Mr. Bannon, you cannot prove authority out of the mouth of a witness whose authority itself has to be established.

MR. BANNON: Q. Mr. Lowe, was Mr. Leonard a man under your jurisdiction? A. No.

Q. Was Mr. Lowe (sic) an executive of the Cadbury-Schweppes Company? A. Mr. Leonard.

Q. Mr. Leonard, I am sorry? A. Yes.

Q. What was his position with the company? A. General Manager, South West Region.

Q. And that included the area of South Australia? A. That's correct, yes.

(Mr. Bannon tendered the whole of the file of documents relating to the proceedings in South Australia which documents included copies of affidavits appearing on the file; Mr. Priestley objected to the tender of any of these documents.) 10

HIS HONOUR: I am of the opinion that so much of the file as represents the record in the technical sense may be relevant to the defence raised in pars. 12 and 13 of the defence in this matter as indicating the nature of the proceedings in South Australia and as perhaps basing an argument that, at least in relation to South Australia, that is the more convenient court to deal with the matter than this court. As to the balance of the material, I would not be disposed to admit it at the present state of the proceedings as I do not think it has yet been rendered admissible. 20

(Abovementioned documents marked Exhibit 1.)

(Copy documents out of Business Names Register of South Australia tendered and marked Exhibit 2.)

MR. BANNON: Q. When the application was made to register the business name Pub Squash Company by the plaintiff here, Cadbury-Schweppes Pty. Limited, on 10th March, 1977 in South Australia, you were aware, were you not, that The Pub Squash Company, the present defendant, had a well established business of selling its product under the name Pub Soda Squash Lemon Drink in South Australia? A. I would not agree with the words "well established". 30

Q. It had a business? A. It had a newly established or about-to-be-established business.

Q. It had a number of sales already made of its product? A. Yes.

Q. Had it established some reputation, although you cannot say the extent of it, in South Australia? A. Yes. 40

Q. That is correct, is it; that is your answer? A. Could you repeat the question, please?

Q. It had established some reputation in South Australia at that time, but you cannot say the extent of it to your knowledge (Objected to; withdrawn.)

Q. Did you know at 12th March 1977 from your company's South Australian people that they understood that The Pub Squash Company had at that date established some reputation in that State (objected to; pressed; rephrased).

Q. At 12th March 1977 did you believe - I am not saying it is a fact - that the defendant in this case had established some reputation in the name Pub Squash Company in South Australia? 10

A. I cannot agree that I knew it had some reputation.

Q. That is not the question. The question is did you believe it had? I am not asking whether you knew it or not (objected to; withdrawn).

Q. When your company made that application in March 1977 in South Australia, to you at the time did the defendant company have some reputation in South Australia? (Objected to; rejected.)

Q. As at 10th March 1977 did you believe that the Pub Squash Company had been selling drink in South Australia under that name? A. No. I knew - I assumed they were selling drinks under the name of the former company, Passiona Bottling Company (South Australia) Pty. Limited, I think, and that since they have registered Pub Squash Company as a business name or as a company and that it was not trading under that name. 20

Q. Did you know at that date, 10th March 1977, that the present defendant, under whatever name it was known then, Passiona Marketing or its present name, had been marketing and selling in New South Wales a lemon drink called Pub Soda Squash? 30

A. In New South Wales?

Q. Yes. A. Yes.

Q. Did you know at that date it had been marketing and selling a lemon drink under the name Pub Soda Squash Lemon Drink in Victoria? A. Yes.

Q. Did you know that that product had entered South Australia?

A. Not specifically. Although I knew some attempts had been made to sell it, I had not personally been to Adelaide to see whether, in fact, it had been sold or was on the shelves.

Q. But you understood it had been offered for sale in South Australia at that date? A. Yes. 40

Q. Would you look at this document, please. Is this a copy

C.J. Lowe, xx

of an application to register the business name Pub Squash Company in Tasmania which is purported to be signed at Melbourne on 15th March 1977 proposing to commence business in Tasmania on 1st April 1977? A. Yes.

Q. That is an application on behalf of your company, is it, in Tasmania? A. Yes.

(Witness stood down.)

(Business name applications tendered and marked Exhibit 3.)

(His Honour informed Mr. Lowe that he was free to instruct 10 Mr. Priestley as to the matters he needed for re-examination and, if for the further purpose of obtaining material for cross-examination it was necessary to talk to other officers of the company, he could do so but only within the confines that Mr. Priestley stated.)

(Further hearing adjourned to Thursday 25th August, 1977 at 10.00 a.m.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PTY. LIMITED

v.

THE PUB SQUASH CO. PTY. LIMITED

THIRD DAY: THURSDAY, 25TH AUGUST, 1977

MR. BANNON: Yesterday afternoon a subpoena was issued to my client calling for the production of certain documents relating to agreements with different companies. If I might answer the subpoena, there are no such documents that we have and there is nothing produced in answer to the subpoena. 10

* Might I mention one matter in the transcript, on p. 25, in the fourth question, in the second line the word "Solo" should be "sold".

HIS HONOUR: Yes.

*MR. BANNON: Page 29 there is a sentence beginning in the last line of the page "At the other end of the scale there a slightly ..." the "a" should be "are". 20

*MR. PRIESTLEY: On p. 20, a third of the way down, there is a question recorded as "I don't think you have a market in Western Australia, is that right?" The word "market" should, I think, be "mark".

HIS HONOUR: Yes.

CECIL JAMES LOWE
On former oath:

HIS HONOUR: You are aware that the oath you took yesterday is still binding on you, Mr. Lowe?

WITNESS: Yes. 30

MR. BANNON: Q. Mr. Lowe, when was it that you became a director of the plaintiff company? A. I think it was about May 1975, or mid-1975.

*See now pages 49, 56 and 43 respectively.

Q. When did you become a director - when was it that you were made the director of the North Eastern Region of the Drinks Division? A. Officially, 1st January, 1977.

Q. 1st January, 1977? A. Yes.

Q. But you had been actually carrying on those duties before then, I take it? A. I had been carrying on a dual role for about three months.

Q. It would be right to say, would it not, that you have been in charge of the production of Solo from its inception, whether working for Tarax or working for Cadbury-Schweppes? A. Treating the word "production" loosely, yes. 10

Q. The initiation of it and the general supervision of the Solo product? A. Yes.

*Q. You told us in the transcript at p.25 that there was a change in the product sold from post-mix units - that instead of using Schweppes Lemon Cordial the cylinders in the post-mix were stocked with Solo, is that right? A. Yes, that is right.

Q. Can you be a little more exact about when that change took place? A. It would be the end of 1974 or early 1975, I think. 20

Q. The end of 1974 or early 1975? A. Yes.

Q. That would be in all post-mix machines belonging to what you have referred to as the Cadbury-Schweppes group? A. Yes. There may have been different progressive introductory dates according to the State concerned which would depend on the inventory level of the syrups, and so forth, but broadly within the time frame during 1975.

Q. Broadly three years ago there were changes made in the States, but there could have been variations of a month or so? A. In the time span of two to three years. 30

Q. These machines, I take it, have been installed extensively around Australia, have they? A. Yes, that is right.

Q. In all States? A. Yes.

Q. And in hotels and in clubs? A. Yes.

Q. And each of these machines are displayed in bars where the public have access to them? A. Where the public can see some of them.

*See now page 49.

Q. They see the top of the machine? They don't see the cylinders? A. No, they don't see the cylinders. They just see the top of the machine.

Q. And each of the machines bears on it the name "Schweppes" which is pretty prominent? A. Or "Coca-Cola", or others.

Q. But your company's machines bear the name "Schweppes"?
A. Our company's machines bear the name "Schweppes", yes.

Q. (Approached witness.) I want to show you a photographic copy of an article produced on discovery. I want to ask you - I don't want you to say anything about it, but I want you to read this part down here? A. Once again --- 10

Q. Read it to yourself; not to anyone else? A. I am sorry, yes.

Q. I'm sorry, there is another passage. Will you be kind enough to read down there and up the top? A. Yes.

Q. Now, the question I want to ask you is this: is the design of the Solo can which has been produced in court based on the Budweiser beer can? A. Not completely.

Q. Was the design of the American Budweiser beer can taken into account in preparing the design of the Solo can? A. As one of a number of international beer can designs. 20

Q. And at the time the Solo can was designed you were aware of this Budweiser beer can in America, is that right? A. Yes.

Q. You knew it was a famous beer in the United States?
A. Yes.

Q. Did you know there was an American trademark with "Pub" used in the United States in the marketing of soft drinks?
A. No.

Q. But you did take into account some knowledge of American trading when the Solo can was designed, is that right? 30
A. No, we took - we considered and decided that the Solo can ought to have a very adult feeling about it, and that the best way to get that feeling would be to look at international beer can designs and attempt to devise a package which had an adult beer type feel. A large number of international beer can designs were looked at to get the feeling that we were seeking.

Q. Have you since then ascertained that there is an American trademark "Pub" for soft drinks? A. I was not aware of the existence of the said trademark until about three days ago as 40

a result of some of the documents which were provided by yourself.

Q. But you went to America for the design of your soft drink can, didn't you? A. No.

Q. Well, you took the Budweiser beer can design into account?
A. Amongst others. It was one of many that we considered.

Q. And I suppose it is common practice in the trade, is it not, to investigate foreign marketing? A. Yes.

Q. And that is what you did when you designed the can for your Solo? A. Not in the sense that we investigated foreign marketing of soft drinks, because what we were developing was intended to be totally unique in the international soft drink scene. 10

Q. In soft drink marketing you do normally investigate foreign marketing of soft drinks, is that right? A. Yes, that is right.

Q. And I suppose your competitors do the same thing, do they?
A. I would assume so.

Q. And you have now found out that there is - (Objected to). 20

Q. You have now found out there is an American mark for soft drinks bearing the word "Pub"? A. From the papers which have been provided only.

Q. I would like to show you now a document which was m.f.i. 3 yesterday? A. Yes.

Q. You see the letters "B.B.A."? A. Yes.

Q. Do they refer to this company, Bush, Boake, Allen?
A. Yes, that is correct.

Q. That was on p.1 of m.f.i. 3, and the same letters appear on p. 2, is that right? A. Yes, that is right. 30

Q. (Exhibit "H" shown to witness.) Would you look at that bottle, please, Mr. Lowe? That is one of the bottles that were tendered by you yesterday. That is produced by one of the bottlers which is not part of the plaintiff company, is that right? A. There is no evidence of that.

Q. Didn't you say yesterday that the bottles were produced - bottled drinks were produced by people other than the plaintiff company? A. No, that is not right. What I said was that there are franchise bottlers in country areas who bottle our

drinks under a formal franchise agreement, but who buy canned products from us for resale.

Q. Who buy what? A. They buy canned products from us for resale.

Q. Who are these people in the country areas who bottle?
A. There is a list of about 30 companies

Q. Have you got that list with you? A. No, I do not have it with me.

Q. Do you know their names? A. I could name most of them. 10

Q. Would you kindly do that? (Objected to; admitted.)

Q. Would you please name them for us? A. Mid-West Bottling Co., Orange; Saxby & Coleman in Taree. There is a bottler in Tamworth whose exact name I can't remember. There is a company called Lillyman's in Moree. There is a company called Moruya Cordials in Moruya.

That basically covers them in New South Wales.

Q. And in each of the other States there are other bottlers as well? A. Not in each other State. In Queensland and Victoria there are. 20

Q. Can you tell me some of those? Can you give me the names of some of those? A. Shamies Pty. Ltd., in Coolangatta, Isa Sparkle Corporation in Mt. Isa, Cohns Pty. Ltd., in Wangaratta, Ay-Gee Pty. Ltd., in Traralgon.

Q. These companies are all independent of the Cadbury-Schweppes group? All independent of Cadbury-Schweppes Pty. Ltd.? A. We have no equitable interest in these companies.

Q. And the product they market bears the Solo label as on the bottle in front of you, is that right? A. Yes, that is right.

Q. Exhibit "H"? A. Yes. No, not necessarily. Some of them bear different styles of labels according to the type of bottle that they fill in. 30

Q. But they all have on the label the word "Solo", do they?
A. Yes.

Q. Their products are marketed and distributed in the various States in which they are situated? A. Yes, within prescribed territorial boundaries.

Q. Would you kindly look at the drink in front of you,

Exhibit "H". That appears to have a pulp in it, doesn't it? And the same goes for the bottle, Exhibit "J", I think?

A. Yes.

Q. The product in your cans - the Solo cans of Cadbury-Schweppes that we are speaking about in this case - do not have pulp in them? A. No, that is not right. They do have pulp.

Q. All of them? A. Yes, if they are within manufacturing standards.

Q. You know, do you not, that the defendant's products do not have any pulp in them? The particular defendant's product does not have any pulp in it? A. To my knowledge that is so, but I cannot swear that that is all of its product. 10

Q. Your company has carried out analyses of cans of the defendant's product, is that right? A. On occasions.

Q. And from these analyses you have discovered that it had a higher carbonisation content than the earlier product of Solo, is that right? A. Marginally higher.

Q. And your company has subsequently altered the carbonisation of its product and increased it, is that right? A. Not recently. 20

Q. But it has done so since the inception of Solo, hasn't it? A. Only in respect of the large bottles.

Q. Only in respect of the large bottles? A. Yes.

Q. Do you make separate batches of the liquid for large bottles as opposed to the small bottles? A. I'm sorry?

Q. Do you make separate batches of the liquid Solo lemon drink to go into large bottles from the batches to go into small bottles? A. You make a batch on the production line, and large bottles you will use all of that production. 30

Q. Does that mean that the batches that go into small bottles are different from the batches that go into large bottles? A. Batches --

Q. The batches that go into small bottles are different in carbonisation from the batches that go into large bottles? Is that correct? A. We in fact do very little small bottling.

Q. So that the answer is "No"? A. To my knowledge.

Q. Is the carbonisation different for the batches which go into bottles from the batches which go into cans? A. In

general terms it is about ten per cent higher when it is put into a large bottle than it is in a can, yes.

Q. And the same goes for the small bottle does it? A. I can't answer you. I don't know.

Q. In these drinks there is something called a Brix sugar acid ratio - a Brix acid ratio? A. Yes.

Q. Since your company analysed the defendant's drink has it altered its Brix acid ratio in its Solo lemon drink? A. Not to my knowledge.

10

Q. Has the Brix acid ratio in Solo lemon drink varied over the years? Has it been varied? A. It may have been marginally reduced early in 1974, but aside from that, not to my knowledge.

Q. I suppose that that affects the taste of the product, does it - the acid ratio? A. It affects the cost of the product marginally, and this would be just a normal process of commercial review to provide the best quality at the lowest possible price.

Q. All I am asking you about now is, does that affect the taste? A. It would depend on how much you varied it.

20

Q. It does affect the taste, doesn't it? A. In varying degrees.

Q. It is the same with wines - whether they have more or less acid in them? A. I am not an expert in that.

*Q. Yesterday at the bottom of p. 29 you were asked "Q. What do you understand to be the technical connotations of lemon squash?" and you said "I regard the lemon fruit as a flavour base which historically has been treated as a bitter type drink á la Schweppes Bitter Lemon. At the other end of the scale there are slightly less bitter drinks. The lemon squash drink has a fruitier sweeter note to it", and then you also said - you were asked "Q. I take it you are not suggesting that your product is lemon squash?" and you said "No, my impression of lemon squash is a flavoured sweetness characteristic without carbonisation". You later went on to say that you had made a mistake earlier about lemon squash being non-carbonate? A. Yes.

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Q. I take it that your first answers - that is, that lemon squash - perhaps I should say that historically - I will put that again. When you were asked that question about the technical connotations of lemon squash you said that you regarded the lemon fruit as a flavour base which historically has been

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*See now page 56.

treated as a bitter type drink à la Schweppes Bitter Lemon?

A. But I added also the fact that there were other versions of lemon drinks which were less bitter.

Q. But I am talking about the historical connotations of lemon squash? A. Yes.

Q. I take it also - A. I have to correct you there. The historical connotation of lemon drinks referred to my comments regarding bitter lemon.

Q. I am trying to get this clear.

10

HIS HONOUR: Perhaps it might be more convenient if Mr. Lowe were to have my copy of the transcript. (Handed to witness.)

MR. BANNON: Q. Is it right that historically lemon squash has been treated as a bitter type drink à la Schweppes Bitter Lemon? A. I have not mentioned lemon squash there. I said I regard the lemon fruit as a flavour base which historically has been treated as a bitter type drink.

Q. Your answer was non-responsive to the question you were asked. The question you were asked was about lemon squash. You appreciate that now? A. Right.

20

Q. You appreciate it now. Do you agree with me that lemon squash historically has been treated as a bitter type drink à la Schweppes Bitter Lemon with soda or lemonade added to it? A. No.

Q. Is not that what the hotels used to do? A. No.

Q. Didn't they take Schweppes Bitter Lemon drink cordial and add to it lemonade or soda? A. Absolutely not. If you were talking of a Schweppes product, they would have taken the Schweppes Lemon Fruit Juice Cordial, which is a totally different product from Schweppes Bitter Lemon.

30

Q. What is Schweppes Bitter Lemon? A. Schweppes Bitter Lemon is a carbonated soft drink made of a lemon juice base in which the emphasis is to develop the bitter note of the lemon.

Q. What is Schweppes Lemon Juice Cordial? A. Schweppes Lemon Fruit Juice Cordial has a relatively high sugar content. It is a relatively high sugar content drink, in which the emphasis is away from the bitter taste connotation.

Q. But it had in it lemon juice, did it? A. Yes.

Q. Mainly? A. The cordial itself would have 25 per cent of lemon juice.

40

Q. And to that was added by the hotel keeper lemonade or soda?

A. Usually a ratio of about five and a half to one.

Q. And you know, don't you, that Tooth's Blue Bow lemon was almost pure lemon juice? A. No, I don't know, and I would be very surprised if it were true.

Q. Have you ever drunk Blue Bow? A. Never.

Q. Do you know if it had a higher content of lemon juice, or do you believe it had a higher content of lemon juice than the Schweppes product? A. I would be surprised in the extreme if any fruit juice cordial had more than 25 per cent fruit juice, which is the legal requirement. 10

Q. To call a product on the market a lemon squash is it your understanding that that has some technical connotation as denoting a certain quantity of lemon juice being in the product? A. No, not as a technical connotation. It denotes a taste style.

Q. Are you aware that in relation to Pure Foods Regulations it has a particular connotation. (Objected to; rejected).

Q. Are you aware that - do you believe that to label a product "lemon squash" - perhaps I will put it another way: your product is not labelled "lemon squash" is it? A. No, it is not labelled lemon squash. It is labelled "Solo Lemon Drink". 20

Q. "Solo Lemon Drink"? A. Yes.

Q. And it is not a lemon squash, is it? A. It is 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.

Q. But it is not lemon squash, is it? A. To the extent that what is lemon squash? I cannot answer the question. 30

Q. You say it is not labelled "lemon squash" and it delivers a taste which you believe is identical with lemon squash? A. That's right.

HIS HONOUR: Of a particular type, Mr. Bannon.

MR. BANNON: Q. Does not that imply there is a difference between lemon squash and a lemon drink which has a base identical? A. No, what it implies is that we have only two options open to us in labelling the product under the Pure Foods Regulations. We can call it "lemon drink" or we can call it "lemon soda squash". We chose to call it "lemon drink" because we felt it was more adult in connotation than "soda squash". We could have called it "Solo Soda Lemon Squash" and been completely legal. 40

Q. Why didn't you call it "lemon squash"? A. Because there are some provisions under the Pure Food Act in the product category we are talking about.

Q. Is there some provision in those regulations regarding lemon squash? (Objected to.)

Q. What is your reason for not calling it "lemon squash"?
A. Because the law won't allow us.

Q. Is that because it is not a lemon squash? (Objected to.)

Q. Do you believe, Mr. Lowe, that it is not a lemon squash? 10
A. No, I believe it is lemon squash of the type people would expect a lemon squash to taste like.

Q. You believe it is in fact a lemon squash, is that right?
A. As I said earlier, we seem to have some definition problems as to what a lemon squash is.

Q. I don't have any. I wonder if you do? A. I believe implicitly that the Solo product is a lemon squash styled product which is identical to that which people would expect to buy if they went to an hotel and asked for a lemon squash.

Q. Do you believe it is a lemon squash? A. Under those 20 conditions, yes.

Q. Under those conditions? A. Yes.

Q. Without those conditions about hotels or the word "style" do you believe it is a lemon squash? A. Yes.

Q. The same as used to be supplied in hotels? A. Yes.

Q. With the same sort of materials in it? A. Basically, yes.

Q. Besides your company there are other companies that supply lemon squash or lemon cordial to the liquor trade, are there not, in Australia? A. Yes. 30

Q. For example, Kirks, in Queensland, is that right? A. Yes, that is right.

Q. Kirks are associated with Amatil, aren't they? A. Yes.

Q. And Hoods, in South Australia? (Objected to; rejected).

Q. Now, Mr. Lowe, I think yesterday I spoke to you about this product, Farmland. I want to show you a can of it now. Is that a can of Farmland produced by your company? A. No, it is not produced by our company.

Q. Do you know who produces that product? A. Amatil.

Q. Did your company previously produce Farmland? A. Yes.

Q. When did your company first start producing it? A. We first started producing it in 1961.

Q. And when did your company cease producing it? A. I would say about three years ago.

Q. Was the liquid put into it the same liquid as goes in your cans of Solo? A. Absolutely not.

Q. When your company was producing Farmland was it contained in yellow cans? A. No. 10

Q. Since then it has been produced in yellow cans such as you see in front of you, is that right? A. By our friendly competitor.

Q. By Amatil? A. Yes.

(Farmland can m.f.i. 4.)

Q. Mr. Lowe, is this can I show you now a can of lemon squash or lemon drink produced by Coca-Cola? A. Yes, it was produced by Coca-Cola.

Q. You brought proceedings against them, didn't you? You brought proceedings against Coca-Cola? A. Yes. 20

Q. And after those proceedings they changed their can?
A. Yes.

Q. An agreed can was then produced which met your requirements? A. Not agreed.

Q. At all events, when the new can was produced you did not institute any further proceedings? A. No, we did not institute any further proceedings.

Q. When did they change the can? A. Probably eight to 12 weeks ago. 30

Q. Eight to 12 weeks ago? A. Yes.

Q. And was this the second can they produced which I show you?
A. Yes.

Q. And these have been extensively distributed? Both of these cans have been extensively distributed? A. Yes.

Q. In New South Wales and elsewhere in Australia? A. No, in New South Wales only to my knowledge.

(Former Leed can tendered and admitted as Exhibit 4.)

(Current Leed can tendered and admitted as Exhibit 5.)

(Farmland can, formerly m.f.i. 4, tendered, objected to.)

HIS HONOUR: Q. Did I understand you to say yesterday, Mr. Lowe, that in relation to Amatil there were proceedings? A. Yes.

Q. Is the can that Mr. Bannon is now tendering the subject of the proceedings? A. No.

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HIS HONOUR: I will admit the can.

(Farmland can, formerly m.f.i. 4, admitted and marked Exhibit 6.)

MR. BANNON: Q. That Farmland is a lemon drink, isn't it? A carbonated lemon drink? A. It would be a carbonated lemon drink, but what does the can say? The fact that it is described as a sparkling lemon flavoured soft drink indicates probably that there is no lemon juice whatsoever in that drink.

Q. When you say "no lemon juice" are you saying that, like your product, it is made artificially? A. That is not what I am saying.

20

Q. Is there any lemon juice in your product? A. Yes, there is lemon juice in our product.

Q. But there are artificial lemon flavours in it as well? A. There are lemon flavours. To what extent they are natural I don't know.

Q. I think from what you were saying earlier you can make a drink which has a lemon squash flavour which is artificial without lemon juice in it? A. I would like to try to do it. I don't think you could.

30

Q. But you know that these flavours can now be produced artificially? A. No I don't.

Q. But at all events you don't suggest yours is pure lemon drink, do you - pure lemon juice - your product? A. It is not pure lemon juice, no.

Q. And it has other flavouring in it, has it not? A. It has flavouring, yes.

Q. It has other flavourings which are not lemon? A. I believe

they would all come from the natural fruit base, but I cannot swear to it.

Q. I will show you another can. Will you have a look at that can, please? Is that another product which has been on the market as a soda squash put up by Shelleys? A. Yes, that is true.

Q. How long has that been on the market to your knowledge?
A. Since about October-November 1975.

Q. Has that been marketed extensively in New South Wales? 10
A. To my knowledge, yes.

Q. And elsewhere? A. Not as Shelleys elsewhere. It is marketed as Kirks in Brisbane and Marchants in Victoria and Guests in Western Australia.

Q. In each case it is in a yellow can? A. Yes, that is correct.

Q. With the same sort of medallion on it? A. Yes.

That, your Honour, is the can which is subject to the other proceedings.

(Shelleys can tendered and admitted as Exhibit 7.) 20

Q. I was asking you yesterday about the fact that products such as Coca-Cola is a cola type drink? A. Yes.

Q. And those products are very often packaged in cans with a red colour, are they not? A. Yes.

Q. Is that the can of Coca-Cola? A. It is the can of Coca-Cola.

Q. I show you now another can. Is that the can of cola put out by your company? A. It is a can of cola put out by our company.

Q. Were there proceedings between your company and Coca-Cola 30 about your cans? A. Not at all.

Q. Did you alter the get-up of your cans from the original get-up of Export Cola? A. Export Cola used to be a gold can. We changed it to red.

Q. You changed it to red? A. Yes.

Q. You agree it is normal to put cola in red cans? A. Not normal.

Q. But it is often done? A. I would not even say it is often done.

Q. Well, it is a common thing for it to be done in the trade, although others may use different colours? A. To my knowledge there are only two red cans of cola in Australia. Those are the two.

Q. And both of them are extensively marketed throughout Australia? A. Yes, both are extensively marketed throughout Australia.

10

(Coca-Cola can and Export Cola can tendered; objected to; rejected.)

(Coca-Cola can m.f.i. 5.)

(Export Cola can m.f.i. 6.)

Q. There was also another product on the market, was there not, Mr. Lowe, in a lemon drink put out by Shelleys in a lemon can called Lemon Delite? A. Yes.

Q. And that was extensively marketed in Australia, was it not? A. I don't think so. My understanding is that the major part of the Shelleys effort went behind the can that you previously tendered - Lemon Club Soda.

20

Q. For how long was Lemon Delite marketed? A. I cannot answer that expertly.

Q. For some years? A. It was not in a yellow can.

Q. That was the question I asked originally. A. Shelleys Lemon Delite has been on the market for a number of years, but to my knowledge not in a lemon can. To my knowledge not in a lemon can until late 1975.

Q. Well, it was in a lemon can -

HIS HONOUR: That is what I understand Mr. Lowe to say before, Mr. Bannon. I think you have got at cross-purposes. My impression is that what Mr. Lowe was saying in answer to your first question is that it has not been in a lemon can for long, but the product has been around for a number of years.

30

MR. BANNON: Q. You say from 1975 on Lemon Delite was a yellow can? A. Yes.

Q. And it still is? A. If it is still on the market place.

Q. You don't know? A. No, I don't know.

Q. Was it on for some years to your knowledge? A. As a product?

Q. Yes. A. Yes.

Q. And for some years in a yellow can? A. To my knowledge since about October 1975 in a yellow can.

Q. You do know, don't you, that lime drinks are only marketed in Australia in green coloured cans? A. There are some lime drinks in green cans.

Q. And your company? Your company has green cans? A. No. 10

Q. But you know other companies that do? A. Shelleys do. That is the only one I can think of off-hand.

Q. Now, regarding Exhibit "E", that was the advertising schedule? A. Yes, that is right.

Q. Would you look at that, please? (Exhibit "E" to witness.) Is that a record of money paid on advertising? A. Yes.

Q. Does it give you the names of the stations where advertising has taken place? A. Yes it does.

Q. Does it tell you the particular type of advertisement put out? A. What do you mean by "type"? 20

Q. Does it tell you each particular advertisement of your company? Does it tell you which advertisement was put on? A. No.

Q. And then you had another document which you put in evidence as Exhibit "F". That was the list of scripts? A. Yes.

Q. Is there any way from which you can tell which of those scripts was the subject of the expenditure shown in Exhibit "E" - any particular expenditure in Exhibit "E"? A. I can broadly state that each commercial was shown so many times by reference to a release. I can state when each commercial was shown by reference to release dates, which I hold of each of these commercials. I hold the release dates of them. 30

Q. Is there anything in the document Exhibit "E" or in the document Exhibit "F" which relates one to the other as to when it was shown? A. No.

Q. Is there any information which shows that? A. There is in respect of radio advertising. There is not in respect of television advertising.

Q. With radio advertising there is information that signifies that fact, is there? A. Yes. 40

Q. What is that information that signifies that? A. There are key numbers down the left hand side of the page to which the people who booked the media could relate each commercial, and indicate which commercial was shown in that particular week.

Q. Are these key numbers a code reference? A. It is just a particular number which is given to a particular commercial. It is the number given to a particular commercial.

Q. So that for the radio broadcasting the key number relates to the particular advertisement? A. To my knowledge, yes. 10

Q. And in relation to Exhibit "F" - the scripts - do they have key numbers on them? A. They have the F.A.C.T.S. Approval number, and also the key number on top, yes.

Q. Exhibit "F" are only television commercials, is that right? They are not radio commercials? A. No, there are television and radio commercials in there. There are television and radio commercials in there.

Q. (Approached witness.) Which is the radio key number? Can you show me one with the radio key number and show me one with the F.A.C.T.S. key reference? A. There is the F.A.C.T.S. key reference. 20

HIS HONOUR: Mr. Bannon, for the benefit of the transcript could you indicate first of all what is the script number in Mr. Lowe's handwriting, and where it is on that script?

MR. BANNON: In Exhibit "F" the one in Mr. Lowe's handwriting is number 2 and the F.A.C.T.S. reference is Approval No. CAAK 1435.

Q. That is right, is it not, Mr. Lowe? A. Yes.

Q. Can you show me now a radio commercial? A. Yes. 30

Q. That is No. 5 in your handwriting, and it has on it key number TRX 5873, is that correct? A. Yes.

Q. TRX - does that mean "Tarax"? A. Yes.

Q. And does that have on it "Client - Tarax"? A. Yes.

Q. Does this key number also tell us which radio stations broadcast that particular script? A. No.

Q. Does it tell you when it was broadcast? A. No. I had separate data which indicates the date on which each one of these commercials went on air.

Q. You have not produced that data to the court? A. No. In terms of evidence I did.

Q. You said you gave evidence, but you did not produce the document? A. No.

Q. And the evidence you gave was when you put these numbers on the pages? A. Yes, that is right.

Q. Now, reverting now to Exhibit "E", does that include advertising themes which do not include the theme "Lemon squash"? Does it include themes which do not include the theme "Lemon squash, just like the pubs used to make", and other phrases? A. No, Exhibit "E" makes no mention of themes at all. 10

Q. Other themes that your company used in advertising this product included the theme such as "A man's drink"? A. Yes.

Q. Another theme was "Solo - a man's drink"? A. We regard the theme as being the sum of both statements.

Q. And then another one was "Solo separates the men from the boys"? A. It was used once.

Q. Another was "I'd always sailed Solo until I discovered Smirnoff"? A. That was a joint promotion run between ourselves and Smirnoff, and it related to Smirnoff advertising - not for Solo advertising. 20

Q. Another one was "You'll be surprised what happens when you mix Smirnoff and Solo"? A. Again, as part of the Smirnoff advertising theme.

Q. Another one was "The new long drink that makes anything possible"? A. As part of the Smirnoff theme, yes.

Q. Another one was that "Anything is possible when you mix Smirnoff and Solo"? A. Yes.

Q. Another one was "The zesty kick of Smirnoff with the fresh tang of Solo"? A. Yes. 30

Q. There were other advertising themes as well which did not have this connotation of an assertion of "Squash like the pubs used to make"? A. Any other advertising themes were not used before about September 1976.

Q. You say all advertising before that date had that connotation? A. Which connotation?

Q. The reference in them to your product being a "lemon squash like the pubs used to make"? A. Not all of them.

Q. That is what I am asking. Perhaps we are at cross-purposes. You say that some of them did not have that?

A. A few.

Q. But there is no way from Exhibit "E" to show which ones had and which ones had not? A. I'm sorry, not from Exhibit "E" no.

Q. You said something about September 1976. Did you have advertising concerning a drink "like pubs used to make"? A. Yes, that is right. 10

Q. That has not been used since? A. Not as a major theme.

Q. Nor as a theme at all? A. It would have cropped up on odd occasions.

Q. But you gave a directive to drop that theme in 1976?

A. Yes.

Q. The major aspect of your advertising, apart from any theme, has been the promotion of this actor, Mr. Michael Ace, is that right? He has played a prominent part in your advertising?

A. I would not say we promoted him - he promoted us.

Q. He played a prominent part in the promotion of your product? 20

A. Yes.

Q. And very often these advertisements had no audio element, is that right? Some of them did not have any "voice-over", I think it is called? Some simply showed Mr. Michael Ace performing various feats of physical prowess? A. I don't recall us making a commercial which did not have a voice-over. If there was any, there may have been only one out of 25 or 30.

MR. BANNON: I call for discovery documents 9.1 to 9.7 respectively.

(Short adjournment.)

30

(On resumption the matter of discovery document was temporarily deferred and Mr. Lowe was stood down in order that some short witnesses may be intervened and released.)

ROBERT KEITH BELL
Sworn and examined:

MR. PRIESTLEY: Q. Mr. Bell, what is your full name, please?

A. Robert Keith Bell.

Q. Where do you reside? A. Unit 8, 241 Clovelly Road, Clovelly.

C.J. Lowe, xx, stood down.

92. R.K. Bell, x

- Q. Are you an accountant by occupation? A. Yes.
- Q. Are you aware of the existence of a drink known as Solo?
A. Yes I am.
- Q. Are you aware of the existence of any other drinks in the same field? A. Yes I am.
- Q. Have you bought Solo for yourself? A. Yes, quite often.
- Q. Is there anything that you do at the time when you buy Solo? I don't want to lead you, Mr. Bell. I just want to ask you, if you can tell us, what you do at the time when you buy Solo? A. Well, when I am buying Solo from a shop that has a refrigerator on the customer's side of the counter usually I have to check that I have got a can of Solo and not a can of one of the other lemon drinks that are in yellow cans, mainly because shopkeepers often stack them together. 10
- Q. When you buy Solo at a shop where, instead of getting it from the refrigerator, it is just handed to you, is there anything you do? A. Not particularly, no.
- Q. Has there ever been an occasion when you have asked for Solo and you have been handed something other than Solo? 20
A. Yes, on a number of occasions.
- Q. Are you able to say what it was that you were handed?
A. Yes. Pub Squash.
- Q. On those occasions what have you done? A. Well, I generally ask the shopkeeper if he will give me Solo, and if he does not stock Solo then I take the Pub Squash.
- MR. PRIESTLEY: Q. Have you any recollection of television advertising in connection with Solo? A. Yes.
- Q. Is there anything in particular that has remained in your mind in regard to the television advertising of Solo? A. Well, it is generally advertising of a man doing some sort of sport. There is one I think of a chap on a sailing boat and a canoeist and the drink dribbles down his chin. 30
- Q. Are there any phrases that you associate with any product of the lemon squash type? A. There is a slogan which says I think, "The lemon squash like the pubs used to make".
- Q. Where have you gained your awareness of that slogan?
A. Television commercials.
- Q. At the present time do you associate that slogan with any product? A. Solo. 40

CROSS-EXAMINATION:

MR. BANNON: Q. Mr. Bell, these shops that sell these soft drinks, you say sometimes it is in open display refrigerators, is that right? A. That's correct.

Q. And sometimes you buy it over the counter? A. Yes.

Q. Do you ever buy it in a hotel? A. No, I have never bought it in a hotel at all.

Q. Do you ever go into a hotel? A. Occasionally.

Q. Have a drink there? A. Yes.

Q. And have you ever had a lemon squash there? A. Yes. 10

Q. You know that hotels sell lemon squashes? They still do, don't they? A. As far as I am aware, yes.

Q. And if you wanted a lemon squash - how long have you been getting lemon squashes in hotels? (Objected to.)

Q. You said you have had lemon squashes in hotels, is that right? You do drink lemon squashes in hotels, is that right? A. Yes.

Q. And for how long have you been doing that? A. Well, I have been drinking lemon squashes from hotels since I was about ten I suppose. 20

Q. I don't want to ask you all the hotels, but which hotels have you gone to or some of them? Round Clovelly? A. The Dennison Hotel at Bondi Junction.

Q. What brand of lemon squash have you had there? A. Well, I believe it was a mixture of lemonade plus lemon cordial.

Q. Which brand of lemon squash? A. I wouldn't be able to tell you.

Q. The lemon squashes you have had there in the hotels, have you ever associated them with any particular brand? (Objected to; rejected.) 30

Q. Mr. Bell, you have drunk a number of lemon squashes in hotels? A. Yes.

Q. Over the years? A. Yes.

Q. And you also know of lemon squash drinks in cans, is that right? A. Yes.

Q. Different brands of them? A. Yes.

Q. There is one by Leed I think, Leed Lemon Squash? A. Yes. I wasn't aware of that one.

Q. I beg your pardon? A. I wasn't aware of that one.

Q. You know of the Pub Squash one? A. Yes.

Q. And you know of the Solo one? A. Yes.

Q. There is a Shelley's Club Soda? A. Yes, I know that one.

Q. Would you agree that anyone of these could be described as a lemon squash of the type the pubs used to make? (Objected to; question withdrawn.)

10

Q. Would you agree that any one of those drinks that I have mentioned to you in your mind fits the description "A lemon squash like the pubs used to make"? A. It depends how you mean it. Do you mean in taste or in a brand of soft drink?

Q. First of all, in taste? A. Yes.

Q. The contents to your mind are of that description. Is that right? (Objected to; rejected.)

Q. Would you ever go into a shop and ask for a lemon squash like the pubs used to make? A. No.

Q. Would you expect if you asked that question to receive any particular type of lemon squash? (Objected to; rejected.)

20

Q. If you went into a shop and asked for a lemon squash like the pubs used to make, would you expect - or, firstly, you have never done that? A. That is true.

Q. Secondly, if you asked for a lemon squash like the pubs used to make, you would agree with me that you might be given any one of the four brands that I have mentioned to you?

A. Yes. That would depend on the shopkeeper I should imagine.

Q. (Witness shown Exhibits "A" and "B1".) Would you kindly look at those two cans, Exhibit "A" and Exhibit "B1"? You would never mistake one for the other, would you? A. Well, I have in the past.

30

Q. From the appearance of them? A. Well, that is hard to say. Under close examination I would not but I have ---

Q. Would you agree that the writing ---

MR. PRIESTLEY: He had not finished.

WITNESS: But I have done it in the past in shops.

MR. BANNON: Q. If you look at the writing on them you would make no mistake, would you? A. No.

Q. And if you have made a mistake in the past, it is only because of the yellow colour of the cans, is that right?

A. Well, I can't really say. I should imagine so.

Q. But the design on the can Exhibit "B1", the Pub Soda Squash can, which shows the two bar doors, is completely different from the design on the Solo can with the medallion and the words "Extra Tang", isn't it? A. They are a very similar colour but the actual design is different, yes.

10

Q. And the wording is quite distinctive, is it not, to you? A. Yes.

Q. You would never make a mistake if you looked at the label on the can, would you? A. Well, under close examination I would not but I have made the mistake previously.

Q. Only because of the yellow colour of the can? A. I cannot determine that. I can't say that I have made the mistake because the can is yellow. I have just gone to a fridge and taken a can of soft drink which I thought to be Solo.

20

Q. Is there anything else you want to add? A. And it has been the other one.

Q. But when you have looked at it you have realised it has been the other brand. Is that right? A. Yes.

Q. The words on them are different? A. Yes.

Q. And they are quite distinct, aren't they, on the Pub Soda Squash can? A. The words?

Q. Yes. A. Yes.

Q. And the bar doors are very distinctive? A. Yes.

30

Q. And the design looks quite different to you from the design of the medallion on the Solo can? A. Yes.

Q. There is nothing else apart from the size of the can and the yellow colour that would lead you to be confused that you could think of, is that right? A. I think possibly the gold and the two emblems on the cans.

Q. The gold? A. Yes, the gold colour of the bar doors and the gold colour of the disc.

Q. The similarities you say are the size of the can, the gold and the yellow; everything else is different? A. The tops are the same. Whatever else - they are both made of aluminium I should imagine.

Q. But there is nothing else that would confuse you? A. Not in the writing.

Q. When you have taken the Pub Squash can out of the container, you have -- A. Out of the fridge.

Q. Out of the fridge - you have put it back when you saw that it was not a Solo can, is that right? A. In some instances and in a couple of instances I have actually bought it before I have realised it is the wrong can of soft drink. 10

Q. But is that on an occasion when you have gone there, when you have picked it up without reading the label? A. It would have been, yes.

Q. When you did that, were you in a hurry? A. Well, I don't know really. I can't remember that specifically. I remember walking into a shop near where I work twice and seeing the can - generally we are in a bit of a hurry at lunch time to get lunch. 20

Q. Would you agree that there are a number of brands of lemon squash type drink on the market? A. Well, there are three to my knowledge.

Q. And they are all in yellow cans to your knowledge? A. Yes.

Q. All of the same size? A. Yes.

Q. The other one you mentioned that you knew of was the Shelley's one, is that right? A. That's right.

Q. Would you have a look at this can. Is that the one you mean - Exhibit 7? A. Yes, that is the one. 30

Q. It is also in a yellow can you would agree? A. Yes.

Q. And similar in appearance? A. Yes.

Q. Again, it has a medallion on it, has it not? A. Yes.

Q. It is closer to the Solo can than the Pub Squash can?
A. Yes, I would agree.

Q. And if you read what is written on the can you would never make a mistake, would you? A. No.

Q. Mistaking the Shelley's one for the Solo? A. No, I don't think so.

Q. Would it be right that in regard to drinks generally, soft drinks, you know, don't you, that if you expect a lemon drink, it is usually in a yellow can? A. I wouldn't say that. I would not have said that.

Q. You expect a cola - it is usually in a red can, isn't it?
A. I only drink two types. That is Coca-Cola and Pepsi. One is in a blue can I think, a predominantly blue one.

Q. What about orange drinks - are they generally in orange cans? A. Yes, as far as I know. 10

Q. Have you mistaken one brand of orange drink for another because of the colour? A. I can't say that I have.

Q. Lime drinks are generally in green cans, are they not?
A. Yes, I should imagine so.

Q. Have you mistaken a lime can for one of some other brand?
A. I can't say that I have. I can't remember an instance where I have done that.

Q. But you are aware that colour is used to differentiate types of soft drink, are you not? A. I would expect so, yes.

RE-EXAMINATION:

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MR. PRIESTLEY: Q. You have described a number of occasions when you have picked up a Pub Squash can out of a refrigerator when you were intending to buy or pick up a Solo can? A. Yes.

Q. And I think you mentioned that on two of those occasions you actually ended up buying the can before you realised. Is that so? A. Yes.

Q. Can you tell us the kind of circumstances in which you made the mistake; what you were doing? A. It was twice. Once at a shop at Sans Souci and once at a shop in town that I can remember, but it may have been more, and both shops had the fridges outside the counter and I selected the can and both times so far as I can recall the cans were stored on the same shelf together. In other words, they were not segregated. 30

Shelleys usually have theirs on a different shelf but in these cases the Pub Squash and the Solo were shelved together. You might have a Solo can, then a Pub Squash and then another Solo can stacked on top of each other and I have just gone to the fridge and taken the first can that has come into my hand I should imagine.

Q. On the occasions you have described, you have had a specific intention of buying Solo, have you? A. Yes. 40

R.K. Bell, re-x

Q. You went into the shop with that objective? A. Yes.

(Witness retired and excused.)

PAUL DAVID CALDERARA
Sworn and Examined:

MR. PRIESTLEY: Q. Is your full name Paul David Calderara?

A. Yes, that is true.

Q. Do you live at 1 Daly Avenue, Concord? A. Yes.

Q. Are you an operations controller? A. Yes, that's right.

Q. By occupation. Just to be clear about it, in what field do you work as an operations controller? A. I work for a computer orientated firm. We also deal in microfilm - just customer contact during and after the sale. 10

Q. Are you aware of a drink known as Solo? A. Yes.

Q. Are you also aware of a drink known as Pub Squash? A. Yes.

Q. Are you able to say of which one you became aware first?

A. Yes, Solo.

Q. At the time when you became aware of Solo, did you associate it with any particular advertising? A. Yes, I did.

Q. Would you tell us what you can recall of the advertising that you associate with Solo? A. A particular slogan? 20

Q. Yes. A. The lemon drink that the old pubs used to make I think it was.

Q. Are you able to say how long you have had that in mind approximately - how long since you first became aware of that slogan? A. As soon as the drink first came out.

Q. Just to check on one thing, how long have you been living in Sydney? A. All my life.

Q. In relation to the two drinks, what sort of package do you generally associate them with? I mean type of package to start with; I don't want a description of it? A. A can. 30

Q. You can probably see some of them in the court room but, trying to keep your eyes off them, do you recall in your mind's eye the appearance of those cans? A. Yes, I do.

Q. To you, do the cans have any similarities? A. Yes, they do.

R.K. Bell, re-x, ret'd.

99. P.D. Calderara, x

Q. Would you tell us what are the similarities that you have in mind? A. Well, in the background, the background of the can is exactly the same colour - the yellow background I am talking about.

They both have a symbol on the front and the basic colour of the symbol itself on both cans is basically gold in colour.

Q. Have you bought either of these products over a period?
A. Yes, I have.

Q. Which one, or if you have bought both of them - would you just tell us which ones you have bought? A. I have bought Solo and Pub Squash but mainly Solo. 10

Q. If you have a choice, which one do you buy? A. Solo.

Q. Have there been any occasions when you have asked to buy Solo and you -- (Objected to).

Q. Perhaps I can put it in this intended to be neutral way. Are there any occasions when you have asked for either of the products when you have got something else? A. Yes.

Q. You have been offered something else. Would you describe those occasions to us. Just tell us what happened on those occasions. 20

MR. BANNON: That is when each one was first; not just generally.

MR. PRIESTLEY: Q. First of all, do you recall specific occasions? A. Yes, I do.

Q. As well as you can remember now, about how long ago was the first occasion that you can recall? A. I would not say any more than a year ago.

Q. What happened on that occasion? A. Well, I went up to the counter and asked for a can of --- 30

Q. What sort of a shop was it? A. Just a milk bar. Went up to the counter, asked for a can of Solo and I was offered Pub Squash. I said, "No, I don't want Pub Squash, I want Solo". She - will I continue?

Q. Well, I will ask you in a moment but just to get one thing clear there, did the lady or whoever it was actually physically tender you a particular can or did she just say something?
A. No, she actually put the can on the counter.

Q. All right. What happened after that? A. She said she

did not have any Solo and that is why she said, "This is all I have got - Pub Squash".

Q. What happened on that occasion? Did you end up buying the Pub Squash? A. Yes, I did.

Q. Any other specific occasions you remember? A. One other time.

Q. About when, approximately? A. About six months ago, not long ago at all, and the same thing basically happened but she did have Solo and I ---

10

Q. Was it the same shop? A. No, a different shop, and I said I would prefer Solo instead of Pub Squash.

Q. Do you buy soft drinks sometimes from the self-service cabinets that are available in some milk bars? A. Yes, I do because most of them have got those things now.

Q. Have you noticed anything in regard to the way the various products are kept in the refrigerators?

MR. BANNON: Well, in which particular shop?

Q. What I would ask you to try and recall for us as well as you can are the methods, whether they be the same in all shops or different in different shops, that you have noticed as to the way the different products are kept? A. Well, in those refrigerators they obviously have all the cans on one side and all the bottles on the other side. They tend to have shelves of the different flavours, all the flavours like Coke on one shelf, lemon drink on the next shelf, lime, and so on.

20

Q. What about lemon squash drinks? A. Well, they are basically on one shelf.

Q. On the occasions when you serve yourself from such a shelf when you are after a lemon squash drink, what procedure do you go through? A. Well, I just select the drink I would like at the time which is always Solo.

30

Q. You say you always take Solo. What do you do in regard to that? A. Well, I just select the can and take the drink.

Q. What degree of attention do you pay in selecting the can? A. A fair amount of degree I would imagine because I have found often that Pub Squash and Solo have been side by side.

Q. I think you have said you take a fair degree of care. Why do you take that fair degree of care? A. Well, most of the time the cans are mixed up on the shelf.

40

Q. Is there any thought in your mind that you might mix them up yourself? A. No.

CROSS-EXAMINATION:

MR. BANNON: Q. I suppose sometimes you buy some cola, do you?
A. Yes, that's right.

Q. And I suppose you have seen in the shops, have you, cans of Coca-Cola (that is m.f.i. 5) and cans of Export Cola (m.f.i. 6) and you notice they are both red-coloured cans?

A. Yes.

10

Q. Have you ever mistaken one for the other? A. No, I don't think I would have.

Q. You know they are different brands and they are both similar shaped tins? A. I know they are different brands.

Q. And similar type tins. They have both got red background colour? A. Yes.

Q. They have both got some white writing on them but you would not make a mistake between them? A. No, I don't think I would.

Q. You know that Colas often come in red-coloured cans, don't you? A. Yes.

20

Q. And the same goes for lemon squashes: they often come in yellow cans? A. Yes.

Q. And orange drinks come very often in orange cans? A. Yes.

Q. I am not saying always, but they do? A. Yes.

Q. This is a common feature in the drink trade, isn't it?
A. I should imagine so, yes.

Q. You, of course, read the labels and see what you are getting, don't you? A. Yes.

Q. Have you ever had a lemon squash drink in an hotel?
A. Yes, I have.

30

Q. How often have you done that? A. Not very often at all. Only once or twice a long time ago.

Q. Any particular brand? A. I beg your pardon? Are you talking in a can or out of a bottle or just over the counter?

Q. In any of those three ways? A. Well, I have just asked

P.D. Calderara, xx

for a lemon squash and the bar tender pours out ingredients into the glass and just pours it out and gives it to me.

Q. You have not asked for a particular brand? A. No, not in a pub.

Q. You have not gone into a hotel and asked for a lemon squash just like the pubs used to make?

MR. PRIESTLEY: I would submit that would be highly improbable.

MR. BANNON: Q. Have you ever done that? A. No.

Q. Have you ever done that when you have gone to buy a soft drink in a can? Have you ever asked for a squash just like the squash the pubs used to make? A. No. 10

Q. Would you agree that the Pub Squash and the Solo are similar types of drinks? I am not saying you would prefer one or the other but they are similar types of drinks? A. Yes.

Q. Would you agree that to call the description "a lemon drink like the pubs used to make" would apply to Pub Squash? A. Sorry, could you say that again?

Q. The description "A lemon drink similar to the one the pubs used to make" would apply to Pub Squash? A. Yes. 20

RE-EXAMINATION:

MR. PRIESTLEY: Q. You were asked whether you have ever gone into a milk bar and asked for squash like the pubs used to make and you said, "No". When you go into a milk bar and ask for a drink, what do you ask for - a squash drink? A. I ask for the brand name of the drink.

Q. Which one when you have your choice do you ask for?
A. Solo.

Q. Do you associate that with the slogan "A squash just like the pubs used to make"? A. Yes. (Objected to.) 30

(Witness retired and excused.)

PHILLIP RICHARD BOULTEN
Sworn and Examined:

MR. PRIESTLEY: Q. Is your name Phillip Richard Boulten and do you live at 40 Wilberforce Road, Revesby? A. That's right.

Q. Are you a law student doing the combined economics/law course having already got your Bachelor of Economics Degree?
A. Yes, that's correct.

P.D. Calderara, xx, re-x, ret'd
103. P.R. Boulten, x

Q. Have you seen cans of Solo and Pub Squash? A. I have.

Q. Have you bought yourself from time to time cans of one or the other, without going into which one at the moment?

A. Yes, I have.

Q. Is the buying of a can of soft drink a matter over which you spend a great deal of time or attention? A. No, it is very casual now.

Q. In what ways in these days of refrigerators and counter service as well do you buy cans of soft drink or a can of soft drink when you feel the need for one? A. Well, one of the ways is they have refrigerated cabinets, you open the door, take one and pay the money at the counter. 10

Q. I am just asking you about what happens in your case when you do it that way. When you go to buy a can from a refrigerated cabinet in that manner, do you have it in mind to buy a particular brand as a rule? A. Not really.

Q. Do you distinguish between the Solo and the Pub Squash cans? A. Not particularly, no.

Q. Recalling their appearance in your mind, are you able to tell one apart from the other? A. Well, you can tell them apart but on going in to buy a can of soft drink, not really. I don't take time to tell them apart --- 20

Q. Are you able to recall any distinctive difference between the cans, just thinking of it again in your mind's eye?

A. I know that Solo would have "Solo" written on it and Pub would have "Pub".

Q. Can I ask you with the degree of attention that you give to the buying or selection of a can of soft drink, do you have in mind any way of telling them apart? A. Not with the degree of attention I give to the buying of a can of soft drink. 30

Q. On the occasions when you choose a can yourself from a refrigerator, have you noticed whether different brands are kept apart from one another or not? A. I think they probably would be.

Q. Well, from that, can I ask you, do you pay much attention to that sort of thing? A. No, I do not.

Q. Now, have you become aware of advertisements for Solo on television over the years? A. Yes.

Q. As well as you can, about how long is it since you first became aware of Solo television advertising? A. I couldn't say exactly but a number of years. 40

Q. Are there any features or phrases from that advertising that you now recall? A. I think the most marked feature of Solo advertising is the male who spills drink down his face and rides canoes and surfboards and things like that.

Q. Are there any slogans that you associate with Solo advertising? A. Not really.

Q. Are there any slogans that you associate with the advertising for Pub Squash? A. Ah ---

Q. By slogan, I mean slogan or phrase or catch line? 10

A. There is no phrase that really sticks in my mind as being associated with one or the other.

Q. Right. Have you any recollection of the phrase "Squash like the pubs used to make"? A. Yes, I have heard that one but I could not really tell which ad it came from. I tend to think it would come from Pub but I could not tell you what ad it came from.

Q. What are the thoughts in your mind that bring you to associate that with Pub Squash? A. Well, the word "Pub" in the phrase. The same name as the product. 20

Q. As to buying over the counter, have you ever bought over the counter? A. Yes.

Q. Have there been any occasions that you can recall when you have asked for one brand and been offered another? A. Yes, quite regularly.

Q. Can you give us some details of that, which brands they were and what happened? A. I could not give details specifically but almost regularly, almost every time if you go to a shop and ask for Pub or Solo, sometimes they say, "We haven't got Pub; we have got Solo", or more often than not they just give you the can of Solo or the other one you didn't ask for and there are a few other brands too - Club Squash - a couple of other things. They are all pretty much the same. I have never, ever rejected it. If they say, "We haven't got Club, would you like, you know, Solo?" I accept whatever they hand over. 30

Q. I think you said a moment ago - and correct me if I am wrong - that sometimes they will tell you they have got one and not the other and sometimes they will just hand you one. Is that right? A. Yes. 40

Q. Do you raise any query if that happens? A. No. Sometimes I don't notice or I would imagine, anyway, not until after I get out, out of the shop.

CROSS-EXAMINATION:

MR. BANNON: Q. The names Pub and Solo are quite different to you, aren't they, as words? A. The words are different.

Q. And a lot of these shops, I take it, tend to be one brand petrol stations, don't they, stocking one product or the other, these places where you will ask for a Pub Squash and they will give you a Solo? A. I don't know.

Q. Have you noticed that? A. I don't make a habit of buying drinks at petrol stations.

Q. No, but they do stock them, don't they - petrol stations? 10
A. Yes.

Q. But you do notice that some of these shopkeepers, like the petrol purveyors, do at times tend to only stock one particular brand? A. That is true.

Q. And it is generally in those circumstances that you ask for one product and they proffer you the other one? A. Yes, it would be.

Q. Do you ever drink Cola? A. Yes.

Q. I suppose the same thing happens there too, does it; you ask for one brand and they will give you the other one? 20
A. Well, not - yes, the same thing happens. You know, I quite often specifically ask for Coca-Cola. If they haven't got Coca-Cola I don't walk out of the shop and don't buy a drink.

Q. They offer you Export Cola? A. Yes, but it is very rarely. Firstly, it is rarely that a shop does not carry Coca-Cola, that does not carry Coca-Cola or Export Cola as alternatives. They are usually there at the same time.

Q. Have you ever gone into a hotel and had a squash there?
A. Yes.

Q. Very often? A. Fairly regularly. 30

Q. How many years ago is it since you first did that? A. Oh, a number of years.

Q. Have you ever asked for any particular brand in a hotel when you have asked for lemon squash? A. No.

(Witness retired and excused.)

COLIN ROBERT ISAAC
Sworn and Examined:

MR. PRIESTLEY: Q. Is your name Colin Robert Isaac? A. Yes.

Q. Do you live at 7 Poole Street, Burwood, Victoria?

A. Yes.

Q. Are you a law student? A. Yes.

Q. In fourth year at Monash? A. That's correct.

Q. Have you had some experience working on a casual basis stacking shelves of supermarkets? A. Yes, I have at both Coles and Safeway supermarkets in Melbourne.

Q. Are you familiar with the canned products of Solo and Pub Squash? A. Yes, I am.

10

Q. In your experience in the supermarkets, can you tell us what happens about the way those cans are stacked? A. Well, I could not on these two particular brands speak on how they are stacked in the supermarket because where I was working at the time doing soft drinks they were not on the market in the supermarket where I was working.

Q. Have you noticed other supermarkets in other places where they are stacked since? A. Yes. In the local milk bar near the university where I go for lunch on Saturdays there are drinks on two shelves, one below the other, and it is very easy to confuse the two when you go to select a can of soft drink, and a friend and I last year when I went --- (objected to).

20

Q. Just take it a bit more slowly, Mr. Isaac. You said a moment ago "It gets very confusing", I think you said ---

MR. BANNON: No, he did not.

HIS HONOUR: He said it is easy to confuse them.

MR. PRIESTLEY: Easy to confuse them, thank you.

Q. Then you went on to mention an occasion in which you mentioned a friend. Now, on that occasion that you are referring to, were you present with your friend? A. Yes.

30

Q. And did you see and hear what happened? A. Yes. We went into the milk bar to each select a can of soft drink.

MR. BANNON: When was this?

MR. PRIESTLEY: Q. Approximately when? A. It would have been August-September last year, and I went to select a can of Coke. (Objected to; allowed)

Q. Would you go on with the account you were giving us? A. I was selecting a can of Coke and he was selecting a can of Solo

and he picked up a can and went to pay for it and said to me, "I have got ..." (Objected to.)

(Witness stood down.)

(Luncheon adjournment.)

GERARD JOHN GOODEN
Sworn and examined:

MR. PRIESTLEY: Q. Is your full name Gerard John Gooden?

A. It is.

Q. Do you live at 41 Victoria Road, Castle Hill? A. I do. 10

Q. Are you a fourth year student? A. Yes, I am.

Q. Are you aware of the existence of drinks known as Solo and Pub Squash? A. I am.

Q. In what form of packaging are you acquainted with those drinks? A. I know that in terms of packaging, in particular Pub Squash is bottled and that both Pub Squash and Solo are in cans.

Q. Are you able to recall approximately when it was you first became aware of Solo in the can being available for purchase? A. It was about, I think, two years ago that I first remember Solo coming onto the market and not long after that Pub Squash came onto the market. 20

Q. Do you recall any advertisements in relation to either or both of those products? A. I definitely recall Solo advertisements because it has been quite effective, in particular, you know, canoeing down streams and such things, sort of masculine, strong image, mascho-type presentation. I haven't seen Pub Squash advertisements for a very long time on television. I don't know if they are on the radio since I listen to 2JJ and FM and would not have heard them probably, but I do recall, I think, some Pub Squash ads that came out when Pub Squash first came on to the market and I think the commercials had a picture of a can of Pub Squash, sort of dewy - on the can, a sort of frosty can and a rather deep voice saying, "Drink Pub Squash". Something to that effect I think it was, low on bubbles, and I had the impression too that they had a slogan which was, "Squash just like the pubs used to make". 30

Q. Did you draw any distinction between the two cans when they first came on the market? A. Not really, and I was surprised now to learn that they are from different companies, because I am very finicky about what I buy. I am consumer loyal to Schweppes, the reason being I drink a whisky called Canadian 40

Club and a product came out on the market called Canada Dry and I thought the two mixed together would be quite good. In point of fact it was atrocious. Ever since then I have decided to stick with Schweppes because it seems to go with the right whisky. It has a nice, crisp bubble. If you are a Scotch man and like a mild smooth scotch, Canada Dry would be what you drink. In stores I buy Schweppes.

Q. You said something when you were asked whether you drew a distinction between the two cans.

10

(First sentence of witness' last answer read by court reporter.)

You were surprised to learn they were from different companies. When was it that you first gained the understanding that they were from a different company? A. Yesterday actually.

Q. Up to that time what had been your understanding as to the producer of the two cans of drink? A. I had never thought that they were particularly different. Having a policy of always buying Schweppes, it surprised me to think that I had bought Squash and hadn't made a distinction between Pub Squash or on the other hand Solo, and so therefore I was surprised to learn that they were from different companies because I had always - I thought they were like Omo and Fab, produced from the same company, or Neptune and Shell petrol or something like that.

20

Q. By reference to the two cans of drink themselves, what was it that there was about them that made you think they were produced by the same company? A. Basically I think their similarity, predominance of colours, the same yellow, black, gold sort of cans. The flavour in particular I am sure, you know, you could drink one and drink the other and not tell the difference between them, and also I got the impression that the image is much the same. My image of the two, I think, is much the same.

30

Q. Was there an incident yesterday that you took part in or saw personally relating to the purchase of a particular drink?
A. Well ---

Q. I am sorry, I withdraw "yesterday". Was there an incident recently which you have a reason to recall in which a particular drink was bought for a particular reason? A. Well, I had a friend of mine who was very finicky on her - (Objected to).

40

Q. You recall the incident? A. Yes.

Q. Would you try and recount what actually happened? A. I had a friend - it was about 6 or 7 months ago. I had a friend who particularly used to like - (Objected to).

Q. Where did it happen? A. It happened at home.

Q. What was it that actually happened? A. I bought Pub Squash in the hope that I could -

Q. You said you bought Pub Squash? A. Yes.

Q. Had you bought that for a particular occasion? A. Yes, and for a purpose. 10

Q. Would you tell us what the occasion was for which you bought it? A. I had bought it for the occasion that a particular person was going to drink with me. She was finicky on her - (objected to).

Q. You told us you bought it for a particular person. You mentioned a moment ago you had a purpose in buying it?
A. Yes.

Q. Would you tell us what the purpose was? A. I was trying to mix the gin and squash the way she wanted it and there was some difficulty on the fact that she didn't like - (objected to; pressed). 20

(Witness stood down.)

(Argument ensued.)

HIS HONOUR: I think the evidence in each situation is admissible whether or not the person is called. If one places any great weight on it may be another matter, but I think that in the situation that apparently Mr. Isaac will deal with it is covered by the res gestae rule. In relation to the situation that apparently Mr. Gooden will deal with it goes directly to the state of mind and the fact of being actually confused. 30

GERARD JOHN GOODEN
Recalled; on former oath:

MR. PRIESTLEY: Q. We have been dealing with an occasion when you bought Pub Squash? A. Yes.

Q. You had taken it home? A. Yes.

Q. What I wish you to answer now is the question: What did you have in mind in a kind of drink you wanted to produce once you used the Pub Squash as part of it? A. Basically I wanted to produce a drink just like the pubs make, which was a gin and squash which up until that time I had been unable to produce 40

using the Schweppes, lime cordial and the Schweppes soda and I had bought this Club Squash because I thought -

Q. Which brand did you buy? A. Pub Squash, I beg your pardon, Pub Squash specifically for that purpose.

Q. What was it you had in mind that led you to buy Pub Squash for that purpose? A. I associated it with the idea that it was a squash like the pubs used to make.

Q. Are you able to say from where it was that you got that association? A. I thought it was advertising, the advertising of Pub Squash. I might add it didn't work. 10

Q. Your friend did not like the drink? A. It is too sweet.

CROSS-EXAMINATION:

MR. BANNON: Q. I think you told my friend, Mr. Priestley, that first of all you have a drink loyalty to Schweppes?
A. Yes.

Q. You drew no distinction between Pub Squash and Solo?
A. Yes.

Q. You thought they came from the same trade source?
A. Yes. 20

Q. That the flavour was the same? A. Yes.

Q. When you went into this shop did they stock any Solo?
A. I thought actually some shops only -

HIS HONOUR: On this particular occasion.

MR. BANNON: Q. This particular shop. A. This was in relation to the?

Q. When you had this drink with the lady? A. Yes, I specifically bought Pub Squash.

Q. Did you notice whether they stocked any Solo? A. No, I don't think so. 30

Q. You do not think they did? A. I couldn't remember. I just had in mind to get some Pub Squash and see how it would go.

Q. You associated this phrase "Squash like the pubs used to make" - A. With the Pub Squash.

Q. You say the flavour of Solo was the same? A. Now, I would say. Since then I see very little similarity.

Q. Do you associate the phrase with Solo too? A. No, I don't think so. I think now particularly since the Solo advertisements I would not associate - I do not associate Solo with the idea of pubs. It is more the outback, rugged man-type image which I would associate with Solo.

MR. BANNON: Q. You have never formed that sort of association with Solo, is that right? A. With the Pub?

Q. With squash like the pubs used to make? A. Not that but I think that they both have the same sort of masculine macho-type image but not with the idea of it sort of being the Pub Squash but that is why I went out and bought it. 10

Q. But you have never associated Solo with the idea of it being squash like the pubs used to make? A. No.

Q. Have you ever had squash in a hotel yourself? A. Yes.

Q. Many times? A. With Gin, yes.

Q. Over some years, I take it? A. Yes, since university.

Q. I suppose the early ones you had did not have Gin and the later ones did, is that a fair statement? A. Fair, yes.

Q. And do you find the Pub Squash is like the squash that the pubs made? A. No, I could not - not now, not after that experiment, definitely not. 20

Q. But before that experiment? A. No, I would have to say no, that is the reason why I tried it to see if I could reproduce the squash that you could get in a bar. I found out since that they have these pre-mixers vending machines and they bring in their squash and they do not use either Schweppes Lime or any of those commercially sold retail squashes so I am still in search of the squash.

Q. I take it you have found Solo is not like the squashes the pubs used to make either? A. Well, I have not tried Solo for that purpose yet. 30

Q. But you have tried it? A. Yes, I have tried it and I have to say that I find the taste is so similar that I do not think probably it would be suitable either because it is too sweet.

Q. You say Pub Squash and Solo are too sweet and neither is like the squash the pubs used to make? A. It is not like the squash I used to get from the bar that I used to go to with it being in the vending machines. 40

Q. (Exhibit "B1" shown.) Have a look at that can. Do you recognise that as a can of Pub Soda Squash? A. Yes, though I think generally they have clear tops.

Q. Isn't that a clear one? A. No.

HIS HONOUR: It is a coloured top, Mr. Bannon.

MR. BANNON: Q. Would you also have a look at Exhibit "A" (shown). That is a can of Solo. Do you recognise that as a can of Solo? A. Yes.

Q. (Exhibit "G" shown). Is that another can of Solo? 10
A. Yes, I would say it was.

Q. Would you kindly turn that last one around, Exhibit "G", on the side you see there are some words on the side?

A. "Solo Lemon Drinks".

Q. "Brisbane, Melbourne, Sydney"? A. Yes.

Q. Have you noticed those words before? A. I don't think I have really looked.

Q. Would you look at the other can, the other Solo can which is Exhibit "A", do you see words on the side of that can?

A. "Tarax Proprietary Limited". 20

Q. Have you ever noticed those words before? A. I cannot say that I have read them.

Q. And the Pub Squash can, Exhibit "B1", would you have a look at the side of that one? A. "Passiona Marketers".

Q. Have you noticed those words before? A. No.

Q. Do you agree none of the cans have any reference to Schweppes on them? A. I think the reason why ----

Q. You agree that is right? A. Yes.

Q. You did say something about the fact that when you go into a store you like to buy Schweppes products? A. Yes. 30

Q. Do you buy Schweppes Lemonade for example? A. Mainly Schweppes Dry Ginger Ale.

Q. But on this particular occasion you bought the Pub Squash because you believed it was something that might appeal to this young lady, is that right? A. Yes, I have also bought it on other occasions particularly builders labouring during holidays, during summer.

(Witness retired and excused.)

MAUREEN BEECH
Sworn and examined:

MR. PRIESTLEY: Q. Is your name Maureen Beech? A. That is right.

Q. Do you live at 15 Janamba Avenue, Kellyville? A. I do.

Q. Are you a secretary by occupation? A. Yes, I am.

Q. What is the name of your employer? A. Coleman Foods.

Q. And are you the secretary to the Managing Director of that company? A. I am.

Q. Is that a company which has, amongst its business, quite a deal of packaging of goods, in connection with the packaging of various commercial goods? A. Yes, it does. 10

Q. Have you seen yourself quite a lot of different packages? A. Yes, definitely.

Q. Are you acquainted with the drink Solo and the drink Pub Squash? A. Yes, I am.

Q. Do you recognise the cans in which those two drinks are sold? A. Yes, I do.

Q. Have you any recollection of approximately when it was that you became aware that Solo was available to be bought on the market? A. It would be about 1974 I think. 20

Q. And how was it that you became aware of that, do you recall? A. I saw it in a milk bar and I bought it.

Q. Over a period did you become aware of advertising going on in relation to Solo? A. Yes, I did.

Q. And in relation to Pub Squash were you also aware of advertising from time to time? A. Yes.

Q. Which of the two drinks was it that you first became aware of as being available for purchase? A. Solo.

Q. Are there any particular advertising slogans or phrases which you recall in regard to one or other of the drinks? A. In regard to Solo the little he-man drinking his can of Solo and dribbling everywhere and the other one just the phrase in relation to "Made from real lemons", "What they used to make in the old pubs". 30

Q. And which is the one that you associate with that phrase? A. Pub Squash.

Q. Are you able to tell us what leads you to associate Pub Squash with that phrase? A. Just the phrase, "Pub Squash", it is in the wording, I have not even looked at it since this has come about in advertising so I do not really know; it is the words "Pub Squash" leads me to believe it was the Pub Squash ad.

CROSS-EXAMINATION:

MR. BANNON; Q. Have you ever associated that phrase that you told us, which I think was, if I have got a correct note of it, correct me if I am wrong, "Made from real lemon", "What they used to make in the old pubs"? A. That's right, yes. 10

Q. Did you ever associate that phrase with the product Solo? A. No, I cannot recall exactly the advertising for Solo. When I was asked this question from the research lady they were the words that sprung to mind in relation to Pub Squash.

Q. Have you ever had squash in a hotel? A. Yes.

Q. Lemon squash? A. Yes.

Q. Would you describe the Pub Squash in the cans as being a squash similar to the squash in the hotels? A. I have never compared one to the other before. 20

Q. But thinking about it now? A. No, not really.

Q. What about Solo? Would you make that comparison with that? A. No, I would not say Solo was like them either.

(Witness retired and excused.)

PHILLIP LEONARD GINN
Sworn and examined:

MR. PRIESTLEY: Q. Is your name Phillip Leonard Ginn? A. Yes.

Q. Do you live at Flat 20, 40 Junction Road, Summer Hill? A. I do. 30

Q. And are you an ordinance inspector employed by a Municipal Council? A. Yes.

Q. Have you seen from time to time cans of drink known as Solo and the drink known as Pub Squash? A. I have.

Q. Have you formed any view about the similarity or otherwise of those cans? A. I am not quite sure what you mean.

Q. I am only speaking of the appearance of the two cans, of

the Solo can and the Pub Squash can? A. They are similar in colouring and obviously the taste of the two items are similar. That is virtually it, just the presentation of the cans in colouring, etcetera.

Q. Have you sometimes sought to buy Solo over the counter at a shop? A. Yes, I have.

Q. On occasions when you have asked for Solo have you always been given Solo? A. No.

Q. What has happened on the occasions when you have not been given Solo? 10

MR. BANNON: Could my friend be specific about dates?

MR. PRIESTLEY: Q. You do have some specific incidents in mind, do you? A. Yes, I do.

Q. Can you try and tell us first of all about the one that occurred first in point of time? About how long ago was it? A. I am not sure how long ago it was.

Q. Just roughly? A. Approximately twelve months I think, I am not sure exactly, but I went into a multi-goods shop - I think it was in Bexley or Carlton at the time - and I asked for a can of Solo because that was the one that I knew was on the market and the chap brought up a can of Pub Squash and I said, "No, I want Solo". He said, "Oh, I'm sorry", and gave me the Solo in place. He was of Mediterranean descent and he just gave me the wrong can. 20

Q. That was one incident, do you recall any others? A. It has happened a second time that I can specifically remember. The gentleman, I don't know whether he misunderstood me -

Q. Just tell us what happened? A. He brought up both cans plus another can of lemon drink, I don't know if he was a casual in the shop or what, he brought up three cans of lemon drink and asked me which one I wanted of the three after being specifically asked for Solo. 30

Q. Have you sometimes served yourself with a can of drink from the refrigerators that are in a lot of the shops now? A. Quite often.

Q. When you have done that in relation to a lemon squash drink have you had a particular brand in mind that you wanted to buy? A. Normally, I have occasionally if I am hot after sport, I am just after a drink, normally I go into a shop with a certain taste in my mouth that I want a certain drink. 40

Q. Well, have there been occasions when you have gone to a

refrigerator with the intention of getting Solo from it?

A. Yes, I have.

Q. Can you recall any occasions when you have had any difficulty or had to take any particular steps in order to get Solo?

A. Yes, I am not sure of your views, your Honour, on my wording but I did a double take once where I reached for a yellow can thinking it was Solo but it was Pub Squash and I had to go to the other door to get the drink. I was talking to someone, my brother, who I had been playing squash with and I just reached for the wrong can. 10

Q. Did you pick up the wrong can? A. I grabbed it, turned it round and said, "Oh no, that is the wrong one", and I went to the other can.

Q. Have you a recollection of when approximately it was that you became aware Solo was on the market? A. I could not say exactly, no.

Q. Can you recall which one you became aware of first as between Solo and Pub Squash, as being something you could buy? 20

A. I am rather averse to any form of commercials; in my own home I automatically blank off when a commercial comes on to the radio or to the T.V. I have on an occasion got the two mixed up.

Q. What two mixed up? A. Solo and the Pub Squash ads mixed up. I was in the bathroom, I was not watching the television, and I just happened to hear the slogan and I said, "Oh, is that that blooming company again", and my wife said, "No, it was the Solo company".

Q. What was the slogan that you heard? A. It was with regards to the "tang of the squashes that pubs used to make", and having lived in the country where hotels do make their own form of squash, some of the very older proprietors have their own kind of cordial mixtures that they mix up for squash. It was just something from the past that clicked to me and I thought it was a Pub Squash ad and we had had five or six in the last couple of hours and I was getting a bit cheesed off with them, that was all. 30

CROSS-EXAMINATION:

MR. BANNON: Q. You heard part of this advertisement? A. Yes.

Q. You did not hear the whole of it? A. No, it was just a couple of words caught to me, that was all. 40

Q. You thought it might refer to one product rather than the other? A. Yes. At the time I was not aware that my wife had changed channels either.

Q. On this occasion that you reached into the refrigerator you were talking to your brother? A. Yes, I was discussing a rather disgusting game of squash.

Q. And you turned the can around and saw it was the other brand? A. Yes, I did.

Q. And that is your habit, you turn them around to see which brand you get? A. Normally, yes, I go into a shop - sometimes when you have got a whole shelf of say lemon drinks or a mixture of cans and the cans do look similar. 10

Q. Most of them seem to be coloured yellow? A. Not all of them, some of them are green, some are blue, some are red, some are black even.

Q. The lemon drinks or the lemon squashes are often coloured yellow, the different brands? A. Different brands - there are a couple of lemon drinks that is one is green and one is white but I normally drink the lemon cans. It is just a taste that I have acquired.

Q. You know, for example, there is a Shelley's Club Soda Squash, do you? A. Yes. 20

Q. That is a yellow can? A. Yes.

Q. And Shelley's Lemon D'Lite in a yellow can? A. Yes.

Q. And I think there is Leed Lemon Squash? A. Yes, it is a green, I am not aware of any lemon squash in the Leed.

Q. Is this a can "Leed Lemon Squash" (Exhibit 4 shown)?
A. No, I have not seen that before, that is a new drink to me.

Q. (Exhibit 5 shown.) Have you seen that one? A. I cannot say that I have. I usually buy it from the same three or four shops in the areas that I work and have my recreation.

MR. BANNON: Q. Mr. Ginn, you are conscious of the brand you are buying, and you have to look at the can to see which one you are getting? A. Normally, yes. 30

Q. You mentioned this gentleman some 12 months ago, when you asked for a Solo and he brought Pub Squash, and he said he was sorry, because that was not the one you wanted? A. That is right.

Q. You said he was a Mediterranean; did you gather that from his speech? A. Yes, sir, his lack of the English language.

Q. He seemed to be deficient in English? A. Yes.

(No re-examination.)

HIS HONOUR: Q. Mr. Ginn, if it were necessary for us to get you back again, could we get you back at, say, an hour or one and a half hour's notice? A. At what time, sir?

Q. I do not know. A. I can be contacted. It is a bit awkward, but I could get the other time off, I am quite sure of that.

HIS HONOUR: On the basis that if perhaps we do need you you would be prepared to come back, you can step down.

10

(Witness retired.)

(Further hearing adjourned to 10 a.m. on Friday, 26th August, 1977.)

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED
v.
THE PUB SQUASH CO. PTY. LIMITED

FOURTH DAY: FRIDAY, 26TH AUGUST, 1977.

(Tape relating to Solo radio advertising, 1973 to date,
tendered by Mr. Horton and admitted as Exhibit "O"). 10

COLIN ROBERT ISAAC
On former oath:

HIS HONOUR: Mr. Isaac, you appreciate that the oath you took
yesterday is still binding on you?

WITNESS: Yes.

MR. HORTON: Q. (Approaching witness with transcript.) I
don't want you to read the whole of this page. This is evi-
*dence on page 67 of the transcript - as far as you got yester- 20
day before the luncheon adjournment. Just to bring it back to
your mind, that is what you were telling us about. You told
us about your experience in supermarkets, and that is finished.
You then went on to mention an occasion, about two-thirds of
the way down the page, when you were with a friend? A. Yes,
that is right.

Q. You said it was about August or September last year?
A. Yes.

Q. And the last question and answer on the page you partly
completed when the adjournment occurred. You see what you were
talking about there? A. Yes.

Q. Well now, what did your friend say at the time that you 30
were both there selecting cans of drink? A. He said to me, "I
have selected a can" - his words to me were, "I have got a can
of Pub Squash instead of Solo". He then turned to put it back
in the fridge and collected a can of Solo that he was after.

Q. In fact did he get a can of Solo? A. Yes, he did.

*See now page 107.

CROSS-EXAMINATION:

MR. BANNON: Q. Mr. Isaac, this refrigerator was one of the open display ones, was it? A. Yes, that is right.

Q. Is this friend of yours - what was his name?

A. Christopher Dale.

Q. Have you seen him recently? A. Yes, I saw him last week.

Q. Where does he live? A. In Kew, in Victoria.

Q. What is the address? A. I could not tell you the street offhand.

Q. Do you know where he can be found? A. Yes, I can contact him through the Monash Law School. He is a law student. 10

Q. In the same year as you? A. No, he is in final year. I am in 4th year.

HIS HONOUR: Q. Mr. Isaac, I wonder if you can just clarify something for me? I have seen in supermarkets and similar places two different types of display refrigerators. One appears to be an upright cabinet with glass doors and one appears to be a version of what looks like a low-down freezing chamber. Which is the one which was involved? A. The vertical type, with glass doors. 20

HIS HONOUR: Is there anything counsel wish to ask arising out of that?

MR. BANNON: No.

MR. HORTON: No.

(Witness retired.)

HOWARD GERARD HARRISON
Sworn and examined:

MR. HORTON: Q. Mr. Harrison, what is your full name, please?

A. Howard Gerard Harrison.

Q. You reside at 26 Bass Street, Caringbah? A. Yes. 30

Q. You are a Bachelor of Economics? A. Yes.

Q. And a graduate in the Faculty of Law, Sydney University?

A. Yes.

Q. Are you familiar with the drinks of Solo and Pub Squash?

A. Yes.

Q. Have you bought them on occasions? A. From time to time I have bought both drinks. I cannot sort of be very particularly sure about these things - just that I know I have bought both in the past at one stage or another.

Q. Have you seen or heard advertisements for one or both of the products? A. Yes.

Q. Do you recollect the whole or any part of the slogan or catch-phrase that is used about one or other of the products in the advertisements you have heard or seen? A. Again I cannot be sure - not of particulars - but the general impression - one general impression I got from the advertisements for both drinks is something about "the squash they used to make in pubs". (objected to). 10

Q. I am not sure your answer was fully taken down before my friend objected. What was the content of the slogan or catch-phrase? A. Something along the lines that "squash the pubs used to make".

Q. Did you associate that with both, or with one? A. Again it is very hard. I just have an impression from the advertising commercials for both drinks. I have never really concentrated on either. I really cannot say which drink I would associate with the slogan. It is something I associate with lemon squash drinks now. 20

Q. The advertising which has been noticed by you was television, or radio, or both? A. Television, I would say, about Solo.

Q. Do you have any recollection of distinguishing between the two types of advertising in relation to both drinks? A. I can quite distinctly remember the Solo; it is the canoeist and the hang glider. I am not sure about the hang glider, but definitely the canoeist and that sort of ads. 30

Q. You have a fairly clear recollection of a slogan attached to one or other, or both? A. That slogan is very clear in my mind.

CROSS-EXAMINATION:

MR. BANNON: Q. You say that you definitely remember the Solo ads about the canoeist and possibly a hang glider? A. Or sporting type ads. But I know definitely the canoeist.

Q. Perhaps I should just ask you this. Do you remember any Pub Squash advertisements featuring someone called the "Six million dollar man" or something of that nature - a fellow who jumped up cliffs? A. No, I am sorry, I don't. 40

H.G. Harrison, xx

Q. You cannot recall the Pub Squash ads? A. No, nowhere as clearly as I can recall the Solo ad.

Q. Have you ever had squashes in hotels? A. Yes.

Q. When you have had squashes in hotels do you know whether they have been Pub Squash brand or Solo brand? A. No, not in an hotel.

Q. You mean to say you have not had them there? A. I have had them there but whenever I have had a squash in an hotel I have had a squash of no particular brand. I don't know which brand they were giving me.

10

Q. When did you start drinking squashes in hotels? A. Four or five years ago.

(Witness retired.)

RICHARD REITZEN
Sworn and examined:

MR. HORTON: Q. What is your full name, please, Mr. Reitzen?
A. Richard Reitzen.

Q. You reside at 22 Moonbi Crescent, Frenchs Forest, and you are a Bachelor of Arts and presently in third year law at the University of Sydney? A. Yes.

20

Q. Mr. Reitzen, have you become aware of two drinks - Solo and Pub Squash? A. I have.

Q. Have you become aware of any advertisement for one or other or both? A. I have become aware of advertising Solo.

Q. Are you aware of both television and radio advertising?
A. I would say definitely I am aware of television advertising but I would not commit myself to radio advertising.

Q. Do you recollect any advertisement for Pub Squash? A. I can't recall any particular advertisement for Pub Squash.

30

Q. Are you aware of a slogan or catch-phrase that has been used in relation to one or other or both of these drinks?
A. I am aware of a slogan which has been used in relation to Solo drink.

Q. When did you become aware of that? When did you become aware that that slogan was related to the Solo drink? A. Two days ago when one of the solicitors or counsel approached me and asked me a similar question.

R. Reitzen, x

Q. Before you became aware that the slogan which I will bring you to in a moment was related to Solo did you have an understanding that it was related to one or other of the drinks?

A. It was my impression that the slogan was related to the Pub Squash drink because the words using the slogan are the name of the product.

Q. Can you tell his Honour your recollection of the slogan that gave you that impression? A. It is a slogan like, "A squash like the pubs used to make".

10

CROSS-EXAMINATION:

MR. BANNON: Q. Mr. Reitzen, these advertisements that you have seen for Solo on television - do you remember any of the details of them? A. I remember one advertisement in which a young man is sailing a catamaran on the way to the beach.

Q. Do you remember anything that was said in that advertisement? A. I seem to recall - but I would not be sure about this - the slogan in that television commercial was of a different nature than the one we are referring to.

Q. Do you remember any Solo advertisement which used the words "A squash like the pubs used to make"? A. I don't remember it being related to the Solo drink, but I do remember the slogan.

20

Q. Have you yourself drunk squashes in hotels? A. Not in hotels. I am sorry, there is one occasion in which I had a drink of squash in an hotel.

Q. And did you regard the phrase "A squash like the pubs used to make" as descriptive of the sort of squashes you can get in hotels? A. Yes, I would.

(Witness retired.)

30

MARY BRIDGET MOLYNEUX
Sworn and examined:

MR. HORTON: Q. Your full name is Mary Bridget Molyneux. You reside at 5/51 Coogee Street, Randwick, and you are a student at the Sydney University Law School? A. Yes.

Q. In what year? A. Second year.

Q. Are you familiar with cans and bottles of drinks called Solo and Pub Squash? A. Yes.

Q. Have you bought one or both of those products? A. I have bought both.

40

Q. Have you bought them from what we have been calling a self-service refrigerator, or over the counter? A. Self-service.

Q. Have you noticed any difficulty at all in distinguishing between the two cans when you go to select one? A. Yes, I always have to look very carefully to see which is which.

Q. Do you recall having heard or seen radio or television advertisements for lemon squash type drinks? A. Yes, both.

Q. Do you recall any slogan or catchwords used in any of those advertisements? A. From the radio advertisements. 10

Q. What is your recollection of the phrase? A. Vaguely, "Great squash - like pubs used to make".

Q. With which product until recently did you associate that slogan? A. Pub Squash.

Q. And I think now you associate it with Solo? A. From yesterday, yes.

CROSS-EXAMINATION:

MR. BANNON: Q. Have you ever had a squash in an hotel?

A. Yes. 20

Q. Do you know which brand squashes you have had in hotels?

A. Well they have just come from a tap, I think. I am not sure which.

Q. You have had them more than once, I take it? A number of times? A. Yes.

Q. You regard the slogan "a great squash like the pubs used to make" as describing the sort of squashes you have had in hotels? A. Well, they all tasted much the same.

Q. As the one in the can? A. Yes.

Q. You think that is a description of lemon squash? A. Yes. 30

Q. It does not mean any one particular person's products?

A. Well, when I heard the phrase I always associated it with Pub Squash.

Q. But the phrase did not mean to you any particular product? It was the description of the contents that went in these things? (Objected to; rejected.)

Q. How long ago did you hear this advertisement on radio?

A. I don't recall when I first heard it. It would have been at least last year.

Q. I suggest it has not been heard on radio for at least 12 months. Would you agree with that? A. No, I don't think so.

Q. You are not sure? A. No, I am not sure.

Q. You were speaking about buying cans. You looked carefully to see which one you were getting? A. Yes.

Q. There are more lemon squashes than just Pub Squash and Solo on the market, aren't there? A. Yes.

10

Q. There are other brands as well? A. Yes.

Q. They are all in yellow cans, are they not? A. I have seen other things in yellow cans.

Q. Shelley's Soda Squash, for example? A. I don't know if it is in a yellow can.

Q. (Exhibit 7 shown to witness.) Will you look at Exhibit 7? Do you recognise that as a can of Shelley's drink? A. Yes.

Q. I suppose that is in the shops, too, is it? A. Yes.

Q. Would you look at Exhibit 5? Have you seen that one, too - Leed? A. I don't recall seeing that one before. It does not especially stand out.

20

Q. (M.f.i.'s 5 and 6 shown to witness.) In buying Cola you know Coca-Cola comes in a red can? A. Yes.

Q. And Export Cola comes in a red can? A. Yes.

Q. You agree if you go to buy Cola you also have to look at what is written on it to make sure you get what you want?

A. Not with coke. It has just been around so long.

Q. But Export Cola is also in a red can of the same size?

A. Yes.

Q. So that if they were both standing side by side in the shop you would want to read the words written on them to make sure you are getting the product you want, wouldn't you?

30

A. I usually recognise coke sort of without much inspection from the label.

Q. That is by looking to see what is written on it? A. It is the general design - the red and white.

M.B. Molyneux, xx

Q. You agree that Export Cola has also got red and white on it? A. Yes.

Q. You have to read the words written on them, don't you?
A. I just usually don't have any trouble distinguishing them.

Q. You know with all these products, because similar colours are used you have to look and see what is written on the can to get the one you want, is that right? A. Are you referring just to coke?

Q. To soft drinks generally. A. Yes, usually similar colours are used for similar products. 10

(Witness retired.)

MICHAEL STEPHEN DONOVAN
Sworn and examined:

MR. HORTON: Q. What is your full name please, Mr. Donovan?
A. Michael Stephen Donovan.

Q. You reside at 10 Mypolonga Avenue, Gymea, and you are an economics law student? A. Yes.

Q. Doing the law part of the course at the moment? A. No, in first year I do three economics subjects and one law subject. 20

Q. At Sydney University? A. Yes.

Q. Are you familiar with the drinks, Solo and Pub Squash?
A. Yes.

Q. Have you bought one or other or both of them on occasions?
A. Yes, I have bought both.

Q. Have you noticed advertisements for one or other or both?
A. I have seen an advertisement - a Solo advertisement - in which the man is rowing down the river in a canoe. I don't think I have seen any advertisement for Pub Squash.

Q. Have you heard any advertisements on the radio for one or other of the drinks? A. No. 30

Q. Are you aware of a slogan or catchwords used in the advertisements about lemon squash? A. I have heard an advertisement that runs something along the lines of "lemon squash - just like the pubs make", but I am not sure of the exact words.

Q. With which product did you until recently associate that slogan? (Objected to; question withdrawn.)

Q. Would you, if you can, give your answer by reference to last week - not this week - last week, with which of the products did you associate that slogan or catch-phrase?
(Objected to.)

Q. Did you associate that slogan last week with one or other of the products we have been mentioning and, if so, which?

A. I associated it with a lemon soft drink, but I am not sure of the exact one. I don't pay a lot of attention. But by the wording I would tend to associate it with Pub, because of the word "pub" in that slogan. 10

Q. I think at present, as you sit in the witness box, you, of course, having received some information which was given to you and which caused you to be here, you now associate it with Solo, I suppose? A. Yes.

MR. BANNON: No questions.

(Witness retired.)

(On Mr. Horton's application counsel adjourned to private chambers to confer with his Honour.)

(On resumption his Honour stated that if he came to the conclusion there was an infringement he would not require any further evidence of damage since they were only dealing with the issue of liability.) 20

JOHN PRESTON
Sworn and examined:

MR. HORTON: Q. Is your full name John Preston? A. Yes.

Q. Where do you live? A. West Road, Pearcedale, Victoria.

Q. What is your occupation? A. Company Secretary with U.S.P. Needham.

Q. That company amongst other things, I think, books television advertising for clients? A. Yes. 30

Q. Did it book television advertising for the drink Solo?
A. Yes.

Q. On behalf of what company did you book that advertising?
A. For Cadbury-Schweppes.

Q. (Approached.) I show you Exhibit "E2". Is that a schedule prepared by or under your direction showing the amounts expended upon television advertising for the drink Solo subject to, I think, one amendment that you need to make to it?

J. Preston, x

A. That is true. This is a summary that was prepared by Cadbury-Schweppes from copies of invoices that were supplied from our office.

Q. Have you looked at these? A. I have and I have found it does not include television advertising for Solo for the month of January 1974, which amounts to another \$7,449.68.

Q. So that the figures on the seventh page of the exhibit which presently reads \$1,256,326 should be increased by the figure you mentioned to read \$1,263,775.68? A. Correct. 10

Q. The schedule shows radio advertising as well as television advertising? A. Yes. The system has changed from January 1977 whereby all media is placed by U.S.P. Needham for Cadbury-Schweppes, both for the drink division and the confectionery division. Before 1977 media other than television for Solo would have been placed by Masius, the other agency.

Q. The schedules relating to radio advertising show the month, the station, the place where the station broadcasts and the amount? A. Yes.

Q. Can you tell from the schedules on what particular days advertisements appeared? A. Not from these schedules that are available here, but from our records in Melbourne, yes. 20

Q. Do you have those with you at all? A. No. There are a tremendous number of papers involved in that and we can only extract summaries from them otherwise we would have to bring - Solo is only one of about twenty Cadbury-Schweppes products. Most of the schedules that would be prepared that would show actual dates would probably include anything up to another twenty clients, but they could be extracted if this information were required. 30

Q. Perhaps it would be sufficient for our purposes if you were able to express a view about the inference that one would draw from these schedules. Take for example the second sheet, one sees in January in Sydney \$2,400 was spent on station 2SM. Would that suggest a number of broadcasts? A. Yes. There would be a certain number of radio announcements amounting to \$2,400.

Q. I think we have been told they are of 30 seconds or perhaps 60 seconds duration? A. It is usually on television. In radio they are mentioned in words, 15, 30, not so much time. 40

Q. Would there be a number of advertisements represented by that figure of \$2,400? A. Yes, certainly.

Q. Could you hazard a guess as to about how many one would

expect to be broadcast for that figure? A. I would only be guessing. I would have probably a better idea if you were to specify in relation to, say, June, 1977, on television when I had brought along with me details of one set of transactions relating to current television advertising.

HIS HONOUR: I do not know whether it is directly related to Exhibit "E1", but there appears several advertising charges and one may get some sort of discount for a greater number. I think the first of the 30 second ones in Exhibit "E1" is \$16.50. 10
The next one I think is \$26.50, which indicates it must be prime time. One would reasonably assume it would be more than one advertisement, probably a significant number.

WITNESS: This is also quite possible, being on 2SM for \$2,400, that they were four packages at \$600 a week. We may not have the specific cost per commercial, for instance, such as on 2SM.

MR. HORTON: Q. As his Honour said, with a figure like that it would be a significant amount of advertising in a month for one radio station? A. Yes. On average it could be 120 spots at an average of \$20, true. 20

Q. If I may take you to Exhibit "E2" to the television section, that shows again the month, the television station and the amount? A. Correct.

Q. There are some figures in brackets on some of the pages which in the balance sheets and company accounts tends to indicate a minus figure. Is that what that is meant to show? A. Yes. That would be an adjustment over a period previously where in fact the bill has been based on what has been scheduled and it is through the checking that we do that would pick up that some announcements have not been telecast as per the schedule. Quite often this account has been rendered to the client and a credit note for these non-telecasts could appear the following month or even the month after. 30

Q. In the second part of Exhibit "E2" there are some invoices apparently bearing your company's name? A. Correct.

Q. What are they? A. They are actually invoices in this case for Solo advertising on television. We make up our invoices on a monthly basis and that would form part of a monthly statement for Cadbury-Schweppes for their advertising for that particular month. 40

Q. For that product alone? A. That is an extract of that product's expenditure. It is headed "Solo" on the left hand corner at the top.

Q. You have two summary sheets, one for the radio advertising

placed by your company and the other one, which you have already looked at to adjust the final figure, a summary for the television advertising? A. Correct.

CROSS-EXAMINATION:

MR. BANNON: Q. In this document there is a soft drink called Rondo, is there not? Do you know that one? A. In which, I am sorry?

Q. Do you know a soft drink called Rondo in a can? A. I have heard of it, yes. 10

Q. Do you know that has on the can something about the manufacturers of Solo? A. No, I am sorry, I don't know.

Q. Do you know whether or not that is a Cadbury-Schweppes product? A. I do not think so, but I don't know, I am sorry.

Q. Do you know whether or not the advertising of Rondo is included in the Solo figures in your schedule? A. No, it is not. It is definitely all Solo.

Q. Would you look at the documents which are Exhibits 10 and 11? (Shown.) Would you look at Exhibit 10 first. Do you see that exhibit contains figures regarding the advertising for Solo on television and the cost of it? A. From the period January to May 1975, yes. 20

Q. Would those figures, those costs be included in your summary, Exhibit "E2"? A. I have a copy of the summary that was "E2" here. I would need to check these because it would appear that these are extracts that have been taken from the schedules prepared by U.S.P. Needham for the use by Masius Wynne-Williams. I can check to see whether in fact these do coincide, but they do not show the individual costs of the commercials and they are in fact spread over three months so I would need to take extracts out of this exhibit and add them together to see whether they add up to that figure. I have no doubt that they do, but I am sure they have been taken from figures we have supplied to Masius. 30

Q. You presume they are taken into account in Exhibit "E2"? A. Yes, I am sure.

Q. The same with Exhibit "E". Would you look at that? Do you see that is a composite document dealing with both television and radio for the period January to May 1975? A. Yes. I am sure these are internal extracts by Masius that relate to the same figures that are included in the previous exhibit. 40

J. Preston, xx

Q. Exhibit "E2"? A. Yes, because all of that advertising was in fact placed by our company, U.S.P. Needham.

(Witness retired and excused.)

DAVID JOHN GUEST
Sworn and examined:

MR. PRIESTLEY: Q. Is your full name David John Guest?

A. Yes, it is.

Q. Do you live at 5 Banksia Avenue, Fairfield? A. Yes.

Q. Are you a law student in your third year? A. That is right. 10

Q. Have you become aware of the existence of soft drinks known as Solo and Pub Squash? A. Yes, I have.

Q. Approximately how long is it since you first became aware of the existence of either of those? A. I would say maybe two years.

Q. As far as you can recollect which was the one you became aware of first? A. Solo.

Q. Do you remember now how it was that you first became aware that such a drink was available? A. I think it could have been the kyak ad on television. I am not really sure but I think that would be it. 20

Q. In relation to advertising, are there any slogans which you have come to associate with either of the products? A. Yes.

Q. What are they? A. Well, the squash just like pubs used to make.

Q. Do you recall through what medium it was you became aware of that slogan? A. I have heard it, you know. It could be radio or television.

Q. Have you associated that in the past with one brand to the exclusion of the other? A. I would not say to the exclusion of the other. If I associated it with one it would be with Pub Squash, yes. 30

Q. Why is that? A. Well, they just used to make Pub Squash, I think, you know, just the impression from the two words.

Q. Had you noticed how the products are made available for sale to the public? Where do you see either of the products available on sale? A. Just in refrigerators in shops. You reach in and get a can.

Q. Have you noticed, when more than one brand is on sale how they are kept in the refrigerators? A. I am not sure what you mean.

Q. Can you recall a specific shop where you have bought a soft drink from a refrigerator? A. Yes.

Q. In that refrigerator has there been more than one brand available? A. More than one brand of drink?

Q. Yes? A. I think so, yes.

Q. Are they kept separately, together or how? A. Sure, they would be. One brand would be kept together and separated from the others, yes. 10

Q. I think you said when you want one you just reach in and pull it out? A. That is right.

CROSS-EXAMINATION:

MR. BANNON: Q. I take it you also know of another product, which I think is Exhibit 7 (shown). Do you know that one, too? A. Yes, I have seen that.

Q. Would you associate that phrase with that product, too? A. No, I don't think I would, not Club Soda, no. 20

Q. Have you ever had squash in an hotel yourself? A. Yes.

Q. Often? A. No, not often.

Q. Do you associate that phrase with the squash you get in the hotels? A. No, I would not.

Q. Would you regard the pub squash drink that you speak of as being a squash similar to the things that you get in hotels? A. They all taste the same to me.

Q. Solo, Pub Squash, drinks in the hotels? A. I would not know one from the other.

Q. You regard them all as squash similar to the hotels drink? A. Yes. (Objected to; question withdrawn.) 30

Q. Similar to the products you have had in hotels? A. Well, I think, yes, lemon squash is lemon squash.

(Witness retired.)

KARL STEPHEN FOSTER
Sworn and examined:

MR. PRIESTLEY: Q. Is your full name Karl Stephen Foster?

A. Yes.

Q. Do you live at 20 Valetta Street, Moss Vale? A. Yes.

Q. Are you a first year law student? A. Yes.

Q. Are you aware of the existence of two drinks known as Solo and Pub Squash or Pub Soda Squash? A. Yes.

Q. What is your recollection of when it was that you first became aware of the existence of either of those drinks? A. When they first started advertising Solo and the man on the river, that was my first recollection. I don't know the precise time when it was. When the man - I realise it came out some time after that, because a friend of my father's said, "Why don't you try this?" 10

Q. I was going to ask you which one you became aware of first?

A. It was Solo, yes.

Q. Subsequently you became aware of the existence of the other drink? A. Yes.

Q. Have you had occasion to buy Solo from time to time? 20

A. Yes.

Q. From what sort of places have you bought it? A. Mainly cafeterias, or like cafe bars.

Q. Have you bought it over the counter or out of self-service refrigerators? A. Out of self-serve refrigerators.

Q. Do you recall an occasion at Moss Vale when you went to buy a can of drink? A. Yes, I picked up the wrong can.

Q. Approximately how long ago was this? A. It would have to be over a year ago.

Q. Did you have the intention of buying a particular brand? 30

A. Yes, I had the intention of buying Solo.

Q. You went to a self-serve refrigerator, did you? A. Yes.

Q. What actually happened then? A. Well, I wasn't concentrating a great deal, just being good friends. I intended buying Solo and I reached in to take the cans and being yellow cans I took the wrong can, which I found out after and I put it back. It was a Pub Squash can.

Q. Were there any Solo cans in the fridge? A. Yes. I took one out after replacing the other.

Q. Do you recall how the Pub and Solo cans were placed in the refrigerator? A. No, I think they were in a haphazard order.

Q. You mentioned you recall seeing the Solo advertisements on the television? A. Yes.

Q. Did you become aware of any Solo advertisements on the radio? A. No, not to my recollection.

Q. Do you have in mind any advertising slogan or slogans associated with either of the drinks? A. Yes, "Squash like the Pubs". On television I have heard "Pub Squash like the pubs used to make". I have associated that with Pub and the man's drink, that I associated with Solo. They are the two. 10

CROSS-EXAMINATION:

MR. BANNON: Q. Do you listen much to advertisements? A. What means?

Q. On television do you pay much attention to them?
A. Yes. I suppose you can't help but pay attention when you are watching television.

Q. When did you hear this advertisement, "Pub Squash like the pubs used to make"? A. I can't recollect the time. 20

Q. Have you ever had a squash drink in an hotel? A. No.

Q. Do you regard Solo as being a squash, a lemon squash?
A. Yes.

Q. Is it a similar sort of drink to the Pub Squash in taste?
A. Yes, both being lemon drinks, lemon squash, yes.

Q. Do you regard them both as being drinks like the pubs used to make? A. Well, I don't really know how "what the pubs used to make", to tell the truth.

Q. For all you know they could be? A. Oh, yes, for all I know they could be to my knowledge. 30

Q. The principal advertisement you have heard on television for Solo is that it is a man's drink; is that right? A. Yes. I associate that with the bloke going down the river, yes.

Q. You have heard it said it is the one that separates the men from the boys; you have heard that one? A. No, I haven't heard that one.

(Witness retired.)

(First style of defendant's can to go onto market tendered without objection admitted and marked Exhibit "P".)

(Short minutes of the order made by the Court in the proceedings by the plaintiff against the Coca-Cola Export Corporation tendered without objection subject to relevance, admitted and marked Exhibit "Q".)

CECIL JAMES LOWE

On former oath:

MR. BANNON: Q. I think on the last occasion you gave evidence you told us that the advertising of Solo as a squash like the pubs used to make, or similar phraseology, was abandoned somewhere about September last year; is that right? A. That is correct. 10

Q. Your company introduced another product on the market, did it not, called Rondo? A. Correct.

Q. Is Rondo a canned lemon squash type of drink of a low calorie nature? A. Yes, it is a low calorie lemon drink.

Q. Is it in a similar sized can to Solo? A. Yes.

Q. Does it have on the label some reference to Solo? A. It says underneath the major label panel "From the makers of Solo". 20

Q. When was that introduced? A. About September last year.

Q. In regard to Rondo, what sort of advertising had you put on the market regarding that? A. There was one television script which was aimed - in a broad sense it said, "Natural taste in lemon without the calories". That is about the major part of the message. It was aimed at females and it sought to capitalise on the reputation of Solo as the premium lemon squash brand in the low calorie segment, which is a very rapidly growing section of the business, and it aimed to have female appeal. 30

Q. Did you consider that the capitalising of the Solo reputation and with its aim being to the female section of the market, that the reference to "Squash like the pubs used to make", or similar phraseology, was inappropriate? A. No, it was just a question of how much you can say in 30 seconds.

Q. Did the introduction of Rondo influence your decision to drop the "Squash like pubs used to make motif"? A. Absolutely not.

Q. One of the slogans or advertising themes that has been very prominent in your company's advertising has been the slogan "A man's drink", has it not? A. Yes. 40

Q. The emphasis with this actor gentleman, Mr. Michael Ace,

has been on the masculinity of the product? A. Yes.

Q. The sort of thing that an athletic man would favour drinking? A. Yes.

Q. It usually shows a young, energetic man who indulges in a lot of sports and athletic activity, does it not? A. Yes.

Q. Not the sort of man you would find lounging around in hotels; is that right? A. No, I don't agree with that.

Q. Did your advertising men find there was conflict in the image between the athletic young man and the "man's drink" on one hand and the concept of a drink of "squash like the pubs used to make" on the other? A. No, not at all. We are not isolating ourselves from the gregariousness of the Australian male or the average Australian male. What we are saying is that for this type of athletic male who does not want to drink beer all the time, here is an adult male drink with all of the masculine connotations of yesterday and today. 10

Q. Since you decided to drop the theme "squash like the pubs used to make", what sort of advertising themes have you been using since then? A. We used the theme, "Solo says it all"; Solo coupled with the words - "Solo, a man's drink"; and then in early January this year for a three-month period we used a theme which simplified said, "Don't give me an imitation of Solo". 20

Q. This theme "A man's drink" is that the theme most extensively promoted? A. The theme "a man's drink" is the secondary copy platform that has been used all the way through.

Q. Now it has become the No. 1 copy platform; is that right? A. No.

Q. What is the No. 1 copy platform? A. Since September and through October, November, December it was a joint platform, the expressions being "Solo says it all", "Solo, a man's drink". The two are inter-related. 30

Q. It would be right to say, would it not, that the slogan referring to "Squash like the pubs used to make", or similar phraseology, was never used in the papers or posters? That is right, is it not? A. I will have to think about that. To the extent that there was not a great deal of press advertising, I can't be sure, but I am inclined to agree with you.

Q. I was asking you the other day about the fact that the supermarkets have these print-outs which are distributed to the trade of the products they are marketing? A. Right. 40

Q. (Approached.) I show you a set of print-outs from

Woolworths Data Services. You recognise these as copies of Woolworths Data Print-outs, do you? (Objected to.)

Q. Do you know that they are? A. Yes, they appear to be Woolworths Data Print-outs.

Q. I am showing you the sheet headed "week period ending 9.10.74"? A. Right.

Q. Do you see Schweppes --- (Objected to witness being cross-examined on a Woolworths document.)

Q. Perhaps I could leave this with you over the lunch time, but what I want to suggest to you is that the first reference to Solo, having looked at these two, you will agree with me the evidence you gave before about Solo being launched in New South Wales is incorrect, and that the first time it was launched in New South Wales was in 1974? A. No, that is not so. (Objected to; allowed.) 10

(Luncheon adjournment.)

ON RESUMPTION:

Q. You have looked at the document over the adjournment?

A. Yes. 20

Q. Having looked at it you wish to change your answer that Solo was launched in N.S.W. in 1973? A. No, I do not wish to change my answer. Solo was launched in December 1973 by virtue of the ---

Q. I only asked you did you want to change your answer?

A. I do not want to change the answer.

(Discovery document 4 called for, not produced, copy used without objection.)

Q. I want to show you, see this document? A. Yes.

Q. I have asked you about this before? A. Yes. 30

Q. And it was the market plan for national strategy that was approved by you and signed by you? A. Correct.

Q. Do you agree that in that document on p. 24 you said that the launch will start with staff presentations in Sydney, Perth, Newcastle, Hobart and Adelaide? A. Right.

Q. You see that the document is prepared in June of 1974?

A. Right.

Q. Does that make you change your answer that it was in 1973?

A. Could I just look at that for a moment? It says in the next paragraph that a special case applies where Tarax is represented but not in route trade. That is the small shop trade. Here the Chullora branch would be responsible for sales but other sales will be the responsibility of Schweppes.

Q. It does not say that Tarax have already been marketing Solo in N.S.W.? A. No, but they had been.

Q. In that document you say on p. 4 that Solo is positioned as an adult male soft drink? A. Right. 10

Q. And of course you would not, the drink has in fact been available to all sections of the community? A. Could you restate that?

Q. It has been available in shops to all sections of the community? A. Yes.

Q. And you know that young people and old people and middle-aged people drink it? A. Yes.

Q. And quite extensively too? A. Yes.

Q. I want to refer you again to another document which is discovery document 3.61? A. Yes. 20

Q. That is a letter of 3rd May 1977. Do you agree that in that letter which you wrote on 3rd May 1977 you said Solo was introduced to the N.S.W. market in October 1974? A. It says that but ---

Q. And that is a letter that you wrote? A. That is a letter that I wrote.

(Letter dated 3rd May 1977, tendered without objection and marked Exhibit 12.)

(Solo planning seminar document called for and produced.) 30

Q. Do you recognise that document? A. Yes.

Q. And attached to it there are some sheets for advertising expenses are there not? A. Yes.

Q. They relate to television and the period September to December 1974? A. Yes.

Q. And radio and so on? A. Yes.

Q. And that relates to expenditure that was made in that

period? A. Expenditure that was planned. Those are plans, not a statement of what actually happened.

(Solo planning seminar document tendered; objected to on the basis of no probative value: tender rejected.)

(Solo planning seminar document, m.f.i. 7.)

Q. I just show you a document which is discovery document 5.12 dated 7th May 1975. Would you have a look at that?

A. Yes, I am familiar with that.

Q. And that is a document that came to your attention at or about that date? A. Yes. 10

Q. And it is quite clear, isn't it, that it was about that date you had formed the view that you knew that the Pub Squash Company had introduced its product, Pub Squash on the market?

A. Yes.

Q. You took the view that it was an imitation of Solo? A. Yes.

Q. You took the view that the phrase "Lemon squash the pubs used to make" might be misapplied to Pub Squash? A. Yes.

Q. And you were suggesting in your advertising that it was an imitation? A. No, that is not correct. 20

Q. But in all events you were aware in your position, both on behalf of the present plaintiff and on behalf of Tarax Drinks Holdings Limited on 7th May, 1975 of the activities of the defendant and of the get-up of its cans and of the possibility, in your mind, that this slogan which you have been using, "lemon squash the pubs used to make" was applied to the product of the defendant? A. Yes. I should mention that that script was never used.

Q. Was it not used because of legal advice (Objected to).

Q. Was it not used because you thought it might be defamatory (Objected to). 30

Q. Did you consider using it? A. We considered using it, yes.

Q. And did you take legal advice about it? A. No.

Q. You remember that your company put an advertisement which appeared in the Sydney Daily Mirror on Monday, 22nd December 1975? A. I do.

Q. Is that the advertisement (witness shown document.)

A. That is the advertisement.

Q. And that is the advertisement which has the heading, "Solo separates the men from the boys"? A. Yes.

Q. And in the advertisement are shown, quite plainly, cans of Solo lemon drink, cans of Shelley's Club Soda Squash, a can of Shelley's Lemon Delight and a can of the defendant's Pub Soda Squash? A. Yes.

(Advertisement m.f.i. 8.)

(Discovery document 28 and discovery document 35 called for; copies used.)

10

Q. You remember, do you not, that following upon that advertisement your company received a letter from Arthur S. Cave & Co., Patent Attorneys of which I am showing you a copy? A. May I see that letter? (Objection to questions on correspondence on the basis of irrelevancy.)

Q. Do you remember receiving that letter? A. I do.

Q. In or about early January 1976? A. Yes.

Q. And then, do you remember that reply was sent by Hedderwick Fookes & Alston, solicitors, on behalf of your company?
A. Yes, it was.

20

Q. And I am showing you a document of 20th January 1976. Is that a copy of the letter signed by your company's solicitors?
A. That is a copy of the letter.

Q. You saw the letter? A. I saw the letter.

Q. I show you another letter of 4th March 1977 from the firm of Sydney solicitors, Maunder & Jeffrey to Hedderwick, Fookes & Alston, discovery document 35? A. Yes.

Q. And you saw that letter too? A. Yes.

Q. And in regard to those letters, did you, following the receipt of the letter of complaint, did you make a decision to discontinue the advertisement, the subject of the complaint (objected to).

30

(Letter dated 13th January 1976, letter dated 4th March 1976 and 20th January 1976 together with advertisement, m.f.i. 8 tendered; objected to; tender rejected.)

(Letters marked; first letter with paragraph marked by a cross, the whole of the letter in reply and in the third letter parts with a little green line beside them tendered; objected to; tender rejected.)

(Abovementioned correspondence m.f.i. 9A.)

(Advertisement, formerly m.f.i. 8 dated 22nd December 1975
tendered without objection and marked Exhibit 13.)

Q. That was the one and only advertisement of that nature, was it not? A. That is right.

Q. Following that advertisement you received a complaint from some patent attorneys? (Objected to; rephrased.)

Q. Following some correspondence between Maunder & Jeffrey and Hedderwick, Fookes & Alston you made a decision not to publish such an advertisement again? A. No, not correct. 10

Q. Did you make such a decision? A. No.

Q. Was a decision made not to publish any such advertisement in the paper? A. No, the original decision which was to publish the advertisement in the first place was taken on the advice of our solicitors that it was in order ---

Q. I did not ask for that. I ask that it be struck out. (Answer allowed.)

WITNESS: We took advice from our solicitors before we published the advertisement. ~~It was their opinion that we were merely~~ - 20 (Objected to; struck out.) It was always our intention to publish the advertisement once only and that we did. We did not make any later decision to discontinue it because there was never any intention to continue it.

MR. BANNON: Q. Is this a copy of the discovery document 3.46 from Hedderwick, Fookes & Alston to your company? A. Yes.

Q. You read that letter, did you not, it was received and noted by you? A. That is right.

Q. You noticed that in that letter it says in the second paragraph: "We remain of the view previously expressed. However, in view of the decision to discontinue the advertisement, the issue is no longer relevant." Do you remember that? A. That is their letter but I did not agree with the context of the letter. There was never any intention to publish it more than once. 30

Q. Having been reminded in that letter, do you wish to change your view that there was a decision to discontinue that advertisement? A. No, there was never any intention to publish it more than once.

Q. I showed you that draft advertisement of 7th May, 1975, the one which you say was in fact published? A. Yes. 40

Q. It referred to your knowledge of the sale of Pub Squash and your views as to similarity. I have referred you to this advertisement in the Sydney Mirror and after each of those events you knew that the defendant company was continuing to trade and to sell its Pub Squash and Pub Soda Squash? A. Yes.

Q. And to expand its area of entry? A. No, not in 1975. My recollection of decisions to take major expansive moves in terms of territory covered would be with these companies late in the summer of 1975/76 in Victoria and almost November 1976 in regard to Queensland and later still as regards South Australia. 10

Q. After this correspondence between the patent attorneys and the solicitors, to which I referred you, in January to March 1976, you knew that the defendant company was expanding in Victoria? A. Which date are you referring to?

Q. I am talking about this correspondence to which I referred you, about advertising in January to March 1976. A. Yes, they were expanding in Victoria but at that stage in a relatively small way. 20

Q. You knew they were expanding and continuing their sales also in New South Wales as well as Victoria? A. Yes.

Q. Then you knew about the proceedings commencing against your company by the defendant in South Australia on 21st April 1977? A. Yes.

Q. After those proceedings began your company knew that the defendant company was expanding its outlets in South Australia? A. Yes.

Q. Indeed you not only knew that, you would agree there is a body called the South Australia Soft Drink Manufacturers Association Incorporated? A. Yes. 30

Q. Of which your company is a member? A. Yes.

Q. On 11th November, 1976, the Pub Squash company's representative was welcomed as a member of that body? A. I am not previously aware of that.

Q. Are you aware of the fact that your representative was present at that meeting, a Mr.---- (Objected to.)

Q. I will show you this document. Will you look at that document? A. Yes. (Objected to and Mr. Priestley indicated a continuing objection.) 40

Q. You have read that document now, have you? A. I have observed it.

Q. Do you agree that your company is a member of this South Australian Soft Drink Manufacturers Association Incorporated?

A. Yes.

Q. And has a representative there, a man by the name of Davis?

A. Yes.

Q. Do you receive regular reports from the South Australian branch of activities? A. I don't, not at all.

Q. Are you aware that the Pub Squash company is also a member of this South Australian branch? A. Only since I saw this piece of paper.

10

Q. Are you aware that your company in South Australia and the Pub Squash company that your company has purchased or exchanged pallets and bottles of the Pub Squash company with it and paid for them? A. I am not aware of it.

Q. Do you know that your company has regularly done that in certain parts of Australia? A. It would be normal practice between the companies within the industry periodically to exchange other people's bottles, cases, pallets etcetera.

Q. Your company has done that with the Pub Squash company? A. I think, if we are referring to South Australia, we would have done it for many years with the Passiona Bottling Company of South Australia Pty. Limited.

20

Q. And afterwards with the Pub Squash Company? A. There is no Pub Squash company in South Australia.

Q. You have done it with the defendant's company under the name Passiona Marketers, whatever their previous name was?

A. No, I cannot say that. We have done it with a company called Passiona Bottling Company Pty. Limited. As to who owns the shares in that company and when they were transferred, I have no idea.

30

Q. You have been doing it in New South Wales with the Pub Squash Company Pty. Limited? A. Since about May 1976.

Q. You have been buying back from them your bottles and pallets? A. I assume so. I have not physically seen the transaction take place.

Q. They have been buying back from you their pallets and bottles? A. Again that is an assumption.

Q. But that is the probability? A. That is the probability.

Q. Indeed in South Australia you know, don't you, that your representative is the State President of this Soft Drink

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Manufacturers Association? A. I am not sure that he still is. I know that he was.

Q. Did not you know that he welcomed the Pub Squash representative to the meeting in 1976? A. I did not know until I saw that minute five minutes ago.

Q. You knew, didn't you, that in November or December 1976 the Pub Squash Company opened outlets in Queensland? A. In what time?

Q. November, December 1976. A. I would have thought later but I am not in a position to argue. 10

Q. When did you think Mr. Lowe? A. I thought it occurred in February, March 1977.

Q. The fact of this inter-trading with the Pub Squash Company on pallets and bottles is a matter within your knowledge, is it not? A. Not specifically.

Q. You knew it was going on, although you did not know the details of it? A. It is normal usage within the industry. As to the specific details of who is doing what with whom, it does not come across my desk. 20

Q. You accept that was going on? A. As I say, it is normal usage, yes.

Q. You knew that their trade was expanding from 7th May, 1975, onwards? A. Yes.

Q. Throughout Australia? A. Yes.

Q. You had formed this view on 7th May, 1975, that their name was confusingly similar to your advertising slogan? A. That is correct.

Q. Your company wrote no letters to them about it? A. No.

Q. And took no proceedings for any relief until it filed a reply, a counterclaim in the South Australian proceedings and brought these proceedings in Sydney on 21st June, 1977? A. That is right. 30

Q. In these matters you have been the man in charge on the part of Cadbury-Schweppes in its operation? A. With the proviso that I do not have authority to implement major legal proceedings by myself.

Q. You are a member of the company board yourself, as a director? A. I am.

Q. You have been the chief executive in charge of this operation, the Solo operation? A. Yes.

RE-EXAMINATION:

(Mr. Priestley sought leave to join three other parties as plaintiffs. The three parties are Tarax Drinks Pty. Limited, Tarax Pty. Limited and Tarax Drinks Holdings Limited. Should the application be granted he would be seeking leave to amend the statement of claim to put some allegations in but not to alter the substance in any way whatsoever. Mr. Priestley moved under Pt. 8 r.8 and the basis of the application is that although he would be content to proceed on the basis of the plaintiff as presently constituted, in view of some of the material that has been sought by the defendant and particularly in view of the considerations mentioned in r. 8(1)(b), it would be better to have all the parties who may possibly be concerned in any part of the relief or concerned in any part of the case comprising the cause of action on the record. Mr. Bannon submitted that if his Honour did join the three parties it should be on the terms that the plaintiff pay the costs of so much time as has been spent on the issue. His Honour gave Mr. Bannon leave to renew his application at some later stage.)

(Short adjournment.)

HIS HONOUR: I grant leave to the plaintiff to join as parties plaintiff Tarax Drinks Pty. Limited, Tarax Pty. Limited and Tarax Drinks Holdings Limited.

I further grant leave to the plaintiff to amend its statement of claim in such manner as it may be advised in consequence of the joinder of the additional parties plaintiff.

I grant leave to the defendant to amend its statement of defence in consequence of the amendment in its statement of claim.

I order that the plaintiff pay the costs, if any, incurred by the defendant in amending its statement of defence in consequence of the amendment of the statement of claim.

I reserve the question of whether or not the plaintiff ought to pay the defendant's costs of the issue to the other proper plaintiffs.

I stand over until Friday, 2nd September at 10 a.m. the question of the defendant's application to amend its statement of defence.

I stand the matter over to Friday next at 10 a.m.

IN THE SUPREME COURT

OF NEW SOUTH WALES

EQUITY DIVISION

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No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

THE PUB SQUASH CO. PTY. LIMITED

FIFTH DAY: FRIDAY, 2ND SEPTEMBER, 1977

HIS HONOUR: I grant leave to the defendant further to amend its amended defence by adding pars. 14, 15 and 16 as appearing in the form of amended defence initialled by me and placed with the papers.

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I grant leave to the plaintiff to file a reply or amended reply in consequence of the amendments.

I order that the defendant pay the costs of and occasioned by the amendment.

(Further hearing adjourned to a date to be fixed.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977.

CORAM: POWELL, J.

CADBURY-SCHWEPPEES PTY. LIMITED

v.

PUB SQUASH COMPANY PTY. LIMITED.

SIXTH DAY: TUESDAY, 31ST JANUARY, 1978.

(Mr. Priestley sought leave to amend the amended statement of claim)

10

HIS HONOUR: I grant leave to the plaintiff further to amend the amended statement of claim by adding in par. 6 after the word, "cans and bottles" the words, "and the advertising" and after the words, "Solo lemon drink" the words, "and the slogans used in promoting it". I further grant leave to the plaintiff further to amend the amended statement of claim by adding in par. 8 thereof after the words, "and offered for sale" the words, "and the advertising and slogans used in promoting it". Costs of and occasioned by or otherwise thrown away by reason of the amendment to be paid by the plaintiff in any event. The plaintiff to have leave to amend its amended statement of defence. I reserve leave to the defendant liberty to apply for any consequential directions as to the particulars if so advised.

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(Mr. Bannon called Tooth & Co. on subpoena. Mr. Goodyear appeared in response to the subpoena and produced the documents. Examination of documents restricted to counsel and their instructing solicitors subject to any special application)

30

CECIL JAMES LOWE
Recalled; Resworn.

CROSS-EXAMINATION continued.

HIS HONOUR: Q. Your name is Cecil James Lowe? A. Yes.

Q. Do you still live at 14 Fairway Avenue, Mount Waverley?
A. Yes.

Q. You are a director of the company, Cadbury-Schweppes?
A. No.

Q. You have ceased to be? A. Ceased to be.

Q. What are you now? A. Director of Corio Meat Packing (Australia) Limited and General manager of their Mayfair Hams and Bacon company.

MR. BANNON: Q. When you were with Cadbury-Schweppes, occupying your position as managing director, I think it was?
A. No.

Q. Manager of what? A. My last position there was director, North East region. 10

Q. While you were there, I take it that you would have received reports each month from the different branches in which the Solo lemon drink was being sold? A. In general terms, yes.

Q. That is the custom in the soft drink trade, is it not, to have monthly reports of sales coming in? A. That's right.

Q. I take it, of competitive activity? A. Correct.

Q. And estimates of the performance of your competitors?
A. Not on a regular basis as that would indicate, nor of an ad hoc basis, and the policy of the report depending upon the quality of the author. 20

Q. The report would tell you of your own performance in each State? A. In general principle, yes.

Q. And of any new products coming on the market? A. In general principle.

Q. Back in 1973 and 1974 and 1975 and 1976 you were getting these reports from South Australia? A. Yes, but I might qualify that. Reports as such are, by nature, in many instances verbal reports of an ad hoc nature, not every item which is occurring being reported faithfully and frequently. 30

Q. But in those years you were getting monthly reports from the South Australian branch? A. In general principle I would have been aware of what the major developments in the South Australian market were.

Q. So you were informed when Pub Squash started to be sold in South Australia by your South Australian branch? A. I don't specifically recall when that information came to me.

Q. But you presume that that would have been included in these monthly reports, along with knowledge of any other new competition? A. At some stage it would have become known to me. 40

Q. You did receive regular reports from South Australia over those years? A. As I say, on an ad hoc basis.

Q. Generally, from month to month, I suggest? A. Not in a formal written monthly version, no.

Q. But you did receive a report each month, whether it was formally written or otherwise, would that be right? A. We would have had certainly an intelligence system that operated regularly, yes on a monthly basis.

Q. From South Australia? A. From all over Australia. 10

Q. And telling you of new products on the market in South Australia? A. In general principle, yes.

Q. In 1976 you know that there was a South Australian Soft drink manufacturers Association Incorporated? A. I know of the body.

Q. You know, don't you, that a Mr. M.S. Davis from your company from Cadbury-Schweppes and he was the South Australian representative, wasn't he? A. That's correct.

Q. Indeed, he was the President of that Association, wasn't he? A. He was at that time. 20

Q. No doubt he told you that in September, 1976, the Pub Squash Company's application for membership of that association was accepted? A. I would not expect him to tell me that. That is a very minor matter which would be of local interest only and in which, from where I sat, I was not interested.

Q. If Mr. Davis was your South Australian representative, which is a probable thing, is it not, that he would have told you of the Pub Squash company's activity in selling Pub Squash lemon drinks in South Australia at that time? A. No, not really. The information I had was that Pub Squash marketers had acquired some of the assets of the then Passiona bottling company which had been placed into receivership and that the company was going through a period of reconstruction. At some later stage, as I recall, Pub Squash products commenced to infiltrate into South Australia, but by the time that had happened my recollection is that my job responsibility had become increasingly directed towards the New South Wales and Queensland markets. 30

Q. (Approached) Would you agree that these documents I show you are a monthly statement, invoices and photographic copies of invoices on your company, the South Australian branch, to the Pub Squash company? A. Yes. 40

Q. In 1976 and 1977? A. That one says March 77, that one says March 77, that one says March 77, that one says July 77, that one says July 77, that one says July 77, that one says July 77.

(Bundle of statements and invoices tendered; objected to as irrelevant; m.f.i. "9B")

A. (Approached) Looking at these documents, there is a reference in the second one to 232 dozen 900ml bottles and 232 crates I.C.S.A. pallet and 5 Chep pallets. You know, don't you, that in the soft drink trade it is customary to exchange between different soft drink companies those articles which are branded with the name of the other company which has been collected by the rival company? A. Correct. 10

Q. And you would have no doubt, would you, that these invoices and statements showed that at the relevant dates on them the Pub Squash company and Cadbury-Schweppes were both selling their soft drinks in South Australia and were exchanging these objects between themselves? A. Not as a matter of deliberate exchange. The practice that happens is that empty bottles belonging to one company or crates belonging to one company come back inadvertently to the other company and then there is a clearing house process which occurs. 20

Q. And they are credited by these invoices, is that right? A. That is the invoice from Cadbury-Schweppes to Pub Squash company, 232 dozen empty 900ml bottles which have been sorted out of the Cadbury-Schweppes return and then returned to the Pub Squash company. The bottles, in fact, are almost certainly Cottees bottles.

Q. The first statement I show you is addressed to Pub Squash, is it not? A. Yes. 30

Q. The second invoice is addressed to Pub Squash, is it not? A. Yes.

Q. The third one is Pub Squash? A. Yes.

Q. The fourth one is to Pub Squash Co. Pty. Limited? A. Yes.

Q. Fifth one is Pub Squash Co. Pty. Limited? A. Yes.

Q. The 6th one is Pub Squash Co. Pty. Limited? A. Yes.

Q. The seventh one Pub Squash and the last one to Pub Squash? A. Yes.

Q. None of those invoices are addressed to Cottees, are they? A. The word "Cottees" appears on one. 40

Q. Or Passiona Bottlers? A. Yes.

HIS HONOUR: After the reference to bottles on one you will find the word "Cottees".

MR. BANNON: Q. In the third document the bottles are indicated as being Cottees? A. That's right.

Q. You know, don't you, that the Pub Squash company were formed trading under the name of Cottees? A. Where?

Q. Do you know that? A. No, I don't know that.

Q. But you do know, at all events, that in South Australia they were trading as the Pub Squash Company and were engaged in this process of exchanging bottles and pallets with your company? A. I don't know as to what date. 10

Q. As to the date of those invoices, that would be apparent to you? A. As at the date of those invoices our Adelaide branch is clearly trading with an organisation called the Pub Squash Company.

Q. Which is a rival soft drink company to Cadbury-Schweppes? A. Sure.

Q. And trading in the exchange of bottles, pallets and crates? A. That's right. 20

(m.f.i. "9B" re-tendered; objection maintained)

HIS HONOUR: Mr. Bannon has tendered the bundle of statements and invoices apparently sent by the South Australian branch of the plaintiff, Cadbury-Schweppes Pty. Limited, to the defendant, either under a firm name or its company name, during the course of March 1977 and through to later dates in 1977.

Mr. Bannon pressed the tender on the basis that he has on file a defence of laches acquiescence and delay. There is some evidence which suggests that the statements and invoices record a course of commercial dealing between the two companies whereby empty bottles of the one were exchanged with the other. 30

Mr. Bannon has also sought to suggest that the invoices and statements reflect that the bottles in question were bottles labelled "Pub Squash". It seems to me that the invoices and statements do record a state of knowledge, but at the moment I am not persuaded that they record that the bottles in question are bottles to be treated as Pub Squash bottles, since one at least bears the reference to the name "Cottees". It seems to have been one of the brands which Passiona Bottles, 40

which has been mentioned in the evidence formerly, dealt with. I will admit the documents as Exhibit 14.

(m.f.i. "9B" admitted and marked Exhibit 14)

MR. BANNON: Q. You told us earlier that apart from these slogans which referred to your former company's product as a "Squash like the pubs used to make" there were other slogans used in the television tapes and advertising" A. Correct.

Q. Can you just tell me what those other slogans were, again? I am not sure if you did before. A. "Solo, a man's drink", "Solo says it all". This was the evolution - that was the evolution campaign and then "Don't give me any imitations of Solo".

10

Q. I think there was another one, "Solo separates the men from the boys"? A. That was used once only in Sydney.

Q. After the use of the slogans referring to "Squash like the pubs used to make" ceased what slogans were adopted then? A. That was where it was transposed into, "Solo, a man's drink, Solo says it all" as one saying and then that was further adapted in December, 1976, to the, "Don't give me any imitations of Solo" campaign.

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Q. Of course, these other slogans had been used from the inception of the television advertising, had they not? A. The slogan, "Solo, a man's drink" had been used in conjunction with the proposition "Lemon squash like the pubs used to make" from the start of the campaign. "Solo says it all" was used only from approximately September, 1976, and, as I said earlier the "imitation" campaign was used in December - commenced in December 1976.

Q. Apart from the 18 tapes, television tapes which were put in evidence, were there other television tapes as well used in advertising Solo? A. I understood that the reel that was presented contained all of the commercials to which we retained access. I am not aware that there was other television tapes which were not shown on that reel, but I don't recall the full content of the reel.

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Q. I should amend what I said. I said television, but I think the reel contained television and radio strips? A. Correct.

Q. Is this the position; there may have been others but you don't recall? A. I cannot swear because I cannot remember.

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Q. I am only asking to the best of your recollection? A. To

the best of my recollection the tapes submitted cover the total campaign.

Q. I think you told us earlier you have adopted this "budweaser" bottle design, had you not? A. No. (Objected to)

Q. You said, did you not, that it had been taken into account in designing the can? A. I think my words were that it was one of a number of international beer designs which were used to provide a feel for the type of pack that we required.

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Q. You also, I think, said that it was decided in May or June of 1974 to launch Solo on a national basis after the previous launching in Victoria in October/November, 1973. Do you remember you said that? A. That's right.

Q. You also said there was several months consideration before you reached that decision; do you remember that?. I will just give you the exact reference. You were asked about this decision to launch nationally at p. 27, about six questions from the bottom of the page. You were asked, "That was towards the end of 1973, was it? A. No, that was early in 1974 and the decision to market it nationally was taken some time - actually, the decision was taken either May or June, 1974, after several months of consideration. It was subjected to several months of consideration before that decision was taken." Do you remember you said that? A. Yes.

20

Q. I suppose when you decided to adopt the name "Solo" for this lemon drink that was being put out by Cadbury-Schweppes and to launch the product in Victoria you likewise put in a period of consideration before the product was marketed?

A. Not really. There had been a number of years of development processes taking place on a number of brands. The decision to market Solo as a lemon squash like the pubs used to make was a crystallisation of a lot of activity which suddenly revealed itself as an opportunity. It wasn't at the time that all of the back work had been done in other fields which resulted in this opportunity emerging, it was a fairly quick decision.

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Q. To launch a product you first of all had to order cans or containers for it, did you not? A. That's right.

Q. I take it that took a certain amount of time, did it?

A. In terms of the design or preparation of plates and so forth?

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*See now page 53.

Q. How long did that take? A. The mechanics of that would probably take -

Q. Can you remember? A. Can I remember in that instance? No, I can't remember specifically, no.

Q. Have you got any idea how long it took? A. Roughly six to eight weeks.

Q. What about arranging for the design of the can and the taking into account of the bud-weaser cans and all those things, how long did that take? A. That took three to four weeks. 10

Q. That is in addition to the six to eight weeks, is it? A. That would be about it.

Q. Then, I take it, you had to get the cans printed? A. No, the process of manufacture includes automatic printing at the same time.

Q. How long did the manufacturing process take? A. From the moment that the plates were made they just put the plates in the machine, press the button -

Q. How long did it take with this product, can you remember? A. Not long. 20

Q. What do you call "not long"? A. I would say no more than two to three weeks in that particular case.

Q. What was the initial quantity of cans that you ordered to be printed? A. I have no idea. I would not have placed the order myself.

Q. Do you know what was the size of the launch in Victoria in 1973, how many cans were put out on the market instantly? A. What is instantly?

Q. How many cans did you have available in stock to launch the product in 1973? A. In the case of the two piece can, with which we were manufacturing, there is no necessity to have it in stock, it is merely a matter of deciding our then production requirements on a day by day basis with the can makers production requirements and one day's production of their supplies one day's production of ours. 30

Q. When you launch a product you have to supply all your retail outlets with an initial assignment of the product, don't you? A. Right.

Q. What was the signs of the assignment that you arranged when you first launched Solo lemon drink? A. I don't recall the specific numbers. 40

Q. Have you got any idea at all? A. The opening sell-in would probably be worth 25,000 cartons at 2 doz. cans.

Q. How long did it take you to get 25,000 doz cans printed and filled? A. 25,000 cartons of 2 dozen.

Q. 25,000 cartons, each carton contains 2 dozen, is that right? A. That's right - probably three to four days.

Q. That is from the time you ordered the cans from the manufacturer, had them printed, had the lemon drink made up and filled in the can, put into boxes and sent out to your agents, is that what you are saying? A. No, from the time the cans came into the factory if one set about manufacturing 25 cartons of cans then it would take three to four days. 10

Q. But can you recall how long it took you from the time you thought of the idea of selling Solo lemon drink to the time you had 25,000 cans printed, filled with lemon drink, put into boxes and sent out to your retail outlet? A. Probably three to four months in total.

Q. Then, of course, it was not till after that that the advertising began in Victoria? A. That's correct. 20

Q. Solo, of course, was an old name used by the Tarax organisation? A. Yes.

Q. And had been used on Orange drink? A. The product on which it was used was a pineapple, lemon, orange cocktail type of thing.

Q. Had it been used on any other drinks that you can recall? A. No, not to my knowledge.

Q. Has it since been used on other drinks apart from the lemon drink, Solo? A. No.

Q. When the Solo lemon drink came on the market, was this pineapple orange cocktail drink continued or discontinued? A. No, the pineapple orange cocktail drink had not been used for seven to eight years. 30

Q. There was no reference in any newspaper advertisements to Solo as being a drink like the Pubs used to make, was there? A. I can't recall offhand that there were any newspaper advertisements for Solo.

Q. After the drink was put on the market it was advertised in the newspapers, wasn't it? A. I don't recall that, but I cannot swear it. 40

Q. Wasn't it advertised in magazines? A. It was advertised in magazines in conjunction with Smirnoff, but that was not advertising Solo by itself.

Q. You cannot recall any newspaper or magazine which referred to it as a drink like the pubs used to make or squash like the pubs used to make? A. Other than the copy that would have been in the Solo and Smirnoff ads I can't recall any.

Q. That didn't say anything about it being a squash like the pubs used to make, did it? A. It had a number of captions of different types of Smirnoff activity. 10

Q. I suggest it didn't refer to Solo as being a squash like the pubs used to make? A. I would have to check the ads.

Q. You don't know? A. I don't know.

Q. It was also advertised on billboards as well, was it not? A. Yes.

Q. Those billboards never referred to it as being a squash like the pubs used to make, did they? A. No, I don't think so.

Q. While the slogans of advertising on television of Solo have changed, from time to time, the one constant thing that has been advertised and constantly emphasised by Cadbury-Schweppes has been the name Solo, isn't that right? A. Yes. 20

Q. It has never been this phrase, "Squash like the pubs used to make" - has never appeared on the cans of Solo, has it? A. No.

Q. Nor on the cartons in which it has been packed? A. No.

Q. Nor in any printed material that you have sent to retail outlets? A. No, I would disagree with that statement. It was used in the initial trade presenter, as I recall. 30

Q. What is the trade presenter? A. The piece of promotional material with which a sales representative uses to sell into the trade when he is selling a new product.

Q. That is the only printed matter that you can recall, is it? A. Just rephrase the question.

Q. That this phrase "Squash like the pubs used to make" didn't appear on the cans and did not appear on any printed matter in which you advertised the product in the shops? A. Other than the trade presenter that I mentioned, I think that is correct, yes. 40

Q. That was only shown to the retailers? A. Yes.

*Q. I did ask you before at p. 101 of the transcript about the supermarket print-outs? At p. 101 of the transcript you were shown print-outs which appeared to be Woolworths data print-outs. Do you remember that? A. Yes.

Q. (Approached) Do these print-outs appear to you to be a set of print-outs from Franklins. Are you able to identify them? A. No, I can see nothing to indicate that is from Franklins.

10

Q. Do you recognise this set of print-outs as the ones that you were shown on the previous occasion at p. 101 of the transcript? A. It seems the same.

(Computer print-out originally shown to Mr. Lowe on p. 101 of transcript and most recently shown to Mr. Lowe m.f.i..10)

(Computer print-outs shown to Mr. Lowe a little earlier during the course of the morning but not identified by him m.f.i..11)

Q. Would you agree that in 1973, 74 and 75 Woolworths and Franklins were the two major supermarkets handling Cadbury-Schweppes softdrinks? A. No, I would not be in a position to comment on that in those years. To elaborate on that, I cannot say that they were a more significant customer than Campbells, or Coles, or Jewels. They would be two major customers, yes, but whether they were the two most significant is not for me to be able to prove without reference.

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Q. At least, I suggest, you could go this far, that in New South Wales at all events they would have been the major distributors in those years, wouldn't that be correct? A. No, I cannot swear to that.

30

Q. You were the manager of the north-eastern area. Haven't you got any idea? A. At that stage, of course, I was marketing director. I was not responsible for actual sales management and sales information at the detailed level.

Q. But you were getting these monthly reports from New South Wales as to your product, where it was being sold, weren't you? A. Not down to major client level for every city, no.

Q. Weren't you kept informed by your New South Wales representative as to your major retail outlets? A. Yes, but as to the total relevance of them in 73, 74, 75, it is not within my memory to agree to your statement.

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*See now page 138.

Q. You can, at least, agree with this, can't you, that in 1973, 74 and 75 Woolworths and Franklins were major retail outlets for your products? A. I would agree with that.

Q. In New South Wales and in Victoria? A. Yes. - sorry, not Franklins in Victoria, they are not represented.

Q. At least Woolworths in both States and Franklins in New South Wales? A. That's right.

Q. Just about the colour of these cans; you know the Golden Circle product lemon drink, don't you? A. I know of it, yes. 10

Q. Canned product? A. I cannot visualise the exact can.

Q. But you know, don't you, that they were marketing Golden Circle lemon drink in New South Wales and Queensland in yellow cans in 1971 and 1972? A. No, I don't know that. I have not seen one of any such cans.

Q. But you were aware of Golden Circle drinks, weren't you?
A. Yes.

Q. You knew they were canned product? A. Yes.

Q. You were kept informed, were you not, as to the state of your competition in New South Wales? A. In general principle. 20

Q. You knew that they were using yellow cans before you were using them, didn't you? A. No, I do not know that they were using them and until I saw a can I could not concede that they were using them.

Q. Have you ever seen a can of Golden Circle lemon drink?
A. I have seen cans of Golden Circle soft drinks. As to being specifically Golden Circle lemon, recently, certainly not recently.

Q. Can you recall whether you have ever seen Golden Circle?
A. Not specifically. 30

Q. So you don't know whether they were using yellow cans or not, is that the position? A. I could not answer that. No idea.

Q. I show you this can. Do you recognise it if I show it to you, Golden Circle lemon drink? A. Oh, yes, - yes, I have seen that can before.

Q. You have known of that for many years, have you not?
A. Some time, I don't know how many years.

Q. Going back, I suggest, to at least 1972? There are figures on this. A. I could not really say that about 1972, no.

Q. Probably then, though, isn't it? A. No, not necessarily. Golden Circle was a very tight regional brand concentrated only in Brisbane, as far as I can remember, back in 1971/72.

Q. It operated in New South Wales too, I suggest? A. In a very small share of the market. My recollection was it never got more than 1% of the total soft drink market. 10

Q. You know that they were selling the drink, I have shown you, in that can? A. No, I can't say that. I know they were selling some soft drinks in the New South Wales market. As to whether or not they had listing for lemon drink I don't know.

(Can most recently shown by Mr. Bannon to Mr. Lowe m.f.i..12)

HIS HONOUR: Q. That can appears to have had what they call the ring pull top. The present two piece can is the one called the pop top? A. No, the two piece can can have a pop top or the ring pull. That is a three piece can where the top, bottom and the sides are welded at the same time. 20

Q. When did the two piece can become (I think it is fair to say) almost universal in the soft drink market? A. It was introduced in early 1969 and I would say it had achieved a very high degree of acceptance about four to five years ago with most manufacturers now using two piece cans.

MR. BANNON: Q. Would you call a two piece can - A. If you can pass me one of those cans behind the shorthand writer. -

HIS HONOUR: Q. The two piece can is the one with the curved bottom? A. It has no seam around the bottom. 30

MR. BANNON: Q. The ring pull can, you say, is the one that came in about 1969? A. No, that two piece aluminium can there was introduced into Australia in the late 1968, early 1969. (Referred to Exhibit A.)

Q. The ring pull can, when did that come into operation? A. You strain my memory at times. Probably 1964, 65.

Q. Then the can with the two little tabs you push in on the top? The pop top.

Q. That is a later innovation? A. That's right.

Q. When did that come in? A. I would say early 1976. 40

Q. Did that come in as a result of pressure from some State Governments about litter because of the ring pulls being left around places? A. I think that was a factor and the other factor being the desire of the can making and can filling industry to avoid the environmental pressures that they were facing up to.

RE-EXAMINATION:

MR. PRIESTLEY: Q. Your attention was directed today to an answer that you gave on the previous occasion concerning when the decision to market Solo nationally was taken. You were reminded that that was early in 1974 and the actual decision in either May or June of 1974. What did you mean in using the word "nationally" in relation to the decision? A. Solo had at that stage been advertised and sold in Victoria and had had some minimal advertisement in Brisbane to support the sale of the product and was being sold in Sydney in place of the former Tarax lemon drink but without advertising. 10

Q. When you say "at that stage", what time are you referring to? A. We are talking of the time when the first stage of the Solo launch took place, which was in November/December 1973. The proposals to extend it into full distribution into all markets meant selling the product in Sydney and other markets through the existing Schweppes organisation which was running as a sister operation with the Tarax operation, but the Schweppes company had a much wider level of distribution outside of Victoria than Tarax had so that the proposal for a national launch in terms of internal procedures meant the utilisation of the Schweppes force in New South Wales, South Australia, Western Australia and Tasmania to greatly enlarge the distribution of the Solo sales and, once having achieved that wide distribution level, advertising to start in those markets. 20 30

Q. What about Queensland? A. Queensland had - the product had been sold to some degree with minimal advertising from November or December 1973 and at that time there were two separate trading operations, one Tarax and one Schweppes, both operating out of separate factories, both of course, owned by the same corporate body. But Tarax operation had been singularly unprofitable and the sales forces were merged into one organisation in early 1975 and a re-launch took place, but it was a re-launch in terms of generating internal activity. The product was already out in the market place and advertising had already taken place. 40

Q. Just to be clear on that, in the decision taken in the first half of 1974 to sell the product nationally, was Queensland then included? A. Queensland was included, yes.

Q. Only one other matter, on a completely different aspect of the case. You were asked some questions about alterations of the carbonisation of product. Those questions appear at the *foot of p. 47 of the transcript and you were asked whether the company has subsequently altered the carbonisation of product and increased it and you said "not recently". You were then asked "But it has done so since the inception of Solo, hasn't it?" and you answered, "Only in respect of the large bottles" and then you repeated that answer. What is the explanation for the alteration of the carbonisation in respect of large bottles of Solo? A. The problem arises from the fact that with large bottles which have re-sealable screw tops, as one glass is taken out and then the bottle is re-sealed for later consumption, then another glass is taken out and again the re-sealing process takes place, with the carbonisation level of the drink remaining in the bottle each time, sometimes in lowly carbonated drinks, falls too far down the scale. The intention with the large bottles was to adjust the carbonisation level of the large bottles slightly upwards so that the product which remained in the bottle as it was consumed would remain more acceptable to the consumer and more like the product and retain similarity with the product they would get with a normal size can.

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Q. Was the view taken that cans were consumed more quickly than large bottles? A. Yes, cans generally being consumed in one short burst.

HIS HONOUR: Q. When you referred to the large bottles, is that the 900ml bottle or is there a bigger one? A. There are up to 2 litre now.

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Q. Is your reference to the 2 litre one? A. No, my reference there would generally be in the 900mls to 120 ml size.

(Luncheon adjournment)

UPON RESUMPTION

(Witness retired & excused)

(Mr. Bannon called Bush Boake Allen Australia Pty. Limited on subpoena. Mr. Gough appeared and produced the documents. Access granted to both parties.)

*See now page 80.

STEPHEN HEALY
Sworn and examined:

MR. HORTON: Q. Is your name Stephen Healy and do you reside at 9 Sarnia Crescent, Killara? A. Yes.

Q. You are an undergraduate at Sydney University doing Economics/Law, and you are in second year? A. That is right.

Q. Are you familiar with soft drinks called Solo and Pub Squash? A. Yes.

Q. Have you bought one or other or both of them? A. Yes.

Q. Both or just one? A. At one time or another, yes. 10

Q. When did you first become familiar with either of them?
A. I couldn't give you an exact date, but it was about two years ago.

Q. Which one did you strike first, do you remember? A. No, I couldn't tell you.

Q. Did you form any view as to the manufacturer of either product? A. As they appeared on the market about the same time I assumed that they were manufactured by the same company.

Q. Have you seen any advertisement, whether on television or hearing them on the radio, for either of the products? A. Yes. 20

Q. Do you recollect any catchwords, slogans or materials from those advertisements? A. I remember two in particular. I believe the one associated with Solo was connected with being a man's drink, and the second one, I think said "Do you remember how lemon squash used to taste in the pub?"

Q. Which one was that associated with? A. I'm not sure. I assume it was connected with Pub Squash.

Q. Do you remember anything about the pictorial aspect of the advertisement - in general, I mean? A. I think the one connected with Solo was associated with surfing or canoeing or something like that. 30

Q. What about the other one, do you remember? A. No, I don't remember anything about their ads.

Q. Have you ever found any difficulty in distinguishing between the two cans when you go into a shop to buy a can of one or other of these drinks? A. I did know the two cans appeared similar, but I have never been terribly concerned with which can I took from the shelf, and therefore I wasn't very particular at all.

S. Healy, x

Q. By that you mean you are content with whichever one happens to be found in your hand when you go to pay for it?

A. That is right.

CROSS-EXAMINATION:

MR. BANNON: Q. Forgive me asking you, but how old would you be now? A. 18.

Q. When you say you are doing Economics/Law 2, is that this year? A. Yes, second year, this year.

Q. That is at Sydney University? A. That is right.

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Q. When you say you have seen advertisements, can you tell me where you have seen these advertisements? A. On the television.

Q. You appreciate, of course, that Solo and Pub Squash are quite distinct? A. Yes.

Q. There are other brands of lemon drinks on the market as well as those two, are there not? A. I believe so.

Q. Shelleys? A. Yes.

Q. If you go into a shop, do you ask for a particular brand? A. Most of the shops now, it is more or less self-service and you just pick it yourself.

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Q. But you have gone into shops and asked for them, I suppose, on occasions? A. Not really. Most of the drinks are just in the refrigerated part of the shop and you just take what you want and take it to the counter.

Q. Apart from Shelleys and Solo and Pub Squash, there is a Leed lemon drink too, is there not? Do you know Leed? A. I don't know really.

Q. The various brands of lemon drink, are they contained in yellow-coloured cans? A. Usually, yes.

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Q. Shelleys, for example, and the Pub Squash and Solo? A. Yes, that is correct.

Q. And with orange drinks, usually you find they are contained in orange-coloured cans, are they not? A. Yes, that is right.

Q. If you want to select a particular brand you would not select it just on the colour of the can, would you, you would look at the label? A. I would not normally be concerned with the

S. Healy, xx

label. If I was looking for a lemon drink I would take the first one that came to hand.

Q. You do not care which brand they are? A. Not really.

Q. You are not really influenced by their can? A. No.

Q. You just want a lemon drink? A. That is correct.

Q. You think every lemonade is the same, whoever makes it?

A. Yes.

Q. The same goes for lemon drinks? A. Yes.

Q. You do not really believe any of the propaganda about whether one is superior to the other or not? A. Not really.

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Q. You are not influenced by their statements as to whether one, for example, is a man's drink, are you? A. No, not really.

Q. Or that one is how lemon squash used to taste in a pub - it has no influence on you at all? A. No.

(Witness retired and excused.)

(Further hearing adjourned to 10 a.m. on Wednesday,
1st February, 1978.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 1682 of 1977

CORAM: POWELL, J.

CADBURY-SCHWEPPE'S PTY. LIMITED

v.

THE PUB SQUASH COMPANY PTY. LIMITED

EIGHTH DAY: THURSDAY, 2ND FEBRUARY, 1978.

(Mr. Priestley stated that in view of the non-attendance of his witness yesterday such witness had been subpoenaed to attend this morning but the subpoena was served too late and the witness could not attend until 12.30 p.m. Mr. Bannon objected to any plaintiff's witnesses being interposed in his case, and by consent the further hearing was stood down until 2 p.m.) 10

AT 2 P.M.

(Mr. Priestley stated that he had had an opportunity of interviewing the witness whom he had proposed to call and that it was no longer his intention to do so because of the lack of weight of the evidence and its probable inadmissibility. 20

On the application of Mr. Bannon the costs of the morning were reserved)

CASE FOR THE DEFENDANT

(Mr. Bannon opened to his Honour)

(Certificate of incorporation of Langeath Pty. Limited tendered and admitted as Exhibit 17a)

(Certificate of incorporation on change of name from Langeath Pty. Limited to Passiona Marketers Pty. Limited tendered and admitted as Exhibit 17b) 30

(Xerox copy of certificate of incorporation on change of name from Passiona Marketers Pty. Limited to The Pub Squash Co. Pty. Limited, tendered and admitted as Exhibit 17c)

(Interrogatories 1, 2, 3, 6, 7, 8, 45, 46, 47 tendered: 1, 2, 3, 6, 7, 47, 8 objected to)

HIS HONOUR: Mr. Bannon has tendered the interrogatory delivered by the defendant to the plaintiff, Cadbury-Schweppes Pty. Limited in relation to questions 1, 2, 3, 6, 7, 8, 45, 46 and 47. Mr. Priestley has objected to the tender of the first six questions and 47 and the answers on the ground that the only relevance they could conceivably have in the present proceeding is if it be open to the defendant to rely on some one or more of the various equitable defences that have been raised in the Statement of Claim. Mr. Priestley asserts that in the present case the claim that is made is not a claim for equitable relief in the traditional sense, but merely a convenient form for relief based on a common law tort. It seems to me that if I were to rule on this matter at this stage and to reject those questions and answers I would effectively be preempting the final argument as to whether or not such defences are available in the present case. Since it seems to me that if I admit those questions and answers subject to their relevance being argued at the end of the case the plaintiffs in all probability will not be embarrassed in the conduct of any reply that they might wish to bring, I will take that course and admit those questions and answers on that basis.

(Abovementioned interrogatories and answers marked Exhibit 18.)

PETER ROBERT BROOKS
Sworn and examined:

MR. BANNON: Q. Is your name Peter Robert Brooks? A. Yes.

Q. You live at No. 1 Sirius Avenue, Mosman and you are a company director and the managing director of the Pub Squash Company Pty. Limited? A. That's correct.

Q. That company was previously known as Passiona Marketers Pty. Limited? A. That's correct. 30

Q. And before that as Langeath Pty. Limited? A. Correct -

Q. Were you formerly employed in Australia by the Coca-Cola Export Corporation? A. Yes.

Q. While you were with that company was that company engaged in selling concentrate to Franchise Bottlers? A. Yes.

Q. Was one of your functions the function of devising marketing strategies and following new product developments and implementing, through Franchise Bottlers, the marketing policies, procedures and planning of the company? A. Yes, it was. 40

Q. In 1969 did you move from the Coca-Cola Corporation's main section to Coca-Cola Bottlers at Kingsgrove? A. Yes, I did.

Q. Is Coca Bottlers Kingsgrove, as I understand it, a branch of Coca-Cola Export Corporation? A. Yes, it is.

Q. What was your first assignment there, what position were you given? A. My first assignment was marketing services manager.

Q. Were you responsible for market evaluation and product performance? A. Yes.

Q. And statistical analysis? A. Yes.

Q. And market planning? A. Yes.

10

Q. And promotional development? A. Yes.

Q. In 1970 did you attend a marketing seminar in the United States? A. Yes.

Q. While in the United States were you at the Coca-Cola office and did you see a list of their marks? A. Yes, I did.

Q. Registered in the United States? A. That's correct.

Q. Amongst them did you see a trade mark listed for the word "Pub"? A. Yes, I did.

Q. I will show you a photographic copy which is part of a group of documents produced in answer to a subpoena addressed to you and the document to be shown you bears a No. 753758 at the top? A. That is a similar document, yes.

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Q. Does that appear to be a photographic copy of the trademark that you saw in the United States? A. Correct.

Q. When you saw this list did you also see the trademark or a copy of it? A. Actually, they have a whole volume of photostat copies of trademarks in the Coca-Cola office.

Q. Photostat copies of trademark certificates? A. Yes.

Q. Is this a photostat of one of those certificates that you saw? A. Yes, that's correct.

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(Document shown to Mr. Brooks tendered without objection and marked Exhibit 19a)

(Certificate from the Department of State of the United States of America tendered without objection and marked Exhibit 19b)

Q. When you returned to Australia were you back at Coca-Cola Bottlers at Kingsgrove as marketing manager? A. That's correct.

Q. Did you set about trying to reorganise the internal structure of the Marketing Department? A. Actually, it was the whole company.

Q. And also the Distribution Department? A. That's correct.

Q. Was that department at that time plagued by some industrial unrest? A. Yes, it was generally a problem in the soft drink industry. 10

Q. When you got back did you ask the manager of the Statistics Department to evaluate the size of the lemon segment of the soft drink market? A. Yes, I did.

Q. And to provide information regarding sales of post-mix and canned and bottled lemon drinks with a view to introducing lemon squash into the Sydney market for the company? A. Yes, I did.

Q. How long after your return from the United States was that? A. It would have been early in 1971. 20

Q. Did you also ask the Technical Manager of the Coca-Cola Bottlers to formulate a lemon squash in post-mix suitable for hotels? A. Yes.

Q. And also to develop a formula base suitable for bottling and canning? A. Yes.

Q. Was the formula developed and taste tested within the company? A. Yes, it was.

Q. The company at that time was also producing a lemonade product under the name Leed? A. That's correct.

Q. Which is, I think, still on the market? A. Yes, it is. 30

Q. Had there been difficulties about the launching of Leed on the market? A. Yes, there were difficulties with launching Leed.

Q. Did a senior management of the company turn down your suggestion of introducing a lemon squash on the Sydney market? A. We introduced it in the post-mix into the hotels, but we postponed any introduction of beverage in cans or bottles until we had secured the release of Leed.

Q. Was there some difficulty regarding lemon squash drinks on the machinery? A. Yes, there was.

Q. In 1972 did you form any view as to the forming of a soft drink company? A. Yes, I did.

Q. Just tell his Honour what it was that you thought about doing? A. I thought of acquiring a company that was in the Sydney market and had lost considerable market share over a period of years, mainly due to management problems and union difficulties and so forth, and I thought there was an opportunity to purchase that company or purchase the assets of that company and commence a soft drink company myself. 10

HIS HONOUR: Q. What union difficulties were there at that stage? A. The whole soft drink industry went through a period of difficulty with the Liquor Trades Union and there were considerable problems also in the breweries and the breweries have the same unions. Most of the drivers at the time were also under the Award of the Liquor Trades Union and I think the soft drink companies worked as often as the breweries worked and they were averaging about 70 working days a year on strike. I overcame the difficulties in Coke and we went for a period of 12 months without any union unrest, so I thought perhaps I could take over the Cottees operation and it was losing approximately \$1.5 million a year. 20

Q. It was the cartage aspect of the industry that was causing trouble, was it? A. It was the Liquor Trade Union, which also involved some plants' forklift drivers, in other plants it could have been the manufacturing process. It was quite a mixed union shop in the soft drink industry at the time.

MR. BANNON: Q. The Cottees operation was controlled by General Foods, was it not? A. That's correct. 30

Q. I don't know if you can tell us their full corporate name? A. The Cottees operation, Sydney, the soft drink division was Passiona Bottling Company, Sydney, and it was a wholly-owned subsidiary of the parent company in the U.S., General Foods Corporation.

Q. Was the general manager or managing director of General Foods Australasia, a Mr. Lazzley? A. That's correct.

Q. Did you have some discussion with him early in 1973 concerning the taking over of the Cottees operation conducted under the name Passiona Bottling Company? A. That is correct. 40

Q. Then in 1973 did you meet Mr. Lazslo Mojsza? A. That's correct.

Q. When was it that you met him, can you remember? A. Round about April, May.

Q. Of 1973? A. In 1973, yes.

Q. How did you come to meet him and where was he working?
A. I approached the then managing director of Pepsi Cola in Australia to ensure that if I was successful in acquiring the assets of Cottees operation I would be assured of having the Pepsi Cola franchise that they were at the time holding and when I went to the office to meet the managing director of Pepsi Cola -

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Q. Who was that? A. Mr. John Baxter - Mr. Lazslo Mojsza was the finance manager there at the time.

Q. At Pepsi Cola? A. Pepsi Cola Australia.

Q. So Mr. Baxter introduced you to Mr. Mojsza? A. That's correct.

Q. When you met Mr. Mojsza did you have some discussion with him concerning your proposals? A. Yes, I did.

Q. Can you just tell us, as closely as you can, what you said to him and what he said to you? A. Well, our general discussion centred around the winding-down of Pepsi in Australia to a much smaller operation and his interest in getting into a more active environment and I mentioned to him that I was starting off a soft drink company and at the time I was in need of a finance manager and generally after discussing his background and experience in the soft drink business I asked if he would be interested in joining me in the venture and he said he would be interested in joining me in the venture and from then on he assisted me in the total preparation for the take-over of the assets and the formation of the company.

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Q. Had Mr. Mojsza had anything to do with Passiona Bottling Company? A. Yes, Mr. Mojsza had worked for the Passiona Bottling Company prior to his joining Pepsi Cola Australia.

Q. Did Mr. Mojsza show you any document? A. Well, he did show me documents, yes.

Q. Can you recall any specific document that he showed you?
A. Yes, he showed me actual sales and sales forecasts of drinks sold by the Passiona Bottling Company.

Q. I will show you a particular document, which is part of the documents produced by you under subpoena. How did that document come into your possession? A. That came - well, it came into our possession through - from some of the documents that Mr. Mojsza had.

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Q. You obtained that from Mr. Mojsza? A. Yes.

Q. When you had this discussion with Mr. Mojsza in April or May 1973 was that document produced at that discussion?

A. That was one of many documents, yes.

Q. (Approached) Just to be clear as to what was produced on this document, what I call the front side of it, there is headed Plan 1974 Sales Volume and then in the left-hand column there are written the names of various products being Pepsi Cola, Passiona, Lemonade, Tango, Lemon, Coola, what is that one? A. Golden Circle Pineapple Juice.

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Q. Pepsi Cola, Tango, Pepsi Cola, Passiona, Lemonade - what's that one? A. Tango.

Q. Tango, Lemon, Coola, Bitter Lemon? A. Right.

Q. Then on the left-hand side against the words Pepsi Cola, Passiona, Lemonade and Tango over half-way down the page there are pencilled in - no, only three of them. I am sorry, against Passiona, Lemonade and Tango there is pencilled in C-time, 7-time and Pub Squash? A. That's correct.

Q. Who wrote those words there? A. Lazslo Mojsza.

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Q. When did he do that? A. In about May when we were discussing the plans for our proposed introductions.

Q. On the back also in pencil there are written under the heading Suggested Major Products for new company as P.R. Brooks the words 1, Pepsi Cola, 2, Big Boy, 3 Passiona, 4 Coola and then the word against them "Existing lines"? A. Existing lines, yes.

Q. Five, Pub Squash, 6 C-time with juice something - what is that? A. That is with juice content.

Q. 7-time? A. With lime.

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Q. What is the next word? A. With lime - I think that is "Hint of lime".

Q. 8 Strike Cola and against that balancing Pepsi, 9 - what is that word? A. Rate.

Q. 10, Citra and they are bracketed together as low calorie range? A. Yes.

Q. Then 11, mixer range and Ambassador Royal for at least something flavour? A. At least four flavours.

Q. Then the numbers 5 to 11 inclusive are bracketed together and against that are written "All new flavour disclosed for Cottees only C-time, 7-time". What do those words mean?

A. They were having a problem with Tango at the time. It was recalled from the market so it was not our intention to continue packaging Tango and we needed an orange drink as soon as we came onto the market.

Q. What were the words "disclosed for Cottees only C-time, 7-time"? A. Well, taking over Cottees we would sign an agreement related to the franchise to market their products and with any agreement we had the right to market our own products or those products - their other products didn't concern us at that time. They were going to go into our operation after the company was formed.

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Q. Do you mean by "disclosed for Cottees"? - A. In budgeting for Cottees we had to prove a 12-months sales budget for Cottees in order to take over they wanted to see how we could make the business more effective and run it more effectively than they could.

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Q. That means you were telling them that you then proposed C-time and 7-time but not about the other names in the contract? A. That's right.

Q. When was all that note written? A. About May of 1973.

Q. Was it written at the same time as the note on the other side where the three names are written in? A. That was added when we were doing the cash flow to take into account additional moneys.

Q. Would you just listen to my question. Was the note on the back of the document written at the same time as the note on the front or don't you know, or can't you remember? A. No, it was written at the same time.

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Q. Who wrote the note in pencil on the back and the note in pencil on the front? A. Lazzslo Mojsza.

Q. Was that done in your presence? A. Yes, it was.

Q. That was in April or May 1973? A. Yes, May.

(Document headed "Plan 1974" just identified and explained by Mr. Brooks tendered without objection and marked Exhibit 20.)

Q. These negotiations with General Foods continued for some time, did they? A. Yes, well over 12 months.

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Q. You ended up acquiring the Shelf Company, Langeath Pty. Limited? A. Correct.

Q. Terms of conditions were finally agreed with General Foods and during the three months prior to May 1974 were you approaching finality in your agreement? A. Yes, I was.

Q. Did you also approach, apart from Mr. Mojsza, other people to take up positions with your company? A. Yes, I did.

Q. Did the company begin operations on 13th May, 1974 under the changed name of Passiona Marketers Pty. Limited? A. Yes. 10

Q. When your company started did it have a franchise under the arrangement with General Foods and with - did you take over the franchise which they had with Pepsi Cola? A. Yes.

Q. And Pepsi Cola has since then been marketed in Australia by your company? A. That's correct.

Q. Did you also take over Cottees Passiona? A. Yes.

Q. Is that still marketed? A. Yes.

Q. Was there also a Cottees lemon drink? A. Yes.

Q. Did you continue to sell that for a while? A. Actually it was a Cottees lemon flavour. 20

Q. Did you continue to sell that for a while? A. Yes, we did.

Q. Did you employ in your company some technical people?
A. Yes.

Q. Is there a Mr. Newall? A. Correct.

Q. What was his position? A. Mr. Newall at the time was our chemist.

Q. Mr. Allman? A. Yes, technical manager.

Q. Did you give any instructions for the development of the lemon squash that you proposed to market? A. Yes, I did. 30

Q. When did you give those instructions and to whom? A. To John Newall within two weeks of commencing our operations.

Q. Was he told the name of the product which you proposed to market? A. I am not sure if that time I told him. I think I did.

Q. I think you were trying to keep the name under wraps at that time, if I can use that colloquialism? A. Correct.

Q. Did he proceed to test various mixtures to come up with the proposed pre-mix lemon squash drink? A. Yes.

Q. Did you propose to release Pub Squash on the market in February 1975? A. Yes.

Q. Did something happen to delay that? A. Yes.

Q. What happened to delay it? A. There was a series of events that caused us a problem. In commencing we had a lot of difficulty with the old machinery. Then we had a marketing programme that we had which was built around the release of a large plastishield bottle. We had arranged to have this bottle delivered by the glass company and at the last minute they told us they could not supply, so they had supplied Schweppes first and we had to wait until after it was released, then we went into the December period, which no one would release a product in December. Then in January - 10

Q. Why is that? A. Well, you can't get listing in December for a product, the food stores, which is the main source of sales, would not list a product in December. So in January we had all the power strikes that plagued New South Wales at the time and not only we couldn't buy cans or packaging of any description so we could not make our existing range products, much less introducing a new range. 20

Q. So did you defer your major release of Pub Squash for some further months? A. Yes, we did.

Q. Was the final release about the end of April 1975? A. It was round about the 8th April.

Q. Did you have a trial release of it earlier or a trial run of Pub Squash? A. We had a trial run, yes. 30

Q. When was that? A. In February.

Q. When you say you had a trial run, does that mean it came out in cans? A. Cans and bottles, yes.

Q. Were they labelled Pub Squash? A. No, just a test run.

Q. What did you mean by that, they were unlabelled cans?
A. Unlabelled unmarked.

Q. What did you do with those unlabelled cans? A. We used them in the laboratory to test the acid reaction on the can.

Q. Were any of them sold to the public at that time? A. No.

Q. How long would it take to test the reaction of the liquid inside before you released it to the public? A. You get some reaction within six weeks.

Q. If it does not eat through the can, I suppose it will not eat through the person who drinks it, is that the theory?

A. That is generally correct.

HIS HONOUR: Q. Were these steel cans or aluminium cans?

A. At the time they were two-piece drawn steel cans.

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MR. BANNON: Q. How long did it take you, firstly, to develop the mixture? How long did it take the Technical Department, Mr. Allman and Mr. Newall to come up with a product which they considered to be technically sufficient? A. About three months.

Q. Were they testing various flavours and lemon mixtures?

A. They were, yes.

Q. What about acquiring your stock of lemon to put in this product? A. Actually, one of the reasons we could not progress and delayed our launch was there was no lemon juice available to us to launch the product in 1974.

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Q. When did you finally acquire your stock of the lemon juice? A. I think it was around about February.

Q. Then what about obtaining the cans, how long did it take you to do that? A. Well, the problem, once again, was the power strikes and as soon as we had supplied our existing products to the market we then moved to launch Pub Squash.

Q. Where did you get the cans from? A. Pacifican.

Q. You spoke about some plastishield bottles. Are they the sort of bottles one sees around now with a sort of plastic all around the side and you can't see what's inside it? A. That's correct.

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Q. Did you have any difficulty in obtaining those bottles?

A. Yes, we did. We had difficulty from the first instance when we launched litre and a quarter and then to launch Pub Squash - you have to wait approximately six weeks for the artwork to be done and the bottles to be printed.

Q. The product was then, you say, released in April and then did you also release a product called Club Draft Ginger beer?

A. Yes.

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Q. When was that released, can you remember? A. I think it was towards the end of May.

Q. Did you release a product called Citra? A. Yes.

Q. A low calorie lemon soft drink? A. That's correct.

Q. When was that introduced? A. Around about September.

Q. Then following that - or in this period, shall I say, after the release of Pub Squash on the market, did your company begin to acquire a very large trade? A. Yes, we did.

Q. In New South Wales? A. Correct.

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Q. Did you later extend your operations into other States?
A. Yes.

Q. Where did you go to from New South Wales? A. Victoria and it would have been 1976 and into South Australia about the middle of 1976 and Queensland early in 1977.

Q. Was your choice of the name Pub Squash or the decision to name the product Pub Squash in any way influenced by any advertising or slogans used by Cadbury-Schweppes regarding their product Solo? A. No, not at all.

Q. Did your company then, at a later stage, after a release of Pub Squash on the market - or at least somewhere around the same time was it advertised? A. Yes, it was advertised.

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Q. Television? A. Yes.

Q. Radio? A. Yes.

Q. And through the Press? A. I think the Press in co-operative advertising with food stores.

Q. Your company employed a firm of advertising agents to do this work, did it? A. A small company.

Q. What is their name? A. Harris Robinson. At that time it was Harris

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Q. Did your company cause an application to be made for a trademark? A. Yes.

Q. For Pub Squash in the form of a label? A. Correct.

Q. Was that done through your company's patent attorneys, Messrs. Arthur S. Cave & Company? A. Yes.

Q. Did your company receive a letter from its patent attorneys dated 12th March, 1975? (shown) A. Yes.

Q. Then following that was the application for registration of the trademark made and is the document I show you now a copy of the receipt or an acknowledgement from the patents office? A. Yes.

(Letter from Arthur S. Cave & Company 12th March, 1975 to Passiona Marketing Pty. Limited tendered without objection and marked Exhibit 21a.)

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(Application for registration of the mark "Pub Squash" tendered without objection and marked Exhibit 21b.)

Q. Did you become aware towards the end of 1975 of this advertising which I now show you (Exhibit 13) which appeared in the Sydney Newspaper the Daily Mirror? A. Yes.

Q. Following that did you speak to your patent Attorneys, Arthur S. Cave & Company? A. Yes.

Q. And ask them to write to Cadbury-Schweppes about that advertisement? A. Yes.

Q. Can you say if the letter I now show you, dated 13th January, 1976, part of exhibit m.f.i. 9A, is a copy of the letter that they wrote? A. That's the letter.

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Q. Following that letter did you in February 1976 speak to Mr. Saunders, an officer of the plaintiff company? A. Yes, I did.

Q. Who is Mr. Saunders? A. He was then the branch manager for Cadbury-Schweppes, N.S.W.

Q. Did you say anything to him about advertising? A. Yes, I said it was still appearing in some stores and if it was not removed we would take legal action.

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Q. What did Mr. Saunders say to you? A. He apologized - (Objected to)

(Bundle of three letters formerly m.f.i. "9A" tendered without objection and marked Exhibit 22a, b and c.)

Q. Following your conversation with Mr. Saunders, did you see any repetition of the advertisement that you had seen in the Daily Mirror? A. No.

Q. Did your company apply for and become a member of the South Australian Soft Drink Manufacturers Association

incorporated in or about September 1976? A. Actually, they approached us to join the Association.

Q. I just asked did you become a member? A. Yes.

Q. The documents I now show you, are they a receipt for your membership fee, a letter relating to your membership and minutes of a meeting of the association which your company received (shown)? A. Yes.

(Letter of 29th September, 1976 from South Australian Soft Drink Manufacturers Association Incorporated to the defendant tendered; Objected to: admitted and marked Exhibit 23a.) 10

(Receipt from the abovementioned Association in favour of the defendant tendered: Objected to: admitted and marked Exhibit 23b.)

HIS HONOUR: I have at this stage admitted the material subject to objection on the same basis as I admitted other evidence said to be going to the discretionary or equitable defences raised.

MR. BANNON: Q. I now show you a photographic copy of a discovery document bearing the number 130 with its enclosure. Is that a document dated 24th December, 1976 received by your company from the Australian Industrial Research and Development Grants Board? A. Yes. 20

(Letter apparently of 24th December, 1976 from the Australian Industrial Research & Development Grants Board to Mr. Brooks tendered; objected to; admitted and marked Exhibit 24a.)

(Application form apparently related to Exhibit 24a tendered; objected to; admitted and marked Exhibit 24b.) 30

Q. Amongst the documents produced by you in answer to the subpoena of 22nd August, 1977 is this document (shown) Firstly when did you first see that document? A. I cannot actually remember the document - when I first saw that document, but it would have been some time early in 1974.

Q. Early in 1974? A. Yes - I am sorry, it could have been late 1973.

MR. BANNON: Q. Well now, when was it you think you first saw it? A. It would be either late in 1973 or early 1974.

Q. Who prepared that document? A. Lazslo Mojsza. 40

Q. The heading "XYZ company" - what is that? A. That was our proposed company. We did not have a company at the time. That was prior to the formation of Passiona Marketers.

Q. What does the document relate to? A. The first year's sales volumes.

Q. Does it also give the names of the products your company was to market? A. Yes.

Q. Was all this writing on the document at the time Mr. Mojsza showed it to you? A. I believe it was all on it, yes. 10

Q. What about the reference at the foot about "see other pages"? A. The budget is broken up into returnable packages - that is, bottles you bring back into the trade - and one-way packages such as non-returnables. This is the returnable page which always heads the list of any of our sales forecasts.

Q. There were other budget sheets concerning non-returnable materials? A. There would have been cans, one-way bottles, and post-mix.

Q. What you are tendering is the page relating to returnable material? A. Yes. 20

(Document relating to returnable material, tendered; objected to)

Q. You have heard what Mr. Priestley said. Do you now have the other sheets or do you know where they can be obtained?
A. Mr. Mojsza would be the only one who would have them.

(Tender of document relating to returnable material deferred; document m.f.i. 13)

Q. Earlier I asked you about the change of name from Passiona Marketers to The Pub Squash Co. Pty. Limited, and the certificate of change was tendered? A. Yes. 30

Q. Amongst the documents which were produced by you in answer to the subpoena of 22nd August, 1977 on a different issue are the minutes of meetings of directors of the company under its old name, Passiona Marketers, of 5th April? A. Yes.

MR. BANNON: My friend agrees to my reading from the minutes of a meeting of the directors of the company under its old name, Passiona Marketers Pty. Limited, held at the office of Allen, Allen and Hemsley on 5th April, 1976: "Resolution: That an extraordinary general meeting of the members of the company be convened at the office of Allen Allen and Hemsley at 3 p.m. on 5th April 1976 for the purpose of considering and 40

P.R. Brooks, x

if thought fit passing a special resolution changing the name of the company to The Pub Squash Co. Pty. Limited? A. Correct.

Q. And that meeting was in fact held that that resolution was carried? A. Yes.

Q. And did the Companies office send you first a certificate showing the name as changed to "Pub Squash Limited"? A. Yes.

Q. And that had to be sent back and sorted out and the one ultimately tendered in evidence was the one that was sent to you? A. Yes.

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Q. But the change was a result of a meeting held on 5th April 1976? A. That is right.

(Further hearing adjourned to 10 a.m. on Friday,
3rd February, 1978)

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

CORAM: POWELL, J.

CADBURY-SCHWEPPES PTY. LIMITED

v.

THE PUB SQUASH CO. PTY. LIMITED

NINTH DAY: FRIDAY, 3RD FEBRUARY, 1978

ANNETTE LOUISE MASON
Sworn and examined:
(Interposed by consent)

10

MR. PRIESTLEY: Q. Is your name Annette Louise Mason?

A. That's correct.

Q. Do you live at 943 Waugh Road, Albury? A. Yes.

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

Q. If I may go back a little and ask you some questions about your drinking habits, is it the position with you that you have never developed any particular taste for alcoholic liquors?

A. That's correct.

Q. Have you, in fact, got well into your twenties before you first ever went into a hotel? A. That's right. 20

Q. Have you lived in Albury or other country towns all your life? A. Yes.

Q. I think some time in your twenties you became interested in vintage cars? A. That's correct.

Q. Did that involve after a while doing some travelling in vintage car rallies? A. Yes.

Q. Was it in the course of one of those rallies that you first went into a hotel? A. Yes.

Q. Do you have a clear recollection of this first occasion when you went to a hotel? A. Yes, I do. It was about seven years ago at Holbrook, a small country town about forty miles north of Albury. 30

Q. On that occasion was it in the course of a rally that you

stopped at Holbrook? A. Yes, we stopped there for a counter lunch.

Q. Do you recall on that occasion what you had to drink?

A. Yes, I had my first drink in a hotel and it was a large lemon squash.

Q. Can you remember what sort of hotel it was? A. A very old hotel, one of the really old ones you know, bare lino on the floors, little benches to sit on, sort of your very old hotel.

Q. Have you any recollection of the way the drink that you had on that occasion was prepared? A. It was very different to what I had had in clubs and that that I had frequented over the years. It was in a very large glass and it had a very tangy taste and had lots of ice and it was very nice. 10

Q. You liked it? A. Yes.

Q. In following years did you from time to time visit hotels in the country under similar circumstances? A. Yes.

Q. What was it that you used to drink on those occasions? A. Always lemon squashes.

Q. Are you able to say whether those lemon squashes that you had on the various subsequent occasions were similar to the first one that you had had at Holbrook? A. Yes, they were very much the same. 20

Q. I think you are married? A. Yes.

Q. And your husband over the years has indicated a liking for lemon drinks? A. That's right.

Q. Did he from time to time seek to persuade you to drink various lemon drinks? A. Yes, he did.

Q. What was your attitude to that? A. I have got rather a sweet tooth and I usually decline. 30

Q. Are you aware of the soft drink called Solo? A. Yes, I am.

Q. Can you recall the first time that that drink came to your notice? A. My husband used to go down to the local corner store just down our road and pick up soft drinks, usually the Tarax label, and he often used to get lemon for himself and this particular day there wasn't any cold in the fridges and he was told by the store keeper he would be as well to try Solo.

Q. Perhaps if you just tell us what happened when your husband came home? A. He brought Solo home and asked me to try it. 40

I tried it and I thought it was as nice as what I had tasted, very much like a proper lemon squash.

Q. Thereafter, did you drink Solo? A. Yes.

Q. Was that the first lemon drink that you had ever regularly drunk? A. That's right.

Q. What was your view of its taste in comparison to the lemon squash you had had at Holbrook and the other country hotels?

A. Very comparable.

Q. What container was it that you first got Solo in, that first time? A. A large bottle. 10

Q. I think you are unable to recollect the year, but can you recall approximately what part of the year it was that this happened? A. It was about March or April.

Q. That was a drink purchased from the local small corner store, was it? A. Yes, small corner store. I haven't really noticed it anywhere else.

Q. Thereafter, after that first purchase by your husband, was Solo regularly bought in the household? A. Yes, very regularly.

Q. At some stage did you change from buying it at the corner store to buying it somewhere else? A. Yes, it became more expensive at the corner store and we noticed it at the supermarket a lot cheaper. 20

Q. Did you then regularly buy it from the supermarket?

A. Yes, every week.

Q. At the supermarket who did the shopping, you or your husband? A. We both did - usually myself on Thursday nights.

Q. When you say Thursday nights, what time of the night?

A. About between six and seven thirty.

Q. Was this the late shopping night in Albury? A. Yes. 30

Q. How long has the Albury district had Thursday night shopping? A. It is a bit hard to remember exactly, but I would say about three years.

Q. At this stage we have got to this far, had you become aware of any advertising for the product Solo? A. Not originally, no, it was some months later.

Q. So far as the manufacturer was concerned, what was your understanding at that time? A. I just believed it to be a Tarax drink.

Q. At some stage did you notice some advertising? A. Yes, some about 6 months after I was using the drink.

Q. Can I just ask you so far as television viewing is concerned in your house during the year which are the channels that you tend to watch more often? A. Always the A.B.C., as a rule.

Q. At some part of the year do you change a little? A. Well, in the Christmas period in Albury you cannot get much television, and, certainly, the A.B.C. seems to go off, so you are apt to turn on to the commercial stations. 10

Q. Are you able to tell us roughly what time of the year it was that you became aware of the television advertising? A. It would have been in the Christmas holiday period.

Q. What advertising was it that you first noticed? A. Well, the jingle sort of seemed fairly true.

Q. Let's just get a bit more detail. Do you remember the form of the advertisement and its content? A. Yes, I do.

Q. What is your recollection? A. I was annoyed ---

Q. What do you recall of the advertisement itself, what did the advertisement show? A. It showed a man having a drink of Solo. 20

Q. In what circumstances? A. I think he was sitting on a rock near water or something - I don't know really - and he was slobbering it all over himself.

Q. What else did you notice about the advertisement? A. That it had a jingle and that it claimed to be - Solo claimed to be a lemon squash like the pubs used to make.

Q. Were there some parts of the advertisement you did not like? A. Yes, the ad did not appeal to me at all.

Q. Was there any part of the ad that struck you as being all right? A. The fact that it was true that it was a lemon drink like the pubs used to make. 30

Q. At that stage had you ever heard of or seen Pub Squash?
A. No.

Q. Notwithstanding your dislike of the advertisement, did you continue to buy Solo? A. Oh, yes.

Q. Did you at some stage become aware of a produce known as Pub Squash? A. It would have been more than 12 months after I had been using Solo, I would say.

Q. In what circumstances did you yourself first see or become aware of Pub Squash? A. Solo did not seem to be available on the Supermarket shelves anymore and this Pub Squash was always in close proximity to where Solo used to be.

Q. In those circumstances when you were shopping what did you do? A. Well, I asked the person filling the shelves if there was any Solo and he said, "No, this Pub Squash, that's the same".

Q. What did you do then? A. Well, there was nothing else so I bought some Pub Squash. 10

Q. On drinking it what was your impression as to similarity with Solo? A. Well, I didn't think it was similar, not really, not at all.

Q. On the first occasion when you bought Pub Squash what was your understanding about the manufacturer of it or the seller of it? A. No, I just bought it because I thought it was going to be like Solo.

Q. Apart from the supermarket and your own local store, had you bought Solo from time to time at various places around Albury and in the countryside? A. Yes. 20

Q. On the occasions when you have asked for Solo have you always been given Solo? A. No, not once Pub Squash came on the market.

Q. Can you recall any particular occasions when you asked for Solo and you were not given it? A. Well, the last distinct occasion I remember was in November, about 30th November last year.

Q. What happened then? A. I was in Melbourne, my daughter was in hospital and I called in at a corner store near the hospital and asked for Solo and I was given Pub Squash. I queried the gentleman and he told me it was the same and that's all he had. 30

Q. Had anything like that happened before to you? A. Oh, on many occasions. I didn't take any notice of it.

Q. At all stages have you continued to buy the bottles of Solo or have you from time to time bought cans? A. We have bought cans when it has been more convenient, but always bottles every week when we buy bottles.

Q. So far as the cans are concerned, have you observed both the Solo can and the Pub Squash can? A. Yes, they seem to be a little similar - not once you know the can but certainly first off you would have to look twice, I think. 40

CROSS-EXAMINATION:

MR. BANNON: Q. (Witness shown Exhibits "A" and "C".) Do you recognise those cans, Exhibit "A" as a Solo can and Exhibit "C" as a Pub Squash can? A. Yes.

Q. On the Pub Squash can the words Pub Squash appear in large red letters, do they not? A. That's right, yes.

Q. If the salesman has given you a can of Pub Squash you would immediately recognise it? A. Yes.

Q. And say that is not the one I want? A. No, because I know that it is not called Pub Squash.

10

Q. You know? A. I know that Solo is not called Pub Squash.

Q. And you tell the salesman that and that is not the one you want? A. That's right.

Q. But sometimes they have said they do not have Solo and in those cases you have taken the Pub Squash? A. Yes.

Q. When you had a lemon squash in a hotel what did they do, mix it up for you, did they? A. I suppose so, I wasn't watching him.

Q. Did you ask whether it was to be a lemon squash with soda or with lemonade in a hotel? A. No.

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Q. Do you know you can have it both ways? A. Can you?

Q. You can have soda or lemonade? A. Well, I don't know, I just asked for a lemon squash.

Q. Did the Pub Squash seem to be slightly more bitter to you than the Solo? A. It seemed to be more flat.

Q. Also not quite as sweet as the Solo, is that right?
A. Possibly.

Q. I think you have told us that you have a preference for something that is rather a sweet tooth? A. That's right, yes.

Q. You have never checked with the hotel if they have given you lemonade in the soda (sic) squash or soda water? A. I think it is generally lemonade, you can usually taste the difference.

30

Q. The soda water would give you something slightly more bitter, is that right? A. Yes.

Q. Did you notice in any hotel where you had a drink whether they mixed the lemon squash from a bottle or did they use a

mixing machine, did you notice? A. I don't recall them using a mixing machine, no.

Q. Did you notice whether they poured the lemon content from a bottle? A. By mixing machine do you mean they press a button on something and two squirts come out together?

Q. I think it is like that? A. That particular one is not very nice, I don't think. It is better when they do it separately. I don't know why.

Q. Have you seen them doing it from a bottle? A. Yes, when it is with a bottle it is much nicer. 10

Q. But you just don't know -? A. I don't know why that is, but I wondered whether perhaps whatever they had in it went flat.

Q. Lemon drinks in cans, have you bought any other lemon drinks in cans apart from Solo and Pub Squash? A. My husband has on many occasions.

Q. Shelleys, for example? A. I would not know. He buys bitter lemon, whatever that is, but I don't drink it.

Q. I am not talking about bitter lemon, which I think is a distinct type of drink, but have you seen other lemon drinks in yellow coloured cans apart from Pub Squash and Solo? 20
A. Probably, I can't remember anything specific.

(Witness retired and excused.)

PETER ROBERT BROOKS
On former oath:

*MR. BANNON: Q. On p. 156 you were asked about the Pepsi-Cola franchise which you took over from General Foods and you were then asked "And Pepsi-Cola has since then been marketed in Australia by your company" and you said, "That is correct". 30
Was the Pepsi-Cola first marketed by your company in New South Wales? A. Yes, in 1974.

Q. Is that the franchise that you took over from General Foods? A. Correct.

Q. Then later on did you receive the franchise from Pepsi-Cola to other parts of Australia? A. Yes.

Q. Which had formally, I think, been held by Cadbury-Schweppes? A. That's correct.

*See now page 174.

*Q. Page 158 towards the bottom of the page, about five questions from the bottom of the page you were asked about extending your operations with Pub Squash and you were asked "Where did you go to from New South Wales?" Your answer was, "Victoria and it would have been 1976 and into South Australia about the middle of 1976 and Queensland early in 1977". I want to clarify or correct the answer regarding Victoria?

A. Actually, we did move into Victoria and set up a warehouse around about October of 1975 and commenced selling operations to wholesalers, but the major activity commenced in 1976, early 1976. 10

Q. On the last page of the transcript I was asking you about the document m.f.i. 13 and the document headed "The X.Y.Z. Company Limited" and with regard to that is that part of the budget prepared by Mr. Mojsza which you were considering for putting before a company with regard to your projected operations? A. Yes, it was part of a series of work sheets that we used in preparing a presentation for General Foods in regard to the purchase of the company in New South Wales. 20

Q. After the document, which was a handwritten document, was prepared, was a typewritten document prepared for General Foods? A. Yes, it was.

Q. Did the typewritten document contain in it the names of the new products which are set - (Objected to).

Q. What happened to the rest of this document, the other pages, apart from the one we now have? A. They were only work sheets and they were destroyed.

Q. Did you preserve this sheet yourself or did somebody else in your company preserve this sheet? A. That sheet was preserved by Mr. Mojsza. 30

Q. What did the other sheets relate to, the sheets that were destroyed? A. The other sheets related to one way packages, being cans and disposable bottles and post-mix sales or projected sales.

Q. So the other sheets relate to projected sales of one way packages and post-mix? A. Correct.

Q. And the first sheet dealt with bottles? A. With returnable bottles.

Q. And that is the only one that was kept? A. That's correct. 40

*See now page 177.

Q. Were you present when they were destroyed? A. Yes, I destroyed them, actually.

Q. When was that done? A. I destroyed all the sheets shortly after I commenced the operation because I had made something like twelve submissions to General Foods and I was working from home at the time and when I moved into the offices I took files and files of the reports I had given to General Foods and destroyed them.

(Document entitled "Volume budget for twelve months" tendered.) 10

EXAMINATION ON VOIR DIRE:

MR. PRIESTLEY: Q. Yesterday when this document was first being discussed you were asked whether you now have the other sheets or do you know where they can be obtained and you answered, "Mr. Mojsza would be the only one who would have them". From that, is it correct that on the last occasion when you saw the sheets that made up the rest of this budget they were in Mr. Mojsza's possession? A. No, that sheet there - actually, yesterday I believed we had retained the file but it wasn't until yesterday afternoon that I realised why that sheet was in the Pepsi folder that Mr. Mojsza was holding and that was lifted out specifically to work out a proposition that we have to put to Pepsi-Cola to borrow money to purchase bottles from the money that they subsequently leant us and it was returnable bottles, that is why he had the sheet. 20

Q. You said a few moments ago that you yourself destroyed the remaining sheets out of this particular budget? A. I said that I destroyed all the sheets that were in my hand and I believe they were there. 30

Q. Is it right that you destroyed quite a large number of papers at the time that you are speaking of? A. Correct.

Q. Is it right also that you have no specific recollection of destroying the remaining sheets of this budget, but you assume that you did? A. That's correct.

Q. It may well be, may it not, that Mr. Mojsza still has the balance of these sheets in some file somewhere? A. I checked with him last night and he said they were with all my copies that was the only copy he had taken and he handed the rest back to me, so I must assume they were destroyed with the rest. 40

Q. Just how bulky was the documentation that you remember destroying? A. There would have been at least four large cartons.

Q. I don't suppose you went through all the papers in those

P.R. Brooks, x on voir dire

cartons before you destroyed them, did you? A. Yes, I did go through some of them.

Q. But you would not have checked each sheet in every carton?
A. I was mainly interested in the printed sheets, not in the work sheets.

Q. So you did not check any handwritten work sheets that were in those cartons? A. No.

Q. It would be right, wouldn't it, that you simply have no recollection at all of destroying these specific handwritten sheets at all that formed the balance of this budget which we have the first page of? A. As I say, I assume that is true.

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Q. But you have no recollection whatsoever? A. No.

(Examination on voir dire closed.)

(Document entitled "Volume budget for twelve months" formally m.f.i. 13: tender objected to: admitted and marked Exhibit 25.)

CROSS-EXAMINATION:

MR. PRIESTLEY: Q. Would you agree that yesterday in describing your occupation and activities in the years since 1969 you were presenting yourself as a person well experienced in the field of soft drink merchandising and marketing? A. I would say that I had been exposed to it, yes.

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Q. I think your account yesterday began with 1969. Had you had any experience prior to then in this field? A. 1968 I commenced with Coca-Cola.

Q. Before that what had you done? A. I worked for ten years prior to that I was employed by the Nestles Company.

Q. In what capacity? A. Working from sales rep. right through executive managing roles in marketing.

30

Q. What did the executive managing roles and marketing entail? A. Well, I started off as sales rep., district sales manager, account executive, promotional manager, marketing services manager, in administration several areas of training through the company.

Q. With what product were you concerned during that period?
A. Grocery products and chocolate products.

Q. So far as soft drink is concerned, had you had any experience before 1968? A. I used to work with my uncle. He

P.R. Brooks, x on voir dire,

worked for Shelleys and I spent some time help him deliver soft drink while I was on school holidays.

Q. That would be when you were at school? A. Fifteen, sixteen.

Q. That would have given you a general acquaintance of the type of drinks that Shelleys sold and the sort of places where they would be sold, I suppose? A. And the type of activity involved in the manufacture of soft drink and the distribution of that drink, yes.

10

Q. But you were concerned at that stage with the manufacturing side also, at that stage, when you gave your uncle a helping hand? A. No, but I was in the plant. That gave me an opportunity to go in and see them making soft drink.

Q. Did you develop an interest at that stage in the actual marketing and merchandising side of soft drink? A. Do you mean when I was helping my uncle?

Q. Yes? A. No.

Q. When did you first develop any active interest in that? A. When I joined Coca-Cola, but I think it is fair to say when you work in a marketing company like Nestles you always are fairly conversant with all types of marketing activities in the market place, whether it be soft drink or boot polish.

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Q. When you were working with Nestles was it part of your duties or within the sphere of your interest to keep appraised of what competitors with Nestles were doing? A. Yes.

Q. Is that regarded as something very important to an executive concerned with marketing a particular product? A. Depending on the company.

Q. Are there some companies where it is good practise for their marketing executive to be aware of what their competitors are selling? A. In the case of soft drinks, Coca-Cola definitely.

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Q. What was your position first with the Coca-Cola company? A. I joined as operations manager.

Q. What duties did that involve? A. Specifically the Sydney bottling operation.

Q. What did you do? A. My original function was to write up details of problems associated with operating the Sydney Bottling Company.

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Q. Do you mean an accountancy type? A. No, marketing.

Q. Did you say "write up"? A. Write up a report on the problems associated with the operation of the Sydney Soft Drink Company which involved marketing, distribution, general collection of debtors and finance problems, that had existed at the plant and an overall report.

Q. So correct me if I am wrong, your first job was aimed at spotting any problems concerned with that operation and work out ways of correcting them? A. That's correct.

Q. In doing that was it necessary or helpful for you to see what the position was so far as the competition was? A. Not initially, mainly it was administration and management problems that I was concerned with, not so much the marketing problems. 10

Q. At that early stage did you concern yourself at all with what other soft drink manufacturers were doing in lines comparable to those that you were actually concerned with? A. The soft drink industry when I joined was pretty quiet. As a matter of fact there was no development in food stores and we commenced the development of food stores, so as far as looking at a general report, of what soft drink companies were doing, I didn't, but it was my innovation and we became the market leaders and the pace setters. 20

Q. At any stage while you were with Coca-Cola was it any part of your concern in your job to familiarise yourself with the activities of competitors? A. 1969 we concentrated on mainly marketing and distribution.

Q. What did you then do in order to acquaint yourself with what competitors were selling and doing in the marketing way? A. Coca-Cola put out what they call a barometer of soft drink studies which give them the share of each competitor by flavour, by product and we had that available to us. Also we had commissioned Nielsen to supply us information and they are a research company that provides details of research of sales by product, by flavour of various companies and we set up a marketing services company to investigate the activities of competitors and what we should do as a means of enhancing our position in the market. 30

Q. What areas did the barometer survey cover? A. It surveyed place of consumption, whether it be at home, away from home, at work, whatever the type of product. 40

Q. In what geographical areas? A. Australia wide, in each area that Coke had a franchise.

Q. Similarly with the Nielsen organisation? A. Nielsen was mainly metropolitan area by State, but that did not concern me at the time, I was mainly concerned with the Sydney metropolitan area.

Q. Then the service company that you set up? A. Sorry, it was not a service company, it was a marketing service section within the company.

Q. Whose responsibility was that? A. Mine.

Q. What did that particular branch do? A. Budgeting, sales forecasts, market research projects and evaluation of market trends.

Q. Did that involve a close watch on your competitor's activities as well as your own? A. Within the Sydney metropolitan area, yes. 10

Q. Is it right that your job at this stage was confined - the attention that you were giving to the market and to competitors in the market was confined at this stage very largely to the Sydney Metropolitan area? A. Well it was totally confined to the metropolitan area.

Q. How long did that situation go on? A. I think I moved to the corporation in 1972.

Q. When you moved to the corporation in 1972 what duties did you then take up? A. I took up a position as regional marketing manager for Australasia. 20

Q. The region was Australia and New Zealand, was it? A. And a few Pacific islands.

Q. At that stage was it your concern to acquaint yourself with the marketing activities of your competitors outside the Sydney metropolitan area? A. That's correct.

Q. By what methods did you do that? A. By the same methods but on a larger scale, by market research, product testing, Nielsen surveys, barometers.

Q. I think you said you moved to that job in 1972? A. Correct. 30

Q. Did it involve any travelling? A. No, I had a number of people working for me that were operations managers and they travelled and I very rarely travelled.

Q. You stayed entirely in Sydney? A. No, I did travel but I would not have travelled five times in 12 months.

Q. When you did travel where did you travel to? A. To a bottling company, a Coca-Cola franchise bottler in any of the States outside of New South Wales.

Q. Was that the position that you continued to occupy until the time you left Coca-Cola? A. Yes. 40

Q. I think you told us yesterday that you gave notice of resignation in February 1973? A. That's correct.

Q. But they asked you to stay on and you stayed on until about May? A. May, June I think it was. I couldn't be specific. My activities at that time certainly diminished because they had brought a chap in to replace me and he was taking more and more responsibility away from me.

Q. As from February? A. As from February.

Q. He was not brought in before February? A. No, he came - 10
it was round March or April, I think, to tell the truth.

Q. Did you stay on full time from February to May or June, whichever it was? A. I didn't do a lot, but I was there because they asked me to stay while the manager of the time was away and he had holidays and so forth. So my function was really just an overseeing job, there to sign a few expenses and whatever.

Q. But you were being paid your full ordinary salary, I suppose? A. Correct.

Q. You also mentioned yesterday that you had made a suggestion 20
to the Coca-Cola people about developing the lemon side of your soft drink business? A. That's correct.

Q. When was it that you first made that suggestion? A. 1971 -
around 1971, I would have to say.

Q. Over a period did you develop and elaborate that suggestion so that it got itself into some final fairly detailed form?
A. No, I was told flatly "We are not interested".

Q. What, right at the beginning? A. Right at the beginning.

Q. What work or what detail went into the making of the suggestion that you did make to the Coca-Cola people? A. At that 30
time it was a suggestion to the then manager of bottling clerks and I was told that they were not interested by him and he was not interested, but I spoke to the then general manager in 1971 and he said, "Well, look, you move along with a programme and then let's see what happens at a later date". I think he had a bit more vision than the chap at the top, quite frankly.

Q. You say, "Move along with the programme". What did that mean? A. Well, just proceed as you would. I think I should point out that I virtually control the marketing and distribution section of that company and all decisions were left to me. 40

Q. In 1971 you made a suggestion that you develop the lemon

side or a lemon aspect of the business first to one man, then to another? A. Firstly, I made it to the manager of the bottling plants and, secondly, or it could have been I talked to the other chap, the manager of the Sydney Bottling Plant about the project. He was interested and he said, "Well, look, you proceed with the lemon any way you would like" so that is exactly what I did.

Q. So you then embarked on some sort of programme in regard to the lemon? A. That's correct. 10

Q. What was that, what happened from then on? A. I asked our marketing service manager at the time to investigate the lemon segment and they did investigate the lemon segment, wrote to Nielsen and asked that the lemon segment be broken out and supplied to us by segment by flavour and Nielsen replied. I commissioned the technical manager of the company to prepare a lemon squash base for testing, which he did, and he prepared post-mix for testing and that eventually was put into all hotels and clubs. He prepared a preparation of bottled soft drink.

Q. When was it put into hotels and clubs? A. That would have been around about the end of 1971 or some time around that period. 20

Q. Under what name was it marketed to the hotels and clubs?
A. Brand X.

Q. How long did that continue to be marketed? A. Still is.

Q. And still under Brand X? A. Still under Brand X.

Q. What was marketed was entirely the post-mix idea? A. Yes.

Q. In getting to the stage where you had the completed product being sold by the post-mix method, I think you said you had formulated a complete lemon squash mixture or whatever?
A. Bottled product, finished beverage. 30

Q. So that everything was done in the course of that development programme, although not perhaps in the same order or method but the same things were done as were later done by your company Passiona Bottlers in relation to the product that became known as Pub Squash? A. Yes, similar perhaps.

Q. I am not saying that the products were identical, but the same set of procedures would have been followed? A. Same procedures, yes.

Q. That all happened in 1971, did it? A. Through '71, '72. I can't be specific, there were a lot of things happening at the time. 40

Q. When was it that you went to the seminar in the United States? A. May of 1970.

Q. Was it 1970? A. Yes.

Q. Were you sent there by the Coca-Cola organisation?
A. No, I was offered the opportunity to go to a marketing course put on by the Coca-Cola company.

Q. How long were you away? A. Nearly three months.

Q. Was your salary from the Coca-Cola company in Australia stopped during that period? A. No, the company paid the expenses. 10

Q. It was in the course of your employment that you attended that seminar? A. Sure, but the point I was making, they didn't send me they asked me if I would like to go.

Q. It was not obligatory, you were offered the opportunity and you accepted it? A. Sure.

Q. It was in the course of the seminar and while you were present at a Coca-Cola company office in the United States that you first saw this Pub trade mark, is that correct? A. The head office of Coca-Cola Export Corporation is in New York, or was at that time in New York and I worked for the Coca-Cola Export Corporation and the hotel we were having the conference in was next door. We had lay days when we had different conferences and discussions with their marketing people, various aspects of the American market and related to our market. 20

Q. Do you recall just where it was you were when you saw this trademark? A. It was - I am not sure, it was somewhere near Park Avenue and Central Station, that is where they had the building.

Q. But it was in the Coca-Cola premises? A. Yes, it was in the Coca-Cola premises, the Coca-Cola building. 30

Q. When was it that any steps were taken first in relation to that trade mark after you saw it on this occasion in 1970?
A. You mean as regards my getting a copy of it?

Q. Anybody getting a copy of it, yes? A. So far as I am concerned, anyway, I was in the office with the others, marketing services manager (I am not sure what he is doing now) of the Coca-Cola Export Corporation, going through various things and they had all sorts of information and we were looking through many things and he was explaining the Cola segment and so forth and we were talking about the difference in the Cola segment in various areas. So just over a course of days we looked at various pieces of information and just one of the things 40

that happened to turn up was this very large book of registrations of trade marks for fruit juices, cordials and wines and whatever in the States.

Q. When was it that you did anything about getting a copy of that trade mark? A. Well, I was chatting to the guy and it would have been that time. I said, "Is there any chance I could get a copy of that, that's interesting" because my comment was, "Fancy registering Pub in the U.S. Who would ever hear pub in the U.S.? It's relevant in New South Wales or Australia, but what's happening with it here" and the guy said, "Oh, it's a small product and you don't even see it around." 10

Q. Do you recall what the product was? A. No, I didn't see the product, just the trade mark. It's a lemon lime, he thinks, or some type product like that.

Q. Did you bring the copy back with you to Australia?
A. Yes, I did.

Q. And back to your office at Coca-Cola? A. No, I took it home. I had a lot of things that I had picked up in three months-mailed directly to my home. 20

Q. At some later stage you made an approach to the owner of the trade mark in the United States? A. No, I didn't.

Q. When you got the programme with Coca-Cola to the length of Brand X post-mix squash being distributed through hotels and clubs, were you anxious to take the development further and enlarge the range of drinks using this particular lemon squash formula? A. Sorry, would you repeat the question?

Q. You have told us that you suggested the lemon extension to the Coca-Cola people? A. Sure.

Q. They authorised you to take a programme through and you did take a programme through, which resulted in Brand X being available as a post-mix lemon squash type drink in hotels and clubs? A. That's correct. I should point out that was done on the initiative of the management of the bottling company and had nothing to do with the export corporation. At that time we had the authority to do whatever was necessary to get the company and bottling plant profitable and we were outside the scope of Coca-Cola Export Corporation for that period of time. 30

Q. Did you suggest at the same time or in the same period that the same drink might be sold in bottles or cans or in some other form apart from post-mix? A. I suggested that a lemon drink should go on the market, most certainly. 40

Q. With the same base and general formulation? A. Yes.

Q. And that was turned down, was it, by the management?

A. Actually, it just faded into oblivion because we had so much industrial trouble out there that continued into part of 1971 and then I was told that I was moving back to Corporation and we were changing in a whole new structure of management and the whole exercise just disappeared.

Q. How far did the exercise get before it disappeared? Did you get to the stage of having cans made or labels printed?

A. No, as I earlier stated, we went to the stage of producing product in bottles for testing and everyone in the company had to try the lemon squash. Most of the employees liked the taste of the product and agreed with me that it should have been marketed, but as I say there were so many changes the whole thing just faded out. 10

Q. At the stage when the fading out took place, the Brand X post-mix was being moderately successful in the hotels and clubs? A. That's correct.

Q. As far as you then understood, had that acquired more following amongst people who drink in hotels and clubs under the name Brand X? A. No, I think it is the same as anybody else's post-mix, they just go and buy it and they expect if it is post-mix they expect to get a glass of soft drink. The competitors followed us. 20

Q. Was Brand X the name chosen by you? A. The technical people just called it Brand X. It is not relevant in post-mix, we are only interested in selling a carton of lemon - sorry, a can goes out and a four gallon drum and it is just called lemon, the same as lemonade is just called lemonade.

Q. When you mentioned Brand X earlier, were you not indicating that it was branded Brand X when it went out to the hotels and clubs? A. No, it was just marked - it was referred to as Brand X. It was just marked lemon, lemon drink. 30

Q. Not even lemon squash? A. No.

Q. Was it a lemon squash? A. You couldn't call it lemon squash.

Q. That is the regulation, is it? A. Yes.

Q. Because it did not have enough actual percentage of lemon in it? A. That is technical, but you cannot call it lemon squash. You would have to check with somebody technical. 40

Q. So you just call it lemon drink? A. And lemonade was just lemonade and orange was just orange - sorry, they called the orange Fanta.

Q. Let me get that clear. You are talking about a post-mix when you are talking about that Fanta, are you? A. Yes.

Q. And that did have a brand name? A. Yes.

Q. You did say that your lemon programme, as well as going the whole way so far as post-mix was concerned, had got to the stage of having bottled lemon drink of the lemon squash type developed to the stage where you had, full bottles of this particular lemon drink? A. Full bottles of the product, yes.

Q. What happened to those bottles? A. I imagine there are still some in the laboratory of Coca-Cola. 10

Q. None ever sold? A. No, it was only test packets.

Q. At the stage where they were being tested, was there any name given to them? A. No.

Q. Was there any documentation in existence at that time indicating what this particular programme was intending to achieve, any sort of submission to head office? A. No, there was no head office. Actually, as I say, we had complete autonomy, there was a general manager and myself.

Q. There would not have been any document then where any projected name for this particular product ---? A. There would be documentation on the development of the formula and the testing laboratory at Coca-Cola, but there would not be any documentation regarding the project name. That would have been outside my scope of authority in the company to name a product of Coca-Cola. 20

Q. Did you at any time make a suggestion about the name of this product? A. No, not to any management.

Q. To anybody at all? A. Not that product, no.

Q. During the period from February to May of 1973 do you recall whether you did any travelling? A. I didn't travel at all. 30

Q. Your office was just located at which place? A. May of '73?

Q. February to May 1973? A. From February to May I was with Coca-Cola.

Q. Whereabouts was your actual office? A. Frenchs Forest.

Q. You mentioned yesterday that it was during this period - correct me if I am wrong - in this February to May period that you approached General Foods, and, in particular, Mr. Lazzley, the managing director of that company? A. I think I should 40

qualify that. Mr. Lazzley approached me in 1972 and offered me a position as the managing director of their soft drink division of Australia, which I refused. I said to him at the time, "I am not prepared to work for General Foods or for Cottees but, you know, if you want to sell your soft drink company in Sydney I will buy it". So we had lunch and had a bit of a chat about it and he said, "Well, after Christmas why don't you give me a ring" and I phoned him after Christmas and said I was chatting about buying a company, was he interested and he said, "Yes, come in and see me". So that is how we started our conversation. 10

Q. It was following the commencement of those discussions that you indicated in February of 1973 to the Coca-Cola that you would be resigning? A. Yes.

Q. At any stage in your negotiations and discussions with Mr. Lazzley did you have the services of solicitors to look after the legal side of things for you? A. Yes, I did.

Q. At what stage was it when you retained solicitors in regard to that matter? A. I think it was pretty well immediate.

Q. I just want to fix the date. What do you mean by immediate? A. In 1973 I had solicitors within the first part of it, I think, 20

Q. So probably around about that time, at least, when you gave notice of resignation you would have had solicitors acting for you in regard -? A. No, we were still in preliminary discussions, I would say that we would have had solicitors about May.

Q. Who were those solicitors? A. Maunder and Jeffrey.

Q. At what stage was it that a draft agreement concerning the purchase of what was eventually bought came into existence? A. Probably early 1974. 30

Q. So that everything was in a state of negotiation without any form of guidelines about what the eventual transaction would be? A. That's correct, right up until the last few months.

Q. Was it in this first half of 1973 that you met Mr. Mojsza? A. Yes.

Q. You met him upon one of the occasions when you were at Mr. Lazzley's office at General Foods? A. No, I met him at the Pepsi Cola office when I was talking with the managing director of Pepsi Cola in Australia at that time, Mr. John Baxter. 40

Q. Mr. Mojsza had previously worked for General Foods, is that correct? A. That's correct.

Q. Do you know when it was he ceased working for them?

A. I think in 1972. Actually, he worked for Pepsi Cola in 1971 and when Pepsi Cola Australia's Bottling operation closed down General Foods took over the franchise and then he went across to work for General Foods when they took over the franchise.

Q. Then he left General Foods on what occasion? A. I couldn't be sure of the date.

Q. But he went back to -? A. He went to the Pepsi head office. 10

Q. And they were completely distinct organisations in May of 1973? A. Yes.

Q. You have told us that at some stage you asked Mr. Mojsza whether he would be interested in becoming the finance manager of the organisation you had in mind to bring into existence?
A. Correct.

Q. How early in 1973 did you make that proposition to him?
A. In May, I would say. I cannot actually pinpoint the days and months, but it would be round about May or a bit earlier. 20

Q. I just want to be completely clear. It was the first time that you ever met him when you met him in Mr. Baxter's office in the manner you described? A. Yes, it could have been in April or May - yes, it would have been April, I would say towards the end of April.

Q. That would be the earliest date you put on it, towards the end of April? A. Yes.

Q. Of 1973? A. Well, once again I can't remember, give or take a few weeks.

Q. Give or take a few weeks, that is the best recollection you have? A. Yes. 30

Q. So it certainly would have been in April 1973 at the earliest? A. Yes.

Q. Had you known of Mr. Mojsza before? A. Yes, he had an excellent reputation as a manager.

Q. How soon after you met him, if you can put it in terms of weeks, was it you made him the offer or invitation to become finance manager, do you recall? A. Pretty well immediately, I think, we had a discussion.

Q. Did he indicate agreement immediately? A. Yes. Well, he 40

said it interested him to get into that sort of activity, yes.

Q. But was what passed between you anything amounting to a firm commitment at that stage? A. I think we had an agreement in principle.

Q. Were you able to assure him then that you would definitely be commencing in a new organisation? A. I was not even sure myself. It was a matter of if we did commence the operation would he be interested in a position. 10

Q. From then on he helped you in your preparations for the takeover of the Cottees assets and the incorporation and institution of your company? A. Yes.

Q. Was he being paid during this period in 1973 when this was happening? A. By me?

Q. Yes? A. No.

Q. In that last question I somewhat inadvertently suggested to you that he gave you this assistance in 1973. Is that correct, that it was 1973 that he helped you in this way? 20

A. That's correct.

Q. Would it be correct that the greater part of the help that he gave was concentrated in the period shortly before the acquisition of the shelf company? A. No, our biggest problem getting the company going was the finance towards the end of it, not the negotiations with General Foods. We reached basic principle in the first place.

Q. Was not Mr. Mojsza aware of financial problems right from the beginning of his discussions with you? A. Everyone was.

Q. Did you mean by what you just said that it was not until shortly before you acquired the shelf company that the financial problems were solved sufficiently to start? A. Yes, that's correct. 30

Q. And that until that time there had been no certainty at all that those financial problems would be solved? A. That's correct.

Q. So that the situation had been that while the Cottees assets seemed to be readily available upon completion of the negotiations the problem was whether you would be able to get any money in order to buy them from the General Foods organisation? A. Correct. 40

Q. I just want to go forward for a period now. From May 1974

onwards you were, I suppose, carrying on the organisation of the business and the business of Passiona Bottlers with all the energy you could command? A. Passiona Marketers, yes.

Q. This was a new enterprise and a big enterprise as far as you were concerned and you were anxious to make it as successful as possible? A. Correct.

Q. At that time were you very much interested in knowing what was the marketing situation of the various competitors in the field in which your company was entering? A. Within the metropolitan area of Sydney, yes. 10

Q. Within the metropolitan area of Sydney, who were the chief competitors at that time? A. I only ever considered Coca-Cola a competitor. The other competitors I didn't really consider as competitors. Coca-Cola had a -

Q. Who were the people in the market who had any substantial share of the market at the time, May 1974? A. I think that if I could give you the shares, Coca-Cola had over 40 percent of the market, home delivery had 20 percent of the market.

Q. That is a category? A. A group of people, so that us and everyone else, we were sharing around about 40 percent of the total soft drink market and the next major competitor to us would have been Shelleys and after that would have come Schweppes. 20

Q. In which field are you talking now, the whole soft drinks field or a particular area of the soft drinks field? A. The whole soft drinks field.

Q. Upon commencement in Sydney with the Passiona and Cottees products that you had available, what was the share that you had immediately upon commencement? A. Four percent of the market.

Q. What was the name of the lemon product first sold by Passiona Marketers? A. Cottees lemon flavour. 30

Q. How was that marketed, in what containers? A. Cans and small bottles, that is all we marketed it in at the time.

Q. You continued to market that until at least April of 1975, did you? A. No, I don't think so. We had a commitment to cans - actually, it wasn't a very big seller, it was a flavour and it had no juice content and as such it was a general sort of run of soft drinks in a branded line of products that Cottees had and we had a commitment to supply bottlers throughout Australia under an agreement we had with Cottees, General Foods. So we had to manufacture the product for those bottlers. 40

Q. Was that an agreement that you had entered into at the time when you took over the various assets from General Foods?

A. Yes and I had a co-packing agreement with them.

Q. So at the time when you began in May of 1974 as Passiona Marketers you were contemplating and had already arranged for the continued production and sale of this particular lemon drink? A. For the co-packing market, yes.

Q. How long did Passiona Marketers continue to sell that particular drink? A. I can't think of the date that Canada Dry actually acquired brand names from General Foods, but we said it would be available until General Foods moved out of the soft drink business completely, so we could have had cans or some commitment there that we filled a few cases here and there, but the sales were not significant at any time. 10

Q. What were the names of the other products that were sold immediately upon commencement of the Passiona Marketers Company?

A. We sold Passiona, Pepsi Cola, Big Boy Lemonade, Tango, Cottees Lemon and there was a whole lot of package material that we agreed to take and fill with various products, so we had to fill the packaging material and run the product out.

Q. Was the Passiona product the biggest seller at the time when you took over or the time when you began in May of 1974? 20

A. No, Pepsi Cola was.

Q. Passiona was the name, was it not, that was quite well known to the market in soft drinks at that time? A. That's correct.

Q. Was that the name which, in your judgment, at the time when you began in May 1974 was the one most likely to be known to the public apart from the Pepsi Cola name? A. No.

Q. What was the reason for choosing the name Passiona Marketers? A. Because the Passiona Bottling Company, as it was known, was in liquidation and we could not use that name and they said that we would be able to use Passiona. They would give us an agreement - that is, General Foods would give us an agreement to use the Passiona name in some form other than Passiona Bottlers Pty. Limited, so we just chose Passiona Marketers. 30

Q. So as to the Passiona name you were keen to use that at the commencement of your operations in 1974, were you not? A. I didn't have a better name.

Q. You could have named the company any of an infinite number of names I suppose? A. Sure. 40

Q. The name you chose was one involving the word Passiona?

A. Well, all the Passiona Bottling companies round Australia were named Passiona Bottlers, so they asked that we stay within the family name for reasons of identification.

Q. But you were starting off what, as far as you were concerned, was a new enterprise, is that correct? A. Correct.

Q. Would you not agree that you would choose the name for that

enterprise which best suited you? A. Well, you see, the enterprise - the Passiona Bottling Companies in Melbourne and Adelaide were not owned by General Foods, the same as in Perth were not owned by General Foods. They were all independent companies privately owned or publicly owned and it was their request that we call it Passiona something.

Q. But if it suited you to call -? A. They were lending me the money, so it suited me to call it the name they wanted me to call it. 10

Q. Who was it that was lending you the money? A. I don't think this goes to the case how I financed it, but it was General Foods that lent me the money to buy the company.

Q. Did they make it a stipulation of the loan that you continue the name Passiona? A. No, they suggested that I did.

Q. It was not suggested that the loan would not be made to you if you did not call it what they suggested? A. I really don't think it was an issue at the time. I was quite happy to call it Passiona and I saw no reason why I shouldn't.

Q. You were happy to call it Passiona and there was no other name at that time that you would rather have called it? 20

A. At that time, yes.

(Short adjournment.)

UPON RESUMPTION:

MR. PRIESTLEY: Q. Mr. Brooks, you said yesterday that for some time you were trying to keep the name Pub Squash under wrap. Do you remember saying that or answering "yes" to Mr. Bannon's question? A. Yes, that is correct plus every other name they keep under wraps too.

Q. The question was asked, in relation to Pub Squash, with reference to when you told Mr. Newell the name of the product which you proposed to market and the context of the question was around about the time when you commenced operations. I *think it was at p. 156 where you were asked, "Q. Did you give any instructions for the development of the lemon squash you proposed to market? A. Yes. Q. When? A. To John Newell a few weeks after commencing operations"? A. Yes that is correct. 30

Q. Do you recall, at that time, if you revealed the name to him? A. At that time I can't remember. I think he knew of the name later in the year but whether it was at that meeting or some time later that I told him I could not be absolutely positive. He was a senior manager and he would have been *See now page 174. 40

entitled to know the title of the name around about the time we would be releasing the product.

Q. Were you deliberately, from the time of the commencement of the company, avoiding the use of the name "Pub Squash" except between yourself and Mr. Mojsza and senior members of the organisation? A. All the trade names I had I had actually avoided discussing with anyone.

Q. And you wanted, did you, to not make known to anyone outside those who could be trusted in the company, the name of new products until you were pretty close to launching them? 10
A. As much as possible, yes.

Q. And would it be correct that until the end of 1974 there would have been only one or two people who knew of your intention use the name "Pub Squash"? A. No, there could have been more. I could not say who was involved in any conversation with people that I discussed "Pub Squash" with.

Q. You were certainly anxious to prevent the name being known as the name you were going to use in relation to the product, is that correct? A. While I was at Coca-Cola I showed the trade name to the people at Coca-Cola and they said it was a good name. 20

Q. You say trade registration is the pub name? A. Yes, that is correct and they would have known I had considered that name as a possible product for anyone or any time.

Q. You say you not only mentioned the name "Pub" but the name Pub Squash to the people at Coca-Cola before you left in 1973? A. Yes, that is correct.

Q. Can you tell me the names of the people? A. Stewart Lidsfield, Steve Tollis - I assumed these people were all in the marketing services section and at that time it was not any great secret. 30

Q. Was anything written down at that time? A. No.

Q. It was just mentioned in passing? A. Yes. In regard to the material I found overseas it was just one item.

Q. The drink which had been developed and marketed as the post-mix which you called the company Brand X was a drink which qualified if you were going to use it for Pub Squash, was it not? A. It was Pub Lemon Squash and it was always to be called Lemon squash but when they put orders in they said, "Would you send us lemon squash?" 40

Q. You say the name that you say you had in mind and mentioned

to people while you were at Coca-Cola was Pub Squash being the name referable to the lemon squash drink in your mind?

A. Correct.

Q. And Coca-Cola was producing the lemon squash drink while you were with them? A. Yes, post-mix.

Q. And you said you had not at any time suggested a name for this lemon squash drink which was being distributed by Coca-Cola, is that correct? A. That is correct. May I explain? You see they mark it tonic, ginger ale and bitter lemon and lemonade and lemon squash all under the brand name X. None of those products actually have a brand name. 10

Q. What I was asking you was is it not correct you said to us this morning you had not suggested a name for the lemon squash which was being distributed Brand X to anyone in Coca-Cola? A. No names have ever been put on any of the products distributed in the post-mix. There was no necessity to name it.

Q. Did you say this morning that you had not suggested to anybody at Coca-Cola, in relation to the lemon squash being distributed as the post-mix by Coca-Cola, that there will be a particular name for that product? A. That is correct. 20

Q. And I also asked you the same question with regard to the bottle Lemon Squash which had been introduced as an experimental run? A. Yes, that is correct.

Q. You say, however, now that you did mention to the two people you have named in the organisation, that Pub Squash would be a good name for lemon squash? A. Yes, that is correct.

Q. Was that at the time when the lemon squash post-mix drink was being distributed by Coca-Cola? A. Who told us that had nothing to do with that conversation. 30

Q. Was it at the time when that drink was being distributed by Coca-Cola? A. It could have been prior or just after.

Q. When you say prior you mean you might have made that suggestion before the first distribution to hotels and clubs was made of the post-mix lemon squash drink? A. Yes, but I can't remember the exact date.

Q. You say you mentioned this name to at least these two men. Do you say that you mentioned it in a context where you were seriously putting forward that the company ought to adopt this name for one of its products? A. No, I was getting more material that I brought back from overseas and it cropped up and it was there. I said, "Fancy going overseas and getting a 40

name like that" and there was laughter about it and I put it back.

Q. Is it correct that it was a trade mark pub rather than a combination of words Pub Squash? A. No, it was Pub Squash.

Q. What you contend is you had the name Pub Squash in mind as a possible name for a drink to be produced at some time in the future? A. When are you asking this?

Q. When you mentioned it to the two people at Coca-Cola -
A. It is logical that squash follows the word pub for anyone that drinks lemon squash and I cannot remember that conversation, it was in 1971. 10

Q. Would you agree, on the way you are recalling it, that it was a passing reference to a possible name for some product at some time or another? A. Yes, I would say it is a likely name for some product in the future.

Q. And coming forward to 1974, would you not agree that on your account, Pub Squash was a name you had in mind as being a name that could possibly be used for a lemon squash drink at some stage in the company's operation? A. That name with others, yes. 20

Q. And in May 1974 there certainly had not been any definite decision to use that name with any particular product? A. Yes, there was.

Q. You have said in answers to interrogatories that you became aware of the Cadbury-Schweppes television advertisements and the slogan "Squash like the pubs used to make" towards the end of 1974, do you recall that? A. Yes, my managers informed me. I didn't see the commercial myself.

Q. Who was it that first told you about it? A. I can't remember. People did talk about the commercial. 30

Q. When you say people talked about the commercial you mean people outside the organisation as well as inside it?
A. Within the company.

Q. Did you not interest yourself in seeing the commercial on television? A. No, I didn't.

Q. Did you ever see any of the Solo commercials on television?
A. In February 1975, yes.

Q. And you say you have never seen one before that?
A. No, I have not seen one before that. 40

Q. On the occasion when you saw it in February 1975 was it

the result of deliberately setting out to see that commercial or was it an accident? A. I think actually it was just an accident.

Q. What was it that the management told you about the commercial? A. They told me Schweppes have a television commercial with a chap dribbling drink all down his face. I think it was the first comment that was made.

Q. Did they think it was a good or bad ad? A. We thought it was in bad taste. 10

Q. It is not the answer in the commercial point of view is it? A. That is correct.

Q. They thought it was a good ad for the purpose of selling soft drink? A. They only made the comment about dribbling, they didn't say whether it was a good or bad ad or not.

Q. Do you say more than one person in the organisation told you about this advertising? A. I think there was general discussion ---

Q. And a number of people had seen it in your organisation? A. Yes, I am sure. 20

Q. And they were struck by it? A. As much as Export or Coca-Cola I imagine.

Q. But they made the comment about a man with drink dribbling down his chin? A. Yes.

Q. That comment was made by a number of people? A. Yes.

Q. And you agree with advertising that the principal thing is to strike upon some matter that people remember? A. Strike upon something that people retain, not necessarily pictorial.

Q. Yes. I was not confining it to that? A. Yes through association is what people generally try to achieve and not so much remembrance of any particular ad. 30

Q. Do you recall one of the interrogatories namely, 33, which asked, "When did any officer or employee of the defendant, having managerial responsibility, first know or believe that Solo was advertised upon television or radio as having certain of the qualities for lemon squash like the pub used to make" Do you recall that question? A. Yes.

Q. If you can't we can have the interrogatories placed in front of you. Would you like that? A. Yes.

Q. Now the question that I read you was part of 33A 1A on p. 1 of that document? A. Yes.

Q. And the answer is in 33B 1A-C on p. 2? A. Yes.

Q. And you agree that it follows that there was someone at managerial level in your company who was aware, in or about December 1974, that Solo was being advertised as having certain of the qualities like the pubs used to make or words to that effect? A. Correct.

Q. And you swore these interrogatories, didn't you? A. Yes. 10

Q. Who was it in the organisation, in or about December 1974, who knew that this slogan was being used in advertising? A. I can't remember. I can't remember specifically who said it but it was mentioned.

Q. Do you remember it being mentioned in or about December 1974? A. Yes, towards the end of 1974.

Q. How closely are you able to fix the date when you first recall it being mentioned? A. It had to be towards the end of December.

Q. How do you work that out? A. Because I don't think advertising started until December. 20

Q. Would it be right then that your understanding on your recollection is that you would have become aware of the slogan which was being used shortly after the advertising began? A. It was at the end of December. Say it started towards the end of December. It was towards the end of December when I remember a comment being made.

Q. How do you fix December being the end of the time? A. That is my memory of it, being the end of December.

Q. You said you thought it was the end of December because you thought advertising had not commenced earlier before that? A. That is right. 30

Q. And your recollection of it is that you first knew about it shortly after the advertising commenced, whenever it was? A. If it was the end of December but that is when I first knew of it.

Q. If the advertisement began in October you would have thought it would have been at the end of October? A. I was working there 24 hours a day and had it been on television before that I would not have seen it. 40

Q. Perhaps not all the managerial people were working the same hours. Would not you agree that first of all your managerial staff would have been very interested in the launching in New South Wales of an advertising campaign for a lemon squash drink? A. Some of them would have been; most of them didn't know of it at the time.

Q. But you had commenced this company in 1974 and had yourself recruited managerial staff for the new company? A. Correct.

10

Q. By and large those staff had come from other soft drink organisations? A. Correct.

Q. You had personally chosen the ones you thought you could weld into a good team in your company? A. Correct.

Q. And you chose these people for their skill and enthusiasm, as you thought it would be in your company? A. Correct.

Q. And it would be important to know what rival lemon drinks were launched by competitors in Sydney, is that right?

A. We actually did see the can shortly after it was launched.

Q. You say you saw the can, does that mean, for business purposes, somebody went and got a specimen of the can and brought it to the office? A. It is standard procedure when one of the representatives in the trade see a new product they bring it to the sales manager.

20

Q. Somebody brought it to your attention not long after Solo came into national launching - a can of Solo - is that correct?

A. Yes, that is correct.

Q. You have been present while all of the evidence has been given concerning sales of Solo through supermarkets as from December 1973 and then through January and later months of 1974. You have been present whilst evidence has been given on that and argued about, do you agree? A. Correct.

30

Q. And is it your contention that there was no Solo sold through supermarkets such as Franklins and the others that were named in January, February and March of 1974 (objected to; not pressed).

Q. Do you agree, as the managing director of the defendant, you are the person who on behalf of the defendant is principally communicating instructions to your legal advisers and to your counsel? A. Correct.

40

Q. And do you agree you have heard various witnesses here being cross-examined to the effect that there was no sales of

Solo through supermarkets in Sydney in the first three months of 1974? A. I have not seen any evidence to say that there has been.

Q. Is this the position that you yourself did not know one way or the other whether Solo was being sold through supermarkets in the first 3 months of 1974? A. To my knowledge and from all the information I have available from my people there was definitely no Solo sold in those supermarkets prior to October, November of 1974.

10

Q. Do you say that the procedures of reporting, which your representatives were obliged to carry out after the commencement of operation of your company in May 1974, were such if Solo lemon drink was then being sold in supermarkets in Sydney that fact would have been reported back into your managerial level? A. At the time we commenced I think there was no actual reporting system because we were all doing different functions and selling and trying to get a business established.

Q. I am talking about when the organisation began in May 1974. Am I correct in asserting that the reporting was not good at that stage, the report back --- A. We would have picked it up, the sales, on printouts which are supplied on each of the food stores.

20

Q. Did you commence to get the printouts immediately on commencement in 1974? A. No. When you buy products they give you the current one and all the back up information which we have here.

Q. Between May 1973 and May 1974 you were engaged in organising in various ways, in getting the new company started, as it did in May 1974, is that correct? A. Correct.

30

Q. And among other things were you not then keeping an eye, as closely as you could, on the soft drinks that were being sold on the market in Sydney? A. There was an orderly marketing arrangement with most of the companies at the time and there was nothing much happening in the soft drink business.

Q. The orderly marketing agreement did not impose any restrictions on the introduction of new lines, did it? A. No.

Q. You would have been keeping an eye on any new lines that were being introduced in that period, would you not? A. I had just left Coke and I knew they had no plans to introduce new lines.

40

Q. Would you not as a matter of ordinary business prudence keep up to date with what was actually being sold in the market in Sydney from time to time during that 12 months

preparatory period between mid 1973 and 1974? A. If it was anything that was of a major nature, I would know. There was nothing.

Q. You would not know? A. Only by watching the television and seeing what was advertised.

Q. That was the only way? A. Talking to somebody in the soft drink business that would inform me as to what was happening, anything of major importance.

Q. Who in the soft drink business did you talk to from time to time? A. Some of the people who were still working at Coca-Cola. 10

Q. Did you have any contact with any of the people in Cadbury-Schweppes or Tarax? A. No, I might have met them somewhere.

Q. By the time you began in May 1974 it was a year since you left the Coca-Cola organisation? A. Correct.

Q. That would be unbusinesslike to rely on the information that was a year out of date, would it not? A. The market just did not change. I think it was fairly static in that twelve months. 20

Q. What I am suggesting to you is that if you were keeping an eye on the market you could form your own conclusions about what was happening? A. It was a matter of Coke getting bigger; that was pretty well all that was happening.

HIS HONOUR: I really think you are not answering the question, you know. One of the things I have to form a conclusion about is your credibility. I think it would be to your advantage if you would listen closely to Mr. Priestley's questions and confine your answers to them. It maybe it is just a habit of yours but you do tend, as it were, to sidestep the question and come back with something that really is not an answer. 30

MR. PRIESTLEY: Q. If you were keeping an eye on the market you could form your own conclusion as to what was happening in the market? A. I had no means of keeping an eye on the markets because I had no organisation available to me as to promotions other than what I could observe as an individual in that period of time.

Q. You have told us some of the things that you were doing between May 1973 and May 1974 in regard to the organisation of your new venture. You have made it clear that one person with whom you dealt considerably during that time was Mr. Mojsza? A. That is correct. 40

Q. Who are the other people that you were dealing with during that twelve months period. A. Mr. John Baxter from Pepsi Cola and the management of General Foods.

Q. All people very much interested in the soft drink business?
A. No, generally people, or most of them were, from White Plains in the United States, and in the food business.

Q. Mr. Baxter, for example, he was interested in the soft drink business, was he not? A. Yes.

Q. A man who had an association with it practically over a lifetime? A. That is correct. 10

Q. At least some of the people at General Foods were interested in the soft drink business, were they not? A. I did not have a lot to do with the people in the soft drink division of General Foods because the senior management were concerned that any room of a possible closing down of the operation would unnerve most of the executive, so our discussions were at most times fairly confidential.

Q. Are the Sydney metropolitan and Melbourne metropolitan markets the two major soft drink markets in the country? 20
A. Yes, they are.

Q. In the course of formulating your plans for your new company, you had had in mind, had you not, that you would wish to go into the Victorian market as soon as conditions permitted?
A. No, I did not.

Q. You had had in mind you would wish to expand into Victoria if your business was sufficiently successful? A. No, I had not.

Q. You have in fact, expanded into the Victorian market, have you not? A. Yes, I have. 30

Q. As a result of the success of your business? A. No, I was forced to expand into Victoria.

Q. What, some economic mechanism brought that about, did it?
A. Our entry into the market stirred up considerable price cutting in the Sydney market and we found that most of our competitors were generating money outside New South Wales and putting it into this market to discount to a very low price, so we had no alternative but to set up an operation in the other markets to ensure we had a presence.

Q. In the Sydney market your competitors were able to carry the low price that arose from the discounting by reason of the profits they were making elsewhere from higher prices; is that what you are saying? A. That is correct. 40

Q. Is it not correct that it was the Passiona Marketers Company which initiated the discount which brought on the price cutting in Sydney? A. No, it was not.

Q. Who do you say it was? A. I say it was Shelley's soft drinks.

Q. When did they commence their discounting operation?

A. Not long after we commenced operation.

Q. Was the result of their doing that that everybody followed suit immediately? A. I really cannot speak for what other people do, one after the other if it was the result of it or whether it was intended that everyone should cut the price. 10

Q. Once somebody cut prices in the market you as managing director of your company were in a position to ascertain the prices set by each of the persons selling the products in the particular field, were you not? A. Reasonably so, yes.

Q. It would be a matter of intense interest and importance to you? A. Of course, yes.

Q. Are you not able to say whether it was your company or some other company which reacted first after the Shelley's discount? A. No. Discounts are not always clearly defined. What company's do is offer co-operative money payments to food stores which you cannot trace, but, from time to time, reflect in prices. It is not easy to really pinpoint who is doing what in the market. 20

Q. That brought to your attention that Shelley's had done something which brought down prices? A. Some of the accounts we had inherited from General Foods, accounts that they had had for a period of time had phoned us and said to take our coolers out because they were buying products cheaper from other suppliers. In the first case it was Shelley's so we reacted to that and said, "OK, we will match any price." 30

Q. Would you not agree that the prospect of discounting or price cutting was something perfectly foreseeable at the time when your company began operations in May 1974? A. No, I would not.

Q. You are quite positive, are you, it was Shelley's who first began this price cutting campaign? A. No, I am not quite positive because at the time everyone was discounting and I cannot say who was the first to commence. 40

Q. When I asked you a moment ago I thought you said it was Shelley's who was the first? A. I said I believed it was Shelley's. If I said that I apologise. I believe it was Shelley's.

Q. You are prepared to be completely definite, are you, that it was not Passiona Marketers who began the price cutting?

A. I am completely positive that we did not commence it. All our budgeting reflected the highest price. In fact, the price cutting ran us into a very serious situation which we had not projected.

Q. At some stage you have become aware, have you not, that Solo was initially launched in Victoria at the end of 1973?

A. Yes.

10

Q. When is it that you say that you first learnt of that?

A. I think I read it in an article that had been written by somebody or other - I cannot really - I know I did read that it was initially launched.

Q. When do you say you read the article? A. I think it was sometime in 1974 or 1975.

Q. Do you agree that you now know that the launching of Solo in Victoria was successful in the sense that a lot of people so soon thereafter began to buy Solo and a lot of people became very much aware of the television advertising campaign? A. I am aware it was successful, yes.

20

Q. You are aware now that what happened in Victoria in December 1973 and January 1974 was that a new lemon drink was successfully launched into one of the two major markets in Australia? A. Yes, I am aware it was, yes.

Q. And that the kind of lemon drink that was then successfully launched was, in marketing terms, a new departure? A. It was into an existing category, yes.

Q. It was into an existing category but by a kind of drink that had not previously been attempted to be sold in that category? A. I think it is really. Solo is really a lemon drink. The Cadbury-Schweppes brand marketed a lemon drink.

30

Q. You know the language of your trade much better than I do, but, whatever the precise words may be, what had happened was that in December 1973 and January 1974 there had been a successful and new kind of promotion made in regard to a lemon squash drink? A. I cannot say whether it was successful in 1973 or it was successful in 1974 in Melbourne because I really do not know what happened in 1973. I know it was launched.

Q. You did use the word "successful" yourself in answer to a question of mine. In December 1973 and in January and February 1974 there had been a successful - A. I am sorry, I was thinking it was December 1973, but 1974 I think it was launched successfully, but I really do not know the results of 1973.

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Q. You do agree that you later discovered that the Victorian launch was successful? A. I really couldn't say if it was successful. I do not know the sales. I know the product has been accepted. I believe the sales are diminishing so -

Q. Just try to address yourself to answering to what I am asking you. I am asking you whether you now know the Victorian launch which began at the end of 1973 and continued through the first few months of 1974 was then successful? A. I would say it had an apparent success. 10

Q. So your present state of knowledge is apparently that in December 1973 and January, February 1974 there was a successful launch of Solo in the Victorian market? A. Apparent success, yes.

Q. An apparent success of a new kind of marketing in your field in one of the two major markets would be a matter of importance to you, would it not? A. If I knew of it, it would definitely.

Q. It would be something very likely to come to your attention as a man expert in his field? A. I think if it had been very successful. 20

Q. And the fact is, is it not, it did come to your attention?
A. Not until after 1974.

Q. I suggest to you that it came to your attention by report during the first part of 1974? A. No, it did not.

Q. You were aware of the national launch more or less at the time it happened, were you not? A. I think I heard about Solo. I did not know about Solo at all until it was launched in Sydney and 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. I heard it had been launched, 1975, it had been launched in Victoria. Prior to that, I did not know it had been launched in 1973 until after and further into 1975. 30

Q. Leaving the Victorian launch to one side, I am asking you whether you were definitely aware of the launch in the market you were principally concerned with yourself. At about the time of the launch was made? A. Yes, I was.

Q. You became aware, did you not, Solo was immediately gaining large sales in the Sydney area? A. No, I did not.

Q. Did you not make any effort to discover whether that was the case or not? A. Not initially. It would have been after December. It came to my notice Solo had started to pick up in sales. 40

Q. How would you discover the extent of the sales being made by Solo? A. Printouts from food stores.

Q. Any other means? A. Not really. We have no other means - hearsay from representatives.

Q. Representatives would encounter shopkeepers who were buying Solo or Pub Squash - Pub Squash was not around then but other products - and get an idea from what the shopkeepers told them was popular? A. That is right.

Q. That sort of information was given into your organisation shortly the launch of Solo in the Sydney market, was it not? 10
A. No, it was not.

Q. How would it be recorded if it was brought in? A. In those days it would not have been recorded.

Q. As at the end of 1974 you had had in mind to put on the market a lemon squash type drink, had you not? A. That is correct, in 1974, yes.

Q. Before you put your drink on the market, you were aware of a national television campaign for another drink very much in the same area as yours? A. I was aware of it in New South Wales 20 only in December before I put it on the market. That was the question was it?

Q. Yes? A. I was aware of Melbourne and aware of Queensland and New South Wales. I was not aware of it being sold anywhere else.

Q. I suppose from your point of view those 3 States were the only ones that mattered at that time? A. I was only concerned with Sydney.

Q. Was not the price cutting war under way well and truly at the end of 1974? A. Well, it was under way, but we certainly 30 were in no position machinery-wise to manufacture a product for shipment into other States until mid 1975.

Q. As a marketing man, would not the desirability of expanding into other States, if you could manage it, present itself to you as soon as you realise the position arising under the price cutting circumstances? A. That decision was not made until mid 1975.

Q. What I am asking you is, when did you realise it would be a good thing to do, if you could manage to do it, to move into other States? A. I did not consider it until we looked at 40 our financial situation as we moved into 1975. We had to examine our capacity to see if we had sufficient capacity to manufacture in Sydney and ship to a warehouse in Melbourne.

Q. Were you not saying a short time ago that, shortly after, Passiona Marketers began operations in May 1974 there was severe discounting in the trade initiated, you believed, by Shelley's which immediately put severe financial pressure onto your company? A. Not immediately.

Q. How long did it take to manifest itself? A. I would say it became apparent in February, March.

Q. Amongst the new products that you say you had in mind to be put into the market by Passiona Marketers at the time when that company began its operations, was anyone of those particular projected products more important than any of the others in your mind? A. Of the products, the most important product at the time was the product C-Time.

Q. C-Time in May 1974 is the one you regarded as the most important one? A. Yes. 10

Q. Was that the first of the new ones you brought in that market? A. No, the first of the new ones was 7-Time which was a lemonade drink.

Q. C-Time came second to it, did it? A. C-Time had been formulated and it was nearly 5 months until we could release that product.

Q. No firm decision to put a lemon squash drink on the market had been made before February 1975? A. No, I had made the decision I would launch several products one of which was Pub Squash and we were in the process of formulating Pub Squash and other products. 20

Q. But it was not until February 1975, was it, that the first experimental run of the lemon squash drink was made? A. That is correct.

Q. And until that experimental run had been made, it was impossible, was it not, to arrive at a final decision to market the lemon squash drink? A. I had plans to market it prior to -

Q. Just try to remember the question; it was impossible to make a final decision to market a lemon squash drink, was it not, until you had the result of the experimental run? 30
A. That is correct.

Q. After the conclusion of the experimental run, it would have been perfectly feasible for you to discard any idea of the, lemon squash without any more cost, without any great cost having been incurred? A. That is correct.

Q. In February, 1975 at the time of the experimental run, you were well and truly aware, were you not, of the penetration of the Sydney market by Solo? A. Yes, I was.

Q. And well and truly aware of the advertising campaign being conducted by Solo? A. Yes, I was. 40

Q. And, again, well aware that Solo was being sold in association with the advertising slogan, "Squash like the pubs used to make"? A. I do not call it a slogan, I call it background copy.

Q. Whatever you like to call it, you knew what was happening?
A. Yes.

Q. The solo drink was being advertised with that background copy being emphasised? A. No, I think "a man's drink" was being emphasised.

10

Q. You agree that certainly in all of the television advertising that was taking place from whenever it began in 1974 up to February 1975 the words, "squash like the pubs used to make" underwent variation or others were being used? A. No, I was not aware.

Q. You were not? A. I do not know what your advertising programme was. I did see the commercial. I was not aware if that is all you were doing.

Q. You said in the answer to the interrogatory that you have before you whether in or about December 1974 that the slogan was being used in the advertising? A. In some of the advertising, yes.

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Q. What you are qualifying in your answer to my question is not agreeing it was in all the advertising although you agree it was in some? A. That is correct.

Q. You were aware that the television advertisements were being shown very frequently on television? A. No, I was not aware of that.

Q. Again, would it not be something you were interested in knowing about at the time? A. Well, I think we were interested in knowing what you were doing, or knowing what Cadbury-Schweppes were doing, but the frequency of advertising we have no way of measuring. I would certainly like to know how frequently people advertise, but certainly there is no way we can find out.

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Q. You were in touch with an advertising agency at that time, were you not - Harris-Robinson was its name, was it not?
A. Yes.

Q. You know they had facilities for tabulating how often particular advertisements are shown on television? A. They did not; they were only just starting at the time.

40

Q. You knew that sort of information could be purchased from

various organisations around the town, did you not? A. No, I do not think it can.

Q. (Original interrogatories and answers shown to witness.) If you turn to questions 26 to 29 on page 9 of that document and the answer which is stated in one sentence to all those questions in the answer part, it was: "The conversation of the nature outlined in questions 26 to 29 did occur", the nature outlined being at a meeting at which you were present. Somebody said, "Lemon Squash like pubs used to make", why don't we come out with a pub squash or similar?" You recall those questions and answers? A. Yes I do. 10

Q. What is your recollection of the date of the meeting at which a conversation of that nature occurred? A. The conversation was not exactly of that nature, but there was a meeting we were having a drink after work. One of the managers was there and it was towards the end of March.

Q. Who was the manager? A. Ian Robinson.

Q. If you would just turn back to question 17 of page 6, you see that there is an answer "Yes" to the question whether there was any discussion prior to the defendant producing and marketing Pub Squash between officers of the defendant and an advertising agency relating to Solo or its advertising and the get up of cans or bottles in which it was sold. Do you see that? A. Yes. 20

Q. Who was it that had that discussion with the advertising people? A. It was me.

Q. When was it? A. December. I think it was towards the end of December or January.

Q. Would you turn over to page 7 and look at the answer to 17 (b). Do you not agree it was in approximately October 1974 that you had that conversation? A. No, I spoke to Harris-Robinson about December. 30

Q. After the adjournment I want to ask you whether you want to change the answer to 17(b), if you would consider that over lunch hour? A. Yes.

(Luncheon adjournment.)

UPON RESUMPTION:

MR. PRIESTLEY: Q. I have been asking you before lunch about the answers to interrogatories which appear on p. 7 of the statement in answer to the interrogatories which was first prepared, and then I have been asking you about what at p. 7 is 40

described as the answer to 17(b), whether a, b and c together read that you and Mr. Harris approximately October 1974 discussed the introduction of Solo lemon drink and what you conceive to be the shortcomings of its advertising campaign?

A. Slightly inaccurate. It should read as part 18Bb which states that on and after approximately October 1974.

Q. What does that mean? A. We had several discussions that I think the question related to but we discussed the cans as well as the advertising. I am not sure.

10

Q. Answer c in the middle of p. 7 specifically refers to the introduction of Solo and the advertising campaign, would you agree with that? A. That answer itself, yes.

Q. That is related back to discussions between you and Mr. Harris in approximately October, 1974 as it stands? A. As it stands, yes.

Q. But you say it should read, "on and after October, 1974"?

A. Yes, and parts c should read, "Discussions took place regarding the introduction of Solo of a general nature". You see I don't believe there was any advertising in October, so it is not possible to have discussions on advertising. I think it followed the question B that there was ongoing discussions regarding firstly the cans and at a later date the advertising set-up. So discussions were of a general nature and not specific.

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Q. You do agree, do you, that some discussions took place between you and Mr. Harris concerning the introduction of Solo in October, 1974? A. I would have mentioned to him about the cans, October onwards.

Q. And the discussions with Mr. Harris will have taken place, will they not, in respect of an advertisement which your company was considering in regard to its product? A. I think I was trying to answer this question as accurately as I could. It should be remembered it was so many years back, but believing if the campaign on the market towards the end of October I would have discussions with Mr. Harris and I would have had subsequent discussions with Mr. Harris naturally about the product and that is what I am trying to convey.

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HIS HONOUR: That is not an answer to the question.

MR. PRIESTLEY: Q. What was the business purpose of your discussion with Mr. Harris in October, 1974? A. We met weekly and I could not remember at that time what the discussion was.

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Q. You met weekly in connection with the business of your company, did you? A. Yes, that's correct.

Q. When did the weekly meeting begin as a regular thing?

A. Well, perhaps I mean more informal meetings at the time. We didn't use an office, he didn't have an office, he was starting up business and started to call down as from October.

Q. He began to call down in order to discuss advertising business of your company? A. Yes, amongst other things.

Q. You say he was in the process of getting the advertising business going in which he was a principal? A. Correct.

Q. You were a client of that new business of his? A. That's correct. 10

Q. He was coming to see you regularly concerning what sort of advertising or advertising campaign or other business that his firm could be putting in hand on your account? A. Yes, that is correct.

Q. In about October 1974, you discussed with him, you said a moment ago, the Solo cans? A. On or about October, 1974, yes, I would have discussed it, yes. I could not be specific as to the date.

Q. You are certain you did discuss the Solo can with him? A. Yes, I did discuss it with him. 20

Q. Why was it in connection with the business of Passionate Marketers it was relevant to discuss the Solo can? A. I would just have showed it to him stating that this was the new product from Schweppes.

Q. Presuming, presumably you did that for a purpose? A. They are competitors.

Q. What practical purpose was there in your showing Mr. Harris a competitor's can? A. I think it was on my desk at the time and I showed it to him. 30

Q. Was it purely an idle gesture or did it have some business purpose? A. No. It would have been that it was available there and I showed it to him. There was no specific purpose for showing it to him other than marketing information.

Q. At that stage your own label and name for your projected lemon squash cans had not been finally decided, had they? A. That's correct.

Q. Was showing him the Solo can done partly with a view to getting his mind to work on what label and name should be adopted for your can? A. No. 40

Q. What possible point was there in showing him the Solo can?

A. I showed him every can that comes on the market that is available and that we have in the plant.

Q. Why? A. He is an advertising man and he is interested.

Q. So you did it for his purpose and not yours, is that the case? A. I think it is passing information, yes.

Q. Wouldn't you agree it is passing on information that might be useful for his purpose as an advertiser or as an advertising agent and your purpose as a company seeking his advertising skill? A. Certainly.

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Q. Wouldn't you agree that amongst the practical reasons for showing him the Solo can there must have been a reason that it would be of some assistance to him in formulating his own ideas as to what name and get-up should be adopted for your can?

A. No, I don't see why.

Q. Let me put it in a completely negative way. You would be anxious, I suppose, to avoid putting out a can with a get-up identical to that of the Solo can? A. Of course.

Q. Coming back to the interrogatories for a moment. Did you understand at the time you swore the affidavit on 22nd August 1977 that the answers to the interrogatories were true in substance and in fact, that you were pledging your oath to the accuracy of the answers? A. Yes.

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Q. Did you approach the task of answering the questions diligently and conscientiously? A. Yes. We did them in a fairly hurried fashion.

Q. Did you endeavour to make them as accurate as possible?

A. Certainly.

Q. How do you account for the fact that you now say, if I follow you correctly, that the answers on p.7 in pars. B and C under the heading, "As to 17B" are not accurate? A. I think I read them as being what I meant and it was not until you raised the question that I saw that it does read differently from what I meant.

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Q. Have you gone through the answers to interrogatories since they were first sworn with a view to seeing whether there is anything else that may be not accurate? A. Yes.

Q. Have you found anything else? A. I don't think so.

Q. At the moment is it the situation that you have looked and you have found nothing that you think is inaccurate?

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A. Correct.

Q. In considering the answers on p. 7 that I asked you to look through during the lunch hour, did you read the whole of Q. 18 as it commenced towards the end of p. 6 and the answers to that question again? A. Yes.

Q. Is it correct then, is it, that as is stated in 18Bb at the very foot of p. 6, "On several occasions on and after approximately October 1974 there were discussions between officers and employees of the defendant and representatives of the advertising agency or marketing advisers relating to Solo or its advertising or the get-up of the cans"? A. On or after October 1974? (Question withdrawn.) 10

Q. Looking at the foot of p. 6, it is correct, is it not, that the answer given which has got the main signification, 18B is saying that officers and employees of the defendant during informal discussions outside normal working hours on several occasions on and after approximately October 1974 were discussing or having discussions relating to Solo or its advertising or the get-up of the can? A. Yes, that is correct.

Q. They were discussions in which you were taking part? 20
A. Not always.

Q. On occasions? A. On occasions, yes.

Q. And those occasions that you were not present on you know of now? A. I just assumed - I was trying to answer and I assumed people did discuss it.

Q. What led you to that assumption? A. Its product on the market.

Q. You would assume, would you not, that the senior officers of your company would be aware of the product Solo once it did come onto the market? A. Within two weeks, yes. 30

Q. And that such senior persons would also be aware of an intensive advertising campaign relating to that product?
A. Most of our managers were working 16 to 20 hours a day for that period of time and as I said earlier I think that we did become aware of it - I became aware of it in December through employees.

Q. The October date in 1974 given at the very end of p. 6 refers does it not, to your own knowledge of discussions?
A. Of the cans, yes.

Q. Turning to the top of p. 7, the answer sets out the substance of what discussions were held between the officers or employees of the defendant in relation to those matters? 40
A. Yes.

Q. We are agreed that that discussion commenced at about -
in October? A. Our discussions, yes.

Q. You set out some of the matters that were discussed in
those informal gatherings, the first being the fact that it
was unfortunate that Solo lemon squash drink had been launched
when the defendant was preparing to introduce Pub Squash onto
the market? A. Yes.

Q. Were you present at any discussions when that aspect of the
matter was discussed, namely that it was unfortunate that this
drink had been launched? A. I have heard comments made to
that effect. 10

Q. Did you make the comment? A. No.

Q. Do you remember who it was who made the comment? A. No,
I do not.

Q. What do you understand by "the comment"? *A. It was
unfortunate that we have got to get the product on the market
by the name of Pub Squash and there was an advertisement relat-
ing to squash like pubs made.

Q. What was it that made you think that that was important? 20
(Objected to; question withdrawn.)

Q. What was your understanding of why it was that that was
said to be unfortunate? A. I think it was - (objected to;
question withdrawn.)

Q. You were present at a conversation in which somebody made
the remark, "It was unfortunate"? A. Yes.

Q. You have already explained to some extent what you under-
stood by that remark in one answer indeed in your evidence
possibly.

(Answer marked with asterisk read by court reporter.) 30

What was your understanding of the comment made by the employee
that those circumstances were important? A. I'm sorry, would
you repeat the question.

Q. What was your understanding of the comment made by the
employee, whoever he was, that the circumstances as just out-
lined in the answer you last gave were unfortunate? A. My
understanding of what he believed?

Q. Your understanding of what he meant? A. I think he meant
for us to put a product on the market, it takes the shine off
our introduction. 40

Q. It was unfortunate from the point of view of your company that another company had got into the market before you with a similar product which it was advertising in this way? A. No. It was unfortunate they were using the copy in the advertising, not the product.

Q. It was unfortunate from the point of view of your company that the copy talking about "Squash like the pubs used to make" was being used in connection with Solo? A. Unfortunate, I think, meant it was unfortunate anybody was mentioning squash like the pubs used to make for the product, not so much in relation to Solo because that was a problem we could handle. It was unfortunate about the copy or wording. That is what he was endeavouring to convey I should imagine. 10

Q. That is your understanding of what he meant, was it? You understood he was trying to say it was unfortunate about the copy being used concerning "squash like the pubs used to make"? A. Well, I thought that. I really don't know, as I say. (Objected to.)

Q. You have told us that you were present at at least one discussion in which the fact that it was unfortunate that Solo lemon drink had been launched when the defendant was preparing to introduce Pub Squash onto the market was mentioned by someone? A. Yes. 20

Q. Did that happen on one occasion or more than one occasion? A. I can only think it was mentioned some time in January or it was after the period when we were looking at Pub Squash and it was generally more known to people in the company.

Q. You have now put that at January - you realise answer (C) starting at p. 7 is dealing with discussions on and after approximately October 1974? A. That is correct. 30

Q. And I suppose it was you who decided the order in which topics (C) and (i) (ii) (iii) and (iv) were set out on p. 7 - (objected to; allowed). Do you recall the question?

HIS HONOUR: Q. Mr. Priestley was suggesting it was you who determined the order in which items (i) through to (iv) were set out in answer to the question and he asked whether you agreed or did not agree with that? A. I do not think there was any intention to set a particular order.

MR. PRIESTLEY: Q. You supplied the substance of what appeared in (i) to (iv) to whoever was preparing the answers for you to put into written form? A. Yes. 40

Q. Would you agree that the order in which those items appears reflects the order in which you recounted them to the person who was preparing the answers for you? A. Yes, I would say so.

Q. And would you agree that the first matter that came into your mind in regard to what it was that was discussed at these informal discussions which you were trying to recollect was this item about it being unfortunate that Solo had been launched etcetera? A. Yes.

Q. And that was the matter that stuck in your mind most prominently about those discussions? A. Well, not really.

Q. At all events, when asked about them that was the first one that came to your memory? A. Yes. 10

Q. I would put to you that it is something that was discussed as soon as somebody at managerial level in your company had become aware of the content of the television advertising campaign on behalf of Solo? A. There were only three people in the company that knew of Pub Squash.

Q. Well, that served them to limit the people through whom these discussions were held? A. Yes.

Q. Who were the three people? A. These discussions continued right through January - most of the people in the company knew we had been launching a Pub Squash would be late December-January. 20

Q. Until late December-January only three people knew your intention to use the name label "Pub Squash"? A. As I said earlier, I kept it confined to three people, but whether or not other people knew about it without my knowing, I cannot say.

Q. What you had intended at any rate was only you and two other people would know the name until such time as you decided to give it wider circulation? A. Yes.

Q. Who were the others? A. Lazslo Mojsza and Ian Robinson.

Q. And so far as you were aware at any rate you had succeeded in that objective until late December 1974 or January 1975? A. It would be hard to say, I cannot recall anyone mentioning it, but the technical people could have known or found out from Ian Robinson. 30

Q. First of all, your intention was it should be confined to yourself, Mojsza and Robinson? A. Yes.

Q. And so far as you were aware, nobody apart from those people knew until late December 1974 or early January 1975? A. That should be correct, yes, with employees, yes.

Q. At late December 1974 early January 1975 there is no doubt, is there, that you yourself, as well as the other 40

executives in the company, were well aware of the Solo television advertising campaign? A. When was that period?

Q. Late December 1974 early January 1975? A. Yes.

Q. And were aware that the slogan "Squash like the pubs used to make" or some variant of it, was present in, at the very least, a good deal of that advertising? A. No, I do not think that is correct.

Q. What don't you agree with in that? A. I think that the main part of the commercial was definitely Solo drink and a chap in the canoe but the ones "Squash like the pubs used to make", I don't think the emphasis was placed on that until after January February by the company, by Cadbury-Schweppes. That is my recollection. 10

Q. Your recollection though is, is it, that the slogan was used as at December 1974 January 1975? A. Yes.

Q. Did you become aware at any stage that advertising on the wireless was taking place? A. No, I don't think there was any, until 1975.

Q. Were you aware, for example, that 2UW broadcast a thirty second advertisement 40 times in the week commencing September 22nd 1974? A. No, I was not. 20

Q. And 2SM 22 times in the same week? A. No, I was not.

Q. 2UE 30 times in the same week? A. Could you tell me what commercial. I was not aware they were advertising but is this referring to -

Q. This is a Solo advertisement being one of the ones that was played on the tape in the opening of this case in August last and if you recall - if my memory is correct - the text of the wireless advertising was an abbreviated version of the words used in the television audio part? A. I did not hear any radio commercials. The only radio commercial I heard was in 1975 which was "Push your bottles back to Solo". On radio I haven't heard --- 30

Q. Again your various executives, as at September 1975, would have become aware, would they not, of advertising on this scale on the most listened to radio stations of a rival product?

A. Yes, I imagine they would.

Q. When the advertising continued at the like rate in the weeks following the week commencing 22nd September, I suggest to you that you in fact did become aware during that period that there was a new product being advertised which was going to be 40

a competitor of the product you had in mind? A. I knew there was a product in October. I did not know they started advertising.

Q. But weren't you present on the opening day of this case when the television films were shown and the radio tapes played?
A. Yes, but I cannot say prior to that.

Q. But you have known since then? A. Yes.

Q. Did it come as a surprise to you last August to find that the radio commercials took the form that they did? A. No, I think that after 1975 I heard them and I really did not relate it. 10

Q. You have given the impression that, as an executive in the soft drink field, you are an extremely keen and alert person. Wouldn't you agree that if your organisation had not brought something like this to your attention you would have been anxious to rebuke them for being slack? A. I think I have to explain our company at the time was having great difficulty in making any soft drink and most of our people were engaged in just trying to manufacture a product. We had virtually no marketing people and most of our people, even our managers, were working on the bottle line trying to produce a product to sell. We had no packing equipment and quite honestly the furthest thing from our minds was worrying about anything that was happening in the market and just getting our plant into some sort of condition so that we could manufacture and supply the market and that really did not happen until some time in March. 20

Q. Just returning to p. 7 of the answers to interrogatories and what is 18 (B) (c) - you will see there that as from October 1974 onwards the staff apparently had time for informal gatherings of a light-hearted tenor quite frequently? A. 10 o'clock at night. 30

Q. Wouldn't you regard it as most unbusinesslike for an organisation in your situation as it was in October 1974 not to be aware of the commencement of a radio advertising campaign for a product being launched in Sydney in a field which your company was contemplating entering? A. Yes.

Q. And I would suggest to you, if there is one thing you are not, it is that you are not an unbusinesslike person? A. That's correct. 40

Q. And that you would have seen to it that either you or somebody in your organisation had the duty of bringing matters such as the commencement of a major advertising campaign to your attention? A. I think at the time, as I said, we stopped all marketing effort. We stopped all our management development in marketing, exhibiting our names and we concentrated on

one thing, production and distribution, picking up all the old stock for the trade as our managers - our interest in the market place at that time was negligible. Actually it was just a matter of whether we stayed in business or not.

Q. You said in March it was that you really found yourself in a position to decide whether or not to go on with the Lemon Squash product - (objected to; withdrawn).

Q. A moment ago you made an answer in which you referred to March as being the month in which your organisation really found itself in a position to do something. Now what was it you really found yourself in a position to do in March 1975? 10

A. Actually we were in a position to manufacture a little earlier than that but the electricity strike stopped all manufacturing of cans and bottles and so forth and we were not in a position to even manufacture until after that strike had finished and then we were in reasonable stable production.

Q. Then was it in 1975, at the time when you found yourself in a position to produce, that the question of what competitors might be present in the market really did become of importance to you? A. No, I would say it was in December when we settled down most of our manufacturing that I started to take more of an active interest in marketing. 20

Q. You said a little while ago in October your interest in the market then was negligible because of your other problems? A. And up to October we had difficulties.

Q. But by the end of December you were in a position to properly survey the position? A. I started to take a very active interest in the market.

Q. And so from there until the end of January you had fully acquainted yourself with the state of the competition? A. No, I had not fully, but until we put our own place in order first and started to concentrate on what was happening in the market place. 30

Q. Can you recall now in regard to Solo what was the state of your knowledge say towards the end of January 1975? A. I cannot remember at all.

Q. Would you agree before the end of January 1975 you were aware of the sales of Solo that were taking place in Sydney? A. No I would not. 40

Q. Would you agree you were aware of the advertising campaign that was being conducted for Solo through Sydney television and radio stations? A. Yes, I was aware.

Q. And before the end of January you were aware of the use of the slogan "Squash like the pubs used to make"? A. Yes, I was aware of that.

Q. And you were aware, were you not, that people who were buying Solo at that time were very likely to associate it with the advertising campaign which was conducted on its behalf - (Objected to; rejected.)

Q. Did you not take the view as at January 1975 that persons buying Solo were likely to associate Solo with what was being said about it in the advertising campaign then being conducted concerning Solo? A. No, not exactly that - I think that the advertising campaign was certainly centered around Michael Ace and his activities and the type of activity identified with the target group they were appealing to, which Jim Lowe said was sixteen to twenty-fours, seems logical to me and the main theme of the advertising was definitely "Solo a Man's drink" - the image they were trying to portray.

10

Q. You have heard the various witnesses who have been called in this case give their evidence in this case? A. Yes.

20

~~Q.---And-you-have-heard-a-number-of-them-did-associate-the slogan,--"Squash-like-the-pubs-used-to-make"--with-Solo?--A.---Yes - (Objected to; question and answer to be struck out.)~~

*Q. Just looking at p. 61 - Mr. Calderara's evidence about halfway down the page - there is a question: "At the time when you became aware of Solo". Would you read on from there. You recall the witness giving that evidence where he says what is set out there? A. Yes, I don't recall that particular witness.

Q. Can I ask you a general question - can you recall evidence being given by some, but certainly not all of the witnesses, to that effect? A. Yes.

30

Q. Would you not agree that it was readily foreseeable as at January 1975 that at least some members of the public would associate the slogan with Solo in the way that those witnesses have later given evidence of? A. Not at that time I don't believe.

Q. Why not? A. Well, I did not think that that was the main trend, once again of Cadbury's advertising and I did not believe that they would continue referring it to the "One the pubs used to make" because in my opinion it was contrary to the image they were trying to create.

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*See now page 99.

Q. You said that you did not think - but did you come to that thought shortly afterwards? A. I am sorry?

Q. You said at January 1975 you did not - A. January-February period I believe, because at that time I think the product was starting to sell and I thought they would change their image more to Michael Ace type, leaving pub out. I did not think the copy wording fitted the image.

Q. Wouldn't you agree that you yourself actually foresaw that if that advertising continued and the product grew in sales that some people would inevitably associate the slogan with Solo? A. No, I didn't. 10

Q. Would you deny that that thought crossed your mind? A. No, I could not deny that I thought the product was associated with Solo as being a manufacturer of lemon juice, but I definitely did not think of it being associated by other people.

Q. Returning to p. 7 of the answers to interrogatories and (C) (iii) you mentioned that one of the types of matters discussed was that the statement of Squash like the pubs used to make might be misleading and that the promoters of the product might be in breach of the Trade Practices legislation? A. Correct. 20

Q. That was discussed, was it, in the period commencing October 1974? A. No, that would have been January-February - around that period.

Q. So it is January-February - was that a statement that you made at some stage? A. No, I did not make the statement.

Q. Do you remember who it was that made that statement? A. No, I think it was one that just came out of general discussion. I think it related really to lemon squash and what was a lemon squash as against what was a lemon drink really. 30

Q. At that stage at any rate you were aware, namely, the first occasion a remark like that was made at a discussion of your employees - that a squash like the pubs used to make - was a regular feature of the advertising? A. Yes.

Q. And at that stage wouldn't you agree that you foresaw some members of the public must associate Solo with the slogan "A squash like the pubs used to make"? A. I suppose it certainly did not pass my mind - it did not enter my mind as being the main part of the advertising. 40

Q. But this person - whoever it was in that conversation suggested that the slogan might be misleading? A. Yes.

MR. PRIESTLEY: Q. What was your understanding at the time of who would be misled by this slogan? (Objected to; withdrawn.)

Q. You heard the statement made on this occasion that the use of the slogan might be misleading? A. Yes.

Q. Didn't that convey to you the thought that the public might be misled by the use of the slogan a "squash like the pubs used to make" in association with Solo? A. I related it merely to the squash you buy in the hotel. My attitude being it would not be anything like the squash you buy in the hotel. 10

Q. What wouldn't be like the squash you would buy in the hotel? A. Solo.

Q. So that this statement raised in your mind the question whether the slogan about Solo being a squash like the pubs used to make might mislead the public? A. Well, I would have to say that it would mislead people who were drinking squash in hotels, yes.

HIS HONOUR: You are doing it again. You are doing some very fancy dancing around the questions and not answering them.

MR. PRIESTLEY: Q. Wasn't it obvious that the person who made that remark was talking about the possibility that Solo being described as a squash like the pubs used to make could mislead some members of the public? A. Yes. 20

Q. Won't you agree that at that stage when that remark was made you yourself contemplated the possibility that some members of the public associated the slogan "A squash like the pubs used to make" with Solo? A. Yes.

Q. And that you knew some months before your company's product went onto the market that it was a foreseeable possibility that at the time your product went onto the market some members of the public would associate the slogan "A squash like the pubs used to make" with Solo? A. With Solo? 30

Q. With Solo, yes? A. Yes.

Q. And the advertising campaign on behalf of Solo was conducted steadily through the months of 1975 that preceded the launch of Pub Squash? A. Yes, that is correct.

Q. You were aware that the sales of Solo were increasing during those months of 1975 before the launch of Pub Squash? A. Yes.

Q. It was before the launch of Pub Squash that some employee of yours made the statement on p. 9 of the answers to interrogatories 28A, "Why don't we come out with a Pub Squash" or 40

similar words after he had made a reference to lemon squash like the pubs used to make? A. Sorry?

Q. You see the words in inverted commas in 28A on p. 9, that is the question. A. Yes.

Q. You see that in the combined answers 26B to 29B it is stated that a conversation of the nature outlined in the previous four questions did occur? A. I would have to explain that conversation.

Q. I will give you an opportunity to explain it but before coming to that you will agree, won't you, that the answer being the composite answer 26B to 29B agrees with a conversation containing a statement of the nature "Lemon squash like the pubs used to make. Why don't we come out with a pub squash?" happened? A. No. 10

Q. When in the answer 26B to 29B you said, "A conversation of the nature outlined did occur" were you referring the words in 28A "Lemon squash like the pubs used to make. Why don't we come out with a pub squash" or similar words? A. I was referring to part of that conversation, some of those words were spoken but there was no mention of the lemon squash like the pubs used to make. 20

Q. You see 28A asked the question, "Did an employee use those words or words to that effect?" and the answer to 28A is to be found in the composite answer 26B to 29B, you will agree? A. Yes.

Q. There is no denial anywhere in that answer to the question asked in 28A, is there? A. Well, part of the question is correct but the first part of the question is not correct.

Q. Going back to 26A which is also being answered in 26B to 29B would you agree that the answer is saying that at the meeting referred to Solo was discussed? A. In the context of a statement made by one of the managers there, yes. 30

Q. Well, the answer is just simply "yes", isn't it? A. Yes.

Q. And the next question was whether during the course of that discussion reference was made to the plaintiff's slogan, "A lemon squash like the pubs used to make"? A. No, there was no reference to that slogan.

Q. Did you consider the answer to 26B down to 29B before you swore the affidavit? A. Yes. 40

Q. Did the answer as drafted and as sworn to in your affidavit accurately reflect your understanding of what the answer

was? A. Yes, I said a conversation of that nature did take place.

Q. Did you understand at the time that you were not denying any part of what is set out in 26A, 27A and 28A? A. No, I didn't.

Q. Do you seriously suggest to the court that your understanding of the answer that you swore to should be read as denying any part of what is suggested in 26A, 27A and 28A?

A. No, the statement was made, "Why don't we come out with a pub squash" which is correct. 10

Q. I wasn't asking you that, Mr. Brooks. I am asking you whether you seriously suggest that the answer that you swore to could be read as denying that included in the conversation was the reference to "Lemon squash like the pubs used to make"?

A. No, I don't read that as - I believe it reads that a conversation of that nature took place but did not necessarily read as that we mentioned lemon squash.

HIS HONOUR: Q. I am somewhat puzzled, I must say. Do you say that on a proper reading you were saying that there was a conversation in which somebody said, "Why don't we come out with a pub squash?" A. That is correct, yes. 20

Q. And that conversation took place at a time when you were already committed? A. Yes.

Q. To producing pub squash? A. That is right. That is why I wanted to explain what happened. It was two weeks before the launch.

Q. It would appear that the person who said it was Ian Robinson, is that right? A. Correct.

Q. Who had been in on the thing for Solo over a year? 30
A. That is correct.

Q. It is nonsense, isn't it? A. That is why I wanted to explain what happened. It was a jocular remark made in the boardroom two weeks before the launch. When I came in I said, "We are launching another product in the name of Citra". I said, "How is it that I think of all the names?" and he said, "Why don't we come out with a pub squash". That is why it was in the interrogatory and that is the way we answered the question and we said it was a jocular thing.

Q. Neither in the answers 26 to 29 nor in the answer to supplementary interrogatory 36 is there any statement of the version you have just given and I find it very difficult to understand? A. I think we put there that it was a jocular discussion and that was the conversation. I didn't know why it 40

was in the interrogatory, two weeks before we launched the product.

MR. PRIESTLEY: Q. Would you not agree, looking at Q.27A and the combined answer 26B to 29B which is intended to answer 27A amongst the other questions, that there is no denial anywhere in the answer of the use of the phrase, "A lemon squash like the pubs used to make" and words of a similar effect in the discussion about which the questions are being asked? A. No, but I thought that a conversation of that nature would sufficiently indicate a jocular discussion. 10

Q. The jocular discussion is not in the answer either, is it, when you look at it? A. I think we said earlier that there were numerous jocular discussions in the boardroom.

Q. Didn't you say earlier that - middle of p. 7 the answer to C4, "A jocular discussion to call our product 'a squash like the pubs used to make' had taken place at one of the meetings following on October 1974"? A. Yes.

Q. That is quite a different thing from the meeting you were speaking of in March 1975, isn't it? A. It was in the boardroom where all discussions took place. 20

Q. You have placed the conversation about which the questions 26A to 29A were asked as being two weeks before the launch of Pub Squash? A. Yes, it was some time towards the end of March, yes.

Q. The question begins by asking, "In or about March was there such a question ..." and to your recollection it was towards the end of March, was it? A. Yes.

Q. Do you have a recollection of such a discussion taking place two weeks before Pub Squash went onto the market? A. We launched on the 7th and I know at the time around about two weeks before we were actually sitting around saying, "It will be on the market in two weeks" and it was just a general discussion. 30

Q. So that at that stage a couple of weeks before it went on the market there had not yet been any publicity for Pub Squash? A. No.

Q. It was something still entirely within the organisation? A. No, I am not sure. The can manufacturer, the carton manufacturers, all our suppliers would have known about it because the material was being prepared. 40

Q. Would it be right that to the public generally it was not yet known? A. Yes.

Q. You were aware at that stage, weren't you, beyond any doubt whatsoever, that by March 1975 there were considerable sales of Solo in Sydney? A. Yes.

Q. There had been very considerable advertising? A. Yes.

Q. And the slogan by March 1975, "Squash like the pubs used to make" had been very extensively used in advertising?

A. It had only been used in advertising from my recollection. It had been incorporated in the advertising, yes.

Q. Wouldn't you agree that the most effective form of advertising for products of this kind is by television? A. Yes. 10

Q. Television is by far the most effective medium these days, isn't it? A. Yes.

Q. You would agree that you could foresee certainly in March 1975 that people would associate the slogan "Squash like the pubs used to make" with the product Solo? A. Not directly I didn't.

Q. With your knowledge of marketing and advertising you knew, didn't you, in March 1975, that people were already associating Solo with the phrase, "A squash like the pubs used to make"? 20

A. I made the decision based on the fact that I believed they were associating definitely with Michael Oakes because most of the people were talking about Michael Oakes, the guy that dribbled the drink which certainly created a lot of publicity more so than the copy.

Q. The fact that you believed that does not exclude the other possibility. Did you not with your own experience of marketing and advertising know that people in the public in March 1975 associated Solo with the slogan squash like the pubs used to make? A. Yes, some people would have to. 30

Q. It just stands to reason there must be some people who made that association, doesn't it? A. Sure.

Q. You understood also at that time, didn't you, that when your product went onto the market under the name Pub Squash some people were bound to think that the product being sold as "Pub Squash" was the same product as that which was being advertised in connection with the slogan, "A squash like the pubs used to make"? A. No, I don't believe that at all.

Q. Did it cross your mind? A. No.

Q. Not a little thought that that might happen? A. No. Solo had freely established itself in the market place as a softdrink and very successfully. 40

Q. But you have agreed that some people associated it with the slogan "Squash like the pubs used to make"? (Objected to; rephrased).

Q. It had to be so, in March 1975 that there were some people who associated the product Solo with the slogan "Squash like the pubs used to make"? A. Yes, I agree with that.

Q. Wouldn't you equally agree that it was inevitable that when a product in a can the same size, with a colour basically the same, with a drink tasting quite similar inside and with the name Pub Squash went onto the market that some people would think that that was the same product as that which was being advertised in connection with the slogan, "Squash like the pubs used to make"? A. No, I don't believe that. 10

Q. It didn't cross your mind even as a possibility? A. No.

Q. What was the point even of the joke then as you say it was in the answer to 28A that Mr. Robinson jestingly said, "Why don't we come out with a pub squash" was talking about?

A. If you can think that I thought of all the other trade names and two weeks before we were launching a drink because one of the in-jokes. Everyone now says you are a good operator, it was a company in-joke and how it appears in here I really don't know. 20

Q. You mean at that meeting? A. It wasn't a meeting, it was just a drink around the table.

Q. Who was there? A. People from the factory and even anybody outside. It was open for everybody to come and have a drink.

Q. Are you suggesting that prior to Mr. Robinson making this jest at that informal gathering that those other people didn't know that your product was going to be called Pub Squash? 30

A. No, they all knew.

Q. Did anybody laugh at this joke? A. Yes, they did.

Q. Can you explain to us what the joke was? A. I think it was just with a lot of people sitting around having a few drinks and there is a product coming on the market and Robinson stood up and said, "Why don't we launch a product called Pub Squash" and two weeks later everything was being printed. Perhaps our sense of humour is a bit strange but everybody thought it was funny at the time. 40

Q. Again, coming back to these four questions, 26 to 29 on p. 9, did you understand the serious purport of those questions at the time when you read them? Serious from the point of view of this case? A. Yes.

Q. Did you realise that what was being suggested in this question was that your company knowing that Solo was on the market and that some people were associating it with the slogan, "Squash like the pubs used to make" decided to bring on to the market a product by the name of Pub Squash which would be confused with the product advertised in connection with the slogan, "Squash like the pubs used to make"? A. No, I didn't because it related that to only two or three weeks before it was launched and it is just impossible to launch a product - and I was actually wondering why the question was in it. 10

Q. To make it quite clear again. Do you not agree that at the time of this discussion you and all the executives of your company were aware of the Solo marketing situation and the use of the various slogans in the Solo advertising including the slogan "Squash like the pubs used to make"? A. Yes, they were.

Q. And I suggest to you that it must have been completely obvious to all the executives of the company and yourself at that meeting that there would inevitably be confusion between your new product called Pub Squash and the Solo product when your product came onto the market shortly afterwards? 20
A. No, there was no confusion.

Q. Did not any member at the managerial level suggest that there might be some confusion in view of the similarity between the name of your product and the slogan associated with Solo?
A. No, because once again it was not the main theme. I considered it beforehand and because it was not the main theme and the main thrust of their signs and whatever, it just didn't embody that slogan.

Q. What did you consider? A. I considered the theme, the Solo advertising, the ones like the pubs used to make, and it is a man's drink and whatever and I considered it to be copy and I didn't believe Schweppes would continue with it. 30

Q. Did you believe that there was likely to be some confusion between your product and the Schweppes product if you used the name Pub Squash? A. No, I couldn't see any confusion because it clearly - I don't think Solo, when you use it in the background with Solo, a man's drink.

HIS HONOUR: Q. That means you at least thought about whether there might be a possibility of confusion? A. I was considering whether it was a theme statement definitely or whether it was copy. 40

Q. Please answer the question! Did you think about whether or not there was a possibility of confusion if you used the name Pub Squash? A. Yes.

MR. PRIESTLEY: Q. Would you say that if you had concluded that there might be confusion for that reason you would not have launched your product under the name Pub Squash? A. I would have waited until you had discontinued the copy.

Q. You would agree, wouldn't you, that it would have been a wrong thing to do to use the name Pub Squash for your product if it would have caused confusion with the product Solo? (Objected to; rephrased.)

HIS HONOUR: Put it another way, Mr. Priestley - would you have considered it the wrong thing to do. 10

MR. PRIESTLEY: Q. Would you have considered it the wrong thing to do to put Pub Squash on the market under that name if you believed that there would be confusion between the Pub Squash product and the Solo product? A. Yes.

Q. And you would agree, wouldn't you, that you would have believed that was a wrong thing to do because you would have been wrongly taking advantage of the "getting up", sales promotion and advertising of the Solo product? (Objected to; disallowed.) 20

Q. You said, Mr. Brooks, that you would have believed it to be wrong to introduce the Pub Squash product in circumstances where there would have been confusion with the Solo product? A. Yes.

Q. And would you agree that one of the factors in that belief of yours was the belief that to do so would be wrongly to take advantage of the goodwill built up by the manufacturer of Solo by reason of their advertising? (Objected to; allowed.)

Q. (Previous question read.) A. Yes.

Q. And I further put it to you Mr. Brooks, that you realised quite well in March of 1975 that the launch of Pub Squash in the circumstances as they then existed would cause confusion in the minds of some of the general public between the Pub Squash product and the Solo product? A. No, I do not believe that at all. 30

Q. Would you agree that through 1975 and 1976 the Solo advertising continued to make use of the slogan "Squash like the pubs used to make"? A. I cannot remember the exact dates but I think it did continue.

Q. And it was not until towards the end of 1976 that the slogan was dropped from the advertising. Do you recall that in a general way? A. I think that is correct. 40

Q. And would you agree that within that period your company discovered that it obtained considerable benefit from that advertising, so far as assistance in the sale of Pub Squash was concerned? A. That is not correct at all.

Q. Wouldn't you agree it was a present from Heaven that an extensive advertising campaign mentioning "like the pubs used to make" was presented on television while you were marketing a product called Pub Squash? A. No, I did not think they related, quite frankly. They are different products. 10

Q. But you agreed a while ago that you thought television was the most effective advertising medium available at the present time? A. Not necessarily for soft drinks though.

Q. I asked you a question specifically in relation to soft drinks? And you said "Yes"? A. I am sorry, I thought you said "the most successful media to advertise in".

Q. Yes. Are you trying to distinguish between "successful" and "effective"? A. I am agreeing it is the most successful medium. The food stores play such a major part in the sale of soft drinks, but the media must play a part as well. 20

Q. You spent a lot of time causing products to be advertised over the years? A. Yes.

Q. And television advertising is extremely expensive, is it not? A. Yes.

Q. It is extremely expensive because it produces extremely good results for those who pay for it, by and large? A. Depending upon the state of the market, I must qualify that.

Q. And the reason why people pay very large sums of money for television advertising is because they hope it will produce very good results in the way of sales? A. Can I qualify that answer? 30

Q. Yes. A. It depends on the market you emerge on because you have to try and establish a theme. A market without price cutting, television is definitely the best vehicle, but when there is price cutting the product is in the hands of the retailer and then it is not the best medium.

Q. Some of the confusion created in relation to this, would you not agree, was that associated with the slogan in the television advertisement - the slogan "like the pubs used to make" - with Pub Squash? A. Yes. 40

Q. You would agree, would you not, that that must have happened on many occasions with many people? A. Yes.

Q. And that would have been of assistance in selling Pub Squash, must it not? A. I think people buy the product because of taste.

Q. Would you not agree that the fact that many people had associated the slogan that they built up on television - "squash like the pubs used to make" - with your product Pub Squash has assisted in the sale of Pub Squash? A. On our sales of Pub Squash I could not say if it has assisted.

Q. You have been in the marketing and advertising field for many years now, both in confectionery and in soft drinks, haven't you? A. That is correct. 10

Q. And you have had to give consideration on many occasions to the possible effect of advertising? A. Yes.

Q. And whether advertising expenditure should be made?
A. Yes.

Q. And in your opinion would the fact, that many people seeing advertising on television using the slogan "Squash like the pubs used to make" and associate that slogan with the product Pub Squash, have assisted in the sales of Pub Squash? A. No, I do not believe so. 20

Q. Do you have any faith in television advertising at all?
A. Yes, I do.

Q. Would you express the opinion that your own company's advertising for Pub Squash played some part in selling the product to the public? A. Yes.

Q. I think your company spent something over \$100,000 for advertising on Channel 10 over a period of 4 months in 1976, advertising various of your company's products, is that so?
A. It would have been over the period 1975/1976. 30

Q. If you like to look at the copy of the invoice I would suggest to you it was for the more limited period, Mr. Brooks?
A. Yes, that is correct. That is September 1976.

Q. So you recognise the value of spending large amounts of money on television advertising in regard to your products?
A. Yes.

Q. And do you recall that in one of your advertisements for Pub Squash the audio part of the script for the television advertisement which was called "furnace" - do you remember that one? A. Yes, I remember, yes. 40

Q. - used the phrase, "when the heat is on and your throat is

aching for the local, rip into a Pub Soda Squash"? A. Yes, I remember it.

Q. And that was designed to associate the product with an hotel, was it not? A. No, with liquor, yes - as an alternative to liquor, yes.

Q. To bring into mind the "local"? A. Yes. The idea of it was that if you cannot have a drink since you are handling a furnace that does not allow you to drink, the alternative is Pub Squash. 10

Q. And the word "local" is a synonym for "pub", is it not?
A. Yes.

Q. And indeed it is a less usual word in Australia than "pub" for what it is described as, wouldn't you agree? A. That is correct.

Q. It looks as if somebody has been attempting to make people think about a pub without actually using the word, doesn't it?
A. That is correct.

Q. And the viewer of this advertisement was being directed to think "pub", wasn't he? A. I think more - well, yes, sure. 20

Q. And you would agree, you see, that would bring to the mind of the ordinary viewer the slogan "squash like the pubs used to make"? A. No, I do not think so, no.

Q. No association? A. No.

Q. It was not until well into 1975, was it Mr. Brooks, that your company became really embarked upon the project of marketing Pub Squash? A. April 1975 we commenced.

Q. The first product development run was on the 14th February, 1975? A. That is correct.

Q. And up to that time it would not have cost - it would have cost the company virtually nothing to abandon its lemon squash project? A. It would have cost us nothing to abandon it? 30

Q. Up to that time you had spent hardly anything on the lemon squash project? A. That is correct.

Q. And ---- no commitment had been made to the name Pub Squash at that stage? A. It was part of the plan.

Q. It was in your mind? A. Yes.

Q. But no commitment to any person or any label had gone out

prior to February 1975? A. The commitment to launch Pub Squash had been made, yes.

Q. To whom? A. To the company.

Q. You were the managing director and, apart from yourself and your idea that this was something you were going to do, there was no step that had been taken that committed the company in any financial sense to using the name Pub Squash or its product? A. But it was part of the overall plan for the formation of the company and moving into the market to launch the product. 10

Q. I am not sure if you follow what I am getting at. There was nothing to stop you calling the product, if you chose to do so, Lemon Squash or Club Squash or Football Squash or anything at that point? A. No.

Q. It was not until March, was it, of 1975 that you first made any inquiries about a possible trade mark registration for the name Pub Squash? A. I did go down to the Trade Mark Registration in 1973.

Q. Did you not have a conference with some person from Arthur S. Cave and Company and a Mr. Kaufman from a firm of solicitors, on 3rd March, 1975 when you first raised with any legal person the question of the possibility of registering the trade mark? A. We did not register any trade names until that date. 20

Q. And that was the first occasion when you raised the question with any legal person, by the company, of the possibility of registering the name Pub Squash? A. I think we had discussed it with Mr. Kaufman prior to that meeting. He had arranged the meeting. But I think it was in January - January or some such period, when he said he could not handle it, that we would have to go to a trade mark counsel and he was suggesting Arthur S. Cave and Company. 30

Q. You met with a member of Arthur S. Cave and Company, apparently on 3rd March, 1975 and I suggest to you it was only a few days before that that you first spoke to Mr. Kaufman about the matter? A. My recollection is early in January.

Q. Wouldn't you agree that the way you conduct business would have involved a much brisker approach to the patent and trade mark attorneys after you first mentioned it to your solicitor than allowing this to go past? A. I had not registered "C-time" or "7-time", two products I had on the market at the time, and it was just one of those things I did not do until I had time, and we got on top of the trade mark registration. 40

Q. What I am suggesting is that it was only in or about

March of 1975 that you finally committed the company, in a financial and material sense, to the use of the name "Pub Squash"? A. Financial and material sense - as a matter of ordering material.

Q. Yes, and spending money in relation to it? A. Yes.

Q. And that was really the time when the final decision to use the name and to put the product on the market under that name was made? A. The decision had been made but the date set to put it on the market had been determined earlier, but due to the power strikes we had to defer it until we had sufficient supply, and there was no decision until supply was correct. 10

Q. Can I just ask you to look at Exhibit 24 (handed). That is an exhibit which contains in it the application to the Australian Industrial Research and Development Grants Board, in which there is one page headed "Prescribed Expenditure, Appendix D, supporting Schedule". Do you see that page?

A. I am sorry.

Q. It is headed "Prescribed Expenditure, Appendix D, Supporting Schedule"? A. Yes. 20

Q. And then it has got a heading "Item 1 - Materials"?

A. Yes.

Q. And this was a presentation which had been forwarded under your signature to the Grants Board, had it not? A. Yes, that is correct.

Q. And you would accept responsibility for the statements made in it, would you? A. It was not prepared by me. It was prepared by our finance people.

HIS HONOUR: That is not an answer, Mr. Brooks.

Q. Do you accept responsibility for it? A. Yes. 30

MR. PRIESTLEY: Q. The first sentence in that paragraph states, "The following material costs were incurred during 1974/1975 in the course of our new product development programme", and then down below there is a schedule setting out the various product development runs to which that sentence refers, is that correct? A. Yes.

Q. In the second sentence, "Item 1 - Materials", it says, "These product development runs are a necessary and integral part of the new soft drink development", and it goes on "... such as flavour characteristics, product, style and presentation ... etc. require rigorous and thorough testing prior to undertaking a commitment for full production"? A. Yes. 40

Q. And that was true, was it? A. It requires six weeks, yes.

Q. But it requires those things to be done prior to undertaking a commitment for full production? A. It depends on the company and what standards you wish to set. I would have discretion and see how long they want to run these tests for, so that I will make a decision to put them on the market.

Q. What I am trying to ask you is whether you agree that it is true that the factors enumerated in that sentence require rigorous and thorough testing prior to undertaking a commitment for full production? A. That is correct. 10

Q. And that product development run in relation to Pub Squash is shown as having taken place on 14th February, 1975?
A. That is correct.

Q. So that that was something that had to be done before your company could commit itself to full production? A. That is correct.

Q. And it was only after that production development run that you took steps to have your can design finalised? A. No, that is not correct. 20

Q. Wasn't it in March that you went ahead and got the can finalised? A. I am sorry the production of cans?

Q. Yes. A. Yes, the run on the cans was in March - that is the manufacture of the actual can, not the design.

MR. PRIESTLEY: Can I ask whether discovered document 111A is readily available.

MR. BANNON: They are produced.

MR. PRIESTLEY: Can I also give notice that I will be asking for documents 92 and 97 at some stage.

Q. (Approaching.) The document which has got No. 111 on portion of it and is headed "... Passiona Marketers ... squash, pub label design"? A. Yes. 30

Q. In fact appears to be an envelope on which various notations have been made and the first notation under the heading "Pub Squash, bottle label design" reads, "11th March, 1975, order to" - A. I am not sure it is an agency - not mine.

Q. And the second line is "11th March, 1975, order to letter-craft"? A. Yes.

Q. Are you in a position to say that those indicate the dates

when orders were placed by the agency you have just mentioned in regard to bottle labels for Pub Squash? A. I am not sure what the labels refer to. We have a plasti-shield bottle.

Q. You mentioned this was the agency involved. Do you mean the Harris Advertising Agency? A. Yes. I believe that is the returnable bottle ad.

Q. Looking at the other envelope - I am sorry, before leaving the returnable bottle label; would you agree that this envelope indicates the orders for the bottle label designs were placed, some on 11th March, 1975 and some on 3rd March, 1975? (Objected to.) A. I could not say what the writing is. I think the information inside is different to the writing on the front. I am not sure if that is why it is crossed out. 10

Q. May I also show you an envelope marked on the back 111A. I ask you to look at what is written on the front and then ask you whether you agree it appears - whether you will agree that the orders for the label designs for Pub Squash were made on dates commencing on 26th February, 1975? A. Labels are a very small part of our business. That could be correct. 20

Q. I am asking you do you agree whether it is correct?
A. I do not know.

Q. Similarly reverting to envelope 111; having looked at that will you agree that the label design - the orders for the label design for the Pub Squash plasti-shield bottle were not placed until March, 1975? A. I could not answer that correctly.

(Further hearing adjourned until 10 a.m. on Monday, 6th February, 1978.)