

Ottawa  
1966  
Sept. 7-9  
12, 13  
Sept. 22

BETWEEN:

MORRIS FELDSTEIN and STORK }  
CRAFT LTD. .... }

PLAINTIFFS;

AND

McFARLANE GENDRON MANU- }  
FACTURING CO. LTD. .... }

DEFENDANT.

*Patent—Patent Act, R.S.C. 1952, c. 203, s. 57(1)—Motion pursuant to Rule 185 of the General Rules and Orders of the Exchequer Court of Canada by way of appeal from a report of the Registrar upon a reference to inquire into and to determine the damages suffered by the plaintiffs—Infringement of patent—Motion not authorized by Rule 185—Motion dismissed.*

The plaintiffs brought a motion purporting to be made under Rule 185 of the General Rules and Orders of the Court by way of appeal from a report of the Registrar upon a reference to enquire into and determine the damages suffered by the plaintiffs by reason of infringement of a patent for a mattress support used principally in children's cribs.

Such supports, which took the place of a metal bed spring in a crib assembly, were ordinarily marketed as part of a packaged assembly including a crib and accessories therefor, though on occasion, such as when ordered as a replacement, the supports were sold separately. The Registrar had expressed the opinion that in respect of sales lost by reason of the defendant's infringement of the patent damages should be assessed on the basis of loss of profit from sales of supports only but he had not proceeded to fix or report the amount of damages when the motion was brought.

1966  
 FELDSTEIN  
*et al.*  
 v.  
 MCFARLANE  
 GENDRON  
 MFG. CO.  
 LTD.  
 —

*Held*, That Rule 185 did not apply as it contemplated an appeal from a report assessing the amount of damages recoverable by the plaintiffs and that the motion would therefore be dismissed.

*Semble*, the damages to which the patentee would be entitled in respect of sales proved to have been lost through infringement of the patent would not necessarily be limited to profit attributable to the patented article by itself but would depend on the extent of interference with the patentee's trade measured by the loss of profit which but for the infringement he would have made in selling the articles in which he traded, i.e., as applied to this case, cribs provided with patented supports.

MOTION pursuant to Rule 185 of the General Rules and Orders of the Exchequer Court.

*Russel S. Smart, Q.C.* for plaintiffs.

*Donald J. Wright* for defendant.

THURLOW J.:—This is a motion which was presented as having been brought pursuant to Rule 185 of the General Rules and Orders of the Exchequer Court by way of appeal from a report of the Registrar upon a reference to enquire into and determine the damages suffered by the plaintiffs by reason of the infringement of patent number 642,079.

The patent was granted in June 1962 in respect of an invention described as having been made by Morris Feldstein and which is both entitled and referred to in the claims as a "posture support for bed mattresses". The invention consists of a flat hardboard or fibreboard panel perforated by a pattern of small holes and surrounded by a frame made of wood or some other material having greater rigidity than the panel itself. When made for use in a baby's crib, where it has its principal application, it is fitted with hooks or other means for suspending or holding it in the desired position in the enclosure and when used it takes the place and fulfills the function of a metal bed spring. The support is said to have a number of advantages over such a spring in providing proper spinal support for a

1966  
 FELDSTEIN  
*et al.*  
 v.  
 McFARLANE  
 GENDRON  
 MFG. Co.  
 LTD.  
 Thurlow J.

growing child, in rendering a crib capable of use as a playpen and in being "lighter in weight, sagless, rust-proof, washable, quieter and warmer" as well as incapable of snagging mattresses or bedding.

The plaintiff, Morris Feldstein, is the owner of the patent and he is also the president and manager of the plaintiff, Stork Craft Limited, the *de facto* exclusive licensee<sup>1</sup> under the patent.

Both prior to and since the invention of the posture support Stork Craft Limited has been engaged in the manufacture and sale of children's furniture the principal item being babies' cribs which have accounted for 85 per cent of its production. The company manufactures and markets from 30,000 to 40,000 cribs per year. These cribs were formerly sold as a package which, besides the sides, ends and other parts, included a metal spring purchased by the crib manufacturer from a manufacturer of springs. The posture support, which is manufactured by Stork Craft Limited itself, was introduced in 1957 and it has since then been included in the packages in the place of the metal spring. For several years after introducing the posture support Stork Craft Limited continued to supply cribs with metal springs both to complete orders already on hand and to use up its stock of springs but from 1962 onward all the cribs manufactured by the plaintiff company were provided and marketed with posture supports. On a few occasions, possibly as frequently as twelve times a year, Stork Craft Limited has supplied a posture support by itself to fill the order of a customer requiring it as a replacement either for a damaged support or for a metal spring. On such occasions the support sold for about \$3.50 which may be compared with manufacturers' prices of approximately \$25.00 for cribs complete with posture supports or springs. There is, however no established trade in posture supports by themselves since they are normally marketed only in conjunction with the other components of a crib and the plaintiff company is not and never has been engaged in a business of supplying posture boards alone. Moreover, on the evidence it seems not unlikely that that company would have been unwilling to supply them to other crib manufacturers except on such terms as would yield a profit approximately equivalent to what the company itself could have made by

<sup>1</sup> What the terms of the licence were is not disclosed.

using to the full its own capacity to manufacture and market cribs. There is evidence that the plaintiff company at the material time had spare manufacturing capacity from which it may, I think, be inferred that it could have supplied a larger part of the market for cribs than it in fact enjoyed.

In the meantime between the time of the introduction of the posture support on the market in 1957 and the grant of the patent in June 1962 three other manufacturers of babies' cribs, including the defendant, began manufacturing and supplying posture supports with their cribs. Two of these manufacturers desisted therefrom on being advised of the grant of the patent but the defendant persisted despite the plaintiffs' warning and after the grant of the patent manufactured and sold in 1962 and 1963 some 16,200 cribs with posture supports which fell within the claims of the patent. The present action was commenced in December 1962 and resulted in a judgment pronounced by consent on October 15, 1964 which declared the patent to be valid and to have been infringed by the defendant "by the manufacture and sale since the date of the patent of children's cribs having mattress supports made in accordance with the said Letters Patent", restrained the defendant from further infringement and directed the Registrar to hold an enquiry "to determine the damages suffered by the plaintiffs by reason of the said infringement".

When the matter came before the Registrar the parties, instead of proceeding in the normal manner, state that they had agreed that the reference should proceed on the basis that "the issue is whether the damages are to be based on the whole combination, including the mattress support, or on the mattress support only" and that if this preliminary issue were decided the parties would probably be able to agree upon the monetary amounts involved. Evidence was then given by the plaintiff, Morris Feldstein, who was called on behalf of the plaintiffs and by George Breathing McFarlane, the vice-president of the defendant company, who was called on behalf of the defendant, arguments were presented by counsel for both the plaintiffs and the defendant and at a later date a report was filed by the Registrar. By it he expressed the opinion that the patented article was "not a component part of the crib but just an accessory thereto", and that it followed that the assessment of the

1966

FELDSTEIN  
*et al.*  
*v.*McFARLANE  
GENDRON  
MFG. Co.  
LTD.

Thurlow J.

1966  
 FELDSSTEIN  
*et al.*  
 v.  
 McFARLANE  
 GENDRON  
 MFG. Co.  
 LTD.  
 Thurlow J.

damages "should be limited to the sale price of the patented article only" and he so recommended. No finding or recommendation was made as to the amount of the damages. The plaintiffs thereupon brought the present motion.

Notwithstanding the absence of any objection thereto on the part of the defendant the motion in my opinion is not authorized by Rule 185. What was referred to the Registrar by the judgment was not an enquiry to determine an abstract principle, (which the Court is ordinarily unwilling to undertake in the absence of some settled result to flow therefrom) or a particular issue but an enquiry to determine the damages suffered by the plaintiffs by reason of the infringement. The parties no doubt hoped that expense might be saved by the course which they adopted but the fact that a motion by way of appeal has been brought while the amount of damages is still unfixed shows the course to have been abortive in its object and in any event it was not the course contemplated by the judgment. To my mind the judgment required the Registrar to hold an enquiry resulting in the fixation of a proposed amount of money to represent the damages in question and until that stage had been reached there could, in my view, be no report of the kind contemplated by Rule 185 upon which to bring a motion by way of appeal. If a question arose upon which the opinion of the Court was required a procedure was available under Rule 183 but the report contemplated by Rule 185 in my opinion is one upon which a motion for judgment for a particular amount of money as recommended by the Registrar might be made if no appeal were taken within the time limited therefor. In consequence, the only order that can go on the present motion is that it be dismissed and the effect of such a disposition, as I see it, is to leave the matter still in the hands of the referee to be dealt with in accordance with the judgment pronounced on October 15, 1964. However, as the principles to be applied in assessing the damages were argued at length on the hearing of the motion it may not be amiss to state what I think the correct application of them is in case what I may say should be of assistance when the matter is again before the referee.

The extent of the remedy by way of damages available for infringement of a patent is defined as follows in Section 57(1) of the *Patent Act*.

57. (1) Any person who infringes a patent is liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.

1966  
 FELDSTEIN  
 et al.  
 v.  
 MCFARLANE  
 GENDRON  
 MFG. Co.  
 LTD.  
 Thurlow J.

The wording of this section differs from that dealt with in *Colonial Fastener Co. Ltd. et al. v. Lightning Fastener Co. Ltd.*<sup>1</sup> but it appears to me to express the same principle as that which was stated by Kerwin J., (as he then was) in that case when he said at page 41:

If the damages claimed are not too remote, the wrongdoers must, as in every case of tort, compensate the injured party for such damages as he may have suffered.

The difference between the measure of the damages that may be awarded under this principle and what might alternatively be recovered on an accounting of profits made by the infringement is expressed as follows by Lord Watson in *The United Horse Shoe and Nail Company Limited v. Stewart and Company*<sup>2</sup>.

When a patentee elects to claim the profits made by the unauthorised use of his machinery, it becomes material to ascertain how much of his invention was actually appropriated, in order to determine what proportion of the net profits realized by the infringer was attributable to its use. It would be unreasonable to give the patentee profits which were not earned by the use of his invention; but the case is altogether different when the patentee of machinery who does not grant licenses claims damages from an infringing manufacturer who competes with him by selling the same class of goods in the same market. In that case the profit made by the infringer is a matter of no consequence. However large his gains he is only liable in nominal damages so long as his illegal sales do not injure the trade of the patentee; and however great his loss, he cannot escape from liability to make full compensation for the injury which his competition may have occasioned.

The question which arises on the assessment of such damages is one of fact and depends on the circumstances of the particular case<sup>3</sup> but in cases where the patentee does not grant licenses at a fixed royalty and is himself engaged

<sup>1</sup> [1937] S.C.R. 36 at 40-41. See also *Electric Chain Co. of Canada Ltd. v. Art Metal Works Inc.* [1933] S.C.R. 581 at 590.

<sup>2</sup> (1888) 5 R.P.C. 260 at page 266.

<sup>3</sup> In *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1911) 28 R.P.C. 157 Cozens-Hardy, M. R., expressed the matter thus at page 161:

Therefore, in a case such as the present, where licences are not granted to anyone who asks for them for a fixed sum, it is a matter which is to be dealt with in the rough—doing the best one can, not attempting or professing to be minutely accurate—having regard to all the circumstances of the case, and saying what upon the whole is the fair thing to be done.

1966

FELDSTEIN  
et al.  
v.

McFARLANE  
GENDRON  
MFG. Co.  
LTD.

Thurlow J

in manufacturing and marketing the patented article two principles appear to have been applied in resolving it. These are discussed and delineated in the following passages from the speech of Lord Shaw of Dunfermline in *Watson, Laidlaw & Co. Ltd. v. Potts, Cassels, and Williamson*<sup>1</sup>.

In my opinion, the case does raise sharply an important question as to the assessment of damages in patent cases, and with that question I proceed to deal. It is probably a mistake in language to treat the methods usually adopted in ascertaining the measure of damages in patent cases as principles. They are the practical working rules which have seemed helpful to Judges in arriving at a true estimate of the compensation which ought to be awarded against an infringer to a patentee. In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it.

...

In Patent cases the principle of restoration is in all instances to some extent, and in many instances to the entire extent dependent upon the same principle of restoration. The patentee may show that the trade done by the infringer would have been his (the patentee's) trade, and he is entitled in such cases to be restored against the action of the infringer; and he may adopt, in liquidating that principle in money, an alternative course. He may say, "I shall accept the profits which have been made by the infringer in this trade which ought to have been my trade;" or he may take the other head of the alternative and say, "The illicit opposition to, and interference with, my own trade caused me damage. I lost profit which I would have otherwise made in it; I lost business connexion; the development of my business on its natural lines was interrupted by my being driven by these acts of piracy out of sections of my own trade." These and other things may be heads of damage. It is well settled that a patentee may choose his course of measuring his loss either by the profits which the infringer made, or by items of damages such as those referred to, but that in respect of the same matter he cannot have both his own damages and the infringer's profits. In the course, however, of deciding cases, certain expressions have been used by learned Judges, which, according to the contention, are to the effect, or truly mean, that if the patentee chooses the latter course, namely, to reckon up his claim under heads of damage, is limited, so to speak, by the principle of restoration. Phrases, for instance, have been used, which it is said imply that the entire measure of his damage is the loss which he has incurred of the trade done in the pirated articles. And then comes in an astute argument, that in all cases where the infringer can establish that the trade in the machines which happened to contain the patented article or part would, under no circumstances, have ever reached the patentee himself, no claim can be admitted. To take an instance such as the present case affords, the Patentee was not in a position to carry on business in a certain part of the world exclusively possessed for commercial purposes by the energies of the infringer and his agents. It is said in such a case:—"Where is the damage which the patentee has incurred? On the other heads of the case he has

<sup>1</sup> (1914) 31 R.P.C. at 117, 118 & 120.

obtained his damages; but on this part, which covers a section of trade which in no circumstances he could have touched, he can have sustained no damage, because he would never have sold his patented articles within that section. The duty of an infringer is covered by the principle of restoration, and the patentee has surely been restored to as good a position as he was in before the infringement, or would have been in but for it, if he has been put into the same financial position as he would have occupied in that region of trade where alone he would have been operating."

It is at this stage of the case, however, my Lords, that a second principle comes into play. It is not exactly the principle of restoration, either directly or expressed through compensation, but it is the principle underlying price or hire. It plainly extends—and I am inclined to think not infrequently extends—to Patent cases. But, indeed, it is not confined to them. For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire.

. . .

If with regard to the general trade which was done, or would have been done by the Respondents within their ordinary range of trade, damages be assessed, these ought, of course, to enter the account and to stand. But in addition there remains that class of business which the Respondents would not have done; and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorised sale or use of every one of the infringing machines in a market which the infringer, if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (28 R.P.C. 163). Each of the infringements was an actionable wrong, and although it may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorised use of his property. Otherwise, the remedy might fall unjustly short of the wrong.

In various cases—of which the present is a good example—it is only by this combination of actual damage on the principle of restoration, with, in another section of these operations, the principle of royalty, that a full and adequate response can be made to the cardinal question which remains always to be answered in these infringement suits, the question put by Vice-Chancellor Page Wood in *Penn v. Jack* (L.R. 5 Eq. 81), viz.:—"What would have been the condition of the plaintiff if the defendants had acted properly instead of improperly? That condition if it can be ascertained, will, I apprehend, be the proper measure of the plaintiff's loss." To apply the principle: The Appellants did this Java trade improperly. Had they done it properly, they would have done it under royalty. That royalty the Respondents would have obtained.

It will be observed that with respect to sales which the patentee has lost by reason of the infringement the questions as propounded by Lord Shaw are not qualified by any

1966

FELDSTEIN  
*et al.*

v.  
McFARLANE  
GENDRON  
MFG. CO.  
LTD.

Thurlow J.



1966  
 FELDSTEIN  
*et al.*  
 v.  
 MCFARLANE  
 GENDRON  
 MFG. Co.  
 LTD.  
 Thurlow J.

expression limiting the measure of damages to the loss of profits attributable to the patented article itself. Where in the normal course of the patentee's trade the patented article is sold by itself this may well be the limit but where the patented article is not ordinarily sold by itself, as in the present instance, the damage may consist, depending on the particular facts established by the evidence, not merely in loss of profit attributable to the article itself but in the extent of interference with the patentee's trade measured by the loss of profit which he would have made, but for the infringement, in selling the articles in which he trades, that is to say, as applied to this case, cribs provided with the patented posture supports. This is I think precisely the sense intended by Kerwin J., (as he then was) when he said in *Colonial Fastener Co. Ltd. et al. v. Lightning Fastener Co. Ltd.*<sup>1</sup> at page 41:

As to this branch of the defendants' contention, it suffices to remark that when one bears in mind that the object of the patentee's invention was, as expressed in his claims and specifications, to manufacture stringers to be used in fasteners, the plaintiff could not properly be compensated by reference only to the manufacturer's cost and sale price of stringers and without regard to the cost and sale price of the completed article. As has been pointed out previously, *the stringers are of importance only in their use in fasteners and what the plaintiff lost was sales of fasteners*. The principle set forth in *Meters Ltd. v. Metropolitan Gas Meters Ltd* should be applied. There the Court of Appeal had to consider the amount of damages the plaintiff was entitled to where the defendant infringed plaintiff's patents, one of which related to a particular kind of cam and spindle for opening the gas valve in a prepayment gas meter, and the other of which was for a particular kind of crown wheel in a like meter. It had been shewn before the Master and Eve J., to whom an appeal had been taken, that the plaintiff would have sold many more meters but for the defendant's intervention, and it was, therefore, awarded 13s. 4d. for the loss of profit on each of such meters. The Court of Appeal confirmed the judgment and made it clear that they agreed with the Master and with Eve J. that the proper method of assessing the damages was to take the profit on the sale price of the meters and not merely to consider the parts upon which the plaintiff held patents. Adopting this principle, the defendants' contention fails (*Italics added*).

Accordingly while on the evidence presented I see no good reason to differ with the conclusion reached by the learned Registrar that the patented posture support is an accessory<sup>2</sup> in the sense in which the term was used by Eve

<sup>1</sup> [1937] S.C.R. 36 at 41.

<sup>2</sup> The patented parts of the meters in the *Meters Limited* case, 24 R.P.C. 506, 26 R.P.C. 721, 28 R.P.C. 157, were, in my opinion, accessories as well in the same sense of the word.

J., in *Clement Talbot Ltd. v. Wilson*<sup>1</sup> it does not appear to me to follow that the damages sustained by the plaintiff company as a result of the infringement are in respect of lost sales limited to the loss of such profits as might be attributed to the manufacture and sale of posture boards by themselves rather than to the loss of profits on sales of cribs supplied with posture boards which the plaintiff company would have made but for the infringement.

1966  
 FELDSTEIN  
 et al.  
 v.  
 McFARLANE  
 GENDRON  
 MFG. Co.  
 LTD.  
 Thurlow J.

In support of the contrary position the defendant relied chiefly on two cases the first of which was the judgment of the Court of Appeal in the *Clement Talbot*<sup>2</sup> case and the other the judgment of the United States Circuit Court of Appeals in *Wallace & Tiernan Co. Inc. v. City of Syracuse et al.*<sup>3</sup> In the *Talbot* case the defendant had bought in France and had later brought to England a car fitted with a carburettor and control devices on which the plaintiff held patents. The plaintiff did not in the course of its trade sell the patented devices but sold only cars and it claimed as its damages for the infringement the profit amounting to 141£ 6s. which it would have made on the sale of a car. The Court of Appeal held that damages of 24£ 12s. 3d, which had been assessed on appeal from the Master as the difference in value between a car with and one without the patented devices were excessive and should not exceed the amount of 16£ 12s. 3d estimated by the Master. In rendering a judgment in which Fletcher Moulton and Farwell L.JJ. concurred, Cozens-Hardy, M.R. said at page 472:

I think that the amount of damage suffered is the loss of profit which the Plaintiffs have suffered by not selling the accessories in question, and the amount given by the Master more than compensates the Plaintiffs for the loss of profit which they have so sustained.

This statement must I think be read in the light of the fact that no sale of either the car or the patented devices had been made in England and the tort consisted in the defendant having and using the patent devices in England from the time of the importation of the car until he gave them up to the plaintiff pursuant to the order of the Court. For my part I should have thought that the value of the use of the patented devices in the meantime might have afforded

<sup>1</sup> (1909) 26 R.P.C. 467 at 470.

<sup>2</sup> (1909) 26 R.P.C. 467.

<sup>3</sup> (1930) 45 Fed. Rep., 2d, 693.

1966  
 FELDSTEIN  
*et al.*  
 v.  
 MCFARLANE  
 GENDRON  
 MFG. Co.  
 LTD.  
 ———  
 Thurlow J.  
 ———

a more precise measure of the plaintiff's loss since it was impossible in the circumstance to affirm that but for his infringing act the defendant would have bought either a car or the patented devices from the plaintiff but in any event the case, as I view it, is so different from one in which loss is to be measured by the extent of interference with the patentee's trade by competition provided by an infringer that it appears to me to afford no guidance whatever for a case such as the present. The tort in cases such as the present lies in the making of sales. The sales are tortious because their subject matter includes the patented device. But being package deals the sales are not divisible and since in each case the sale itself constitutes a wrong to the patentee, in my opinion, the patentee is entitled to recover whatever damages have been caused to him thereby. That a case such as the *Clement Talbot*<sup>1</sup> case has no usefulness in resolving a case of this kind is I think also apparent from the fact that when about a year later the case of *Meters Ld. v. Metropolitan Gas Meters Ld.*<sup>2</sup> came before the Court of Appeal, consisting of Cozens-Hardy, M.R. and Fletcher Moulton and Buckley L.J.J., Fletcher Moulton L.J. in the course of argument remarked that the decision in the *Clement Talbot* case turned upon the special facts of that case and none of the three members of the Court so much as mentioned it in his judgment. So far as I am aware the case has not been followed in any English or Canadian case but whatever the implications from it may be I should regard them as having to give way to the opinion of Lord Shaw of Dunfermline in the *Watson, Laidlaw*<sup>3</sup> case and to what I conceive to be the ratio of the judgment of the Supreme Court of Canada in the *Colonial Fastener*<sup>4</sup> case.

The other case, that of *Wallace & Tiernan Co. Inc. v. City of Syracuse et al.*<sup>5</sup> is I think distinguishable from the present case on its facts since there the plaintiff as exclusive licensee under the patent had demanded royalty payments from infringers and in some cases had received payments and when the assessment of damages in the par-

<sup>1</sup> (1909) 26 R.P.C. 467.

<sup>3</sup> (1914) 31 R.P.C. 104.

<sup>2</sup> (1911) 28 R.P.C. 157 at 160.

<sup>4</sup> [1937] S.C.R. 36.

<sup>5</sup> (1930) 45 Fed. Rep. 2d, 693.

particular case came before the Master it sought to establish that it had granted licences at a fixed royalty. That case as well appears to have turned on its own particular facts among which was the willingness of the plaintiff to license the use of the invention and to my mind it merely serves to emphasize that the extent of damages is in every case a question of fact depending on the circumstances of the particular case.

Accordingly, I do not think that it follows from the mere fact that the posture supports can be called "accessories" that the loss sustained by the plaintiff company in respect of sales lost by reason of the defendant's infringement of the patent is necessarily to be computed by some calculation based solely on the selling price of posture supports alone. In my view the question to be determined by the Registrar remains one of determining what, in all the circumstances established in evidence, is the loss sustained by the plaintiffs by reason of the infringement and this appears to me to be the question to be answered both with respect to the portion of the plaintiffs' loss which is ascribable to lost sales and to the portion thereof which, though the sales would not have been made by the plaintiffs, nevertheless give rise to a right to damages on the basis of what may be estimated as a reasonable royalty for the use made of the invention. In estimating such a royalty both what the trade of a person in the same business as the infringer could stand without being left with nothing for the effort and what the patentee might reasonably demand, assuming he had been willing to permit use of his invention, are proper considerations to be taken into account.

The motion is dismissed without costs.

1966  
 FELDSTEIN  
*et al.*  
 v.  
 MCFARLANE  
 GENDRON  
 MFG. CO.  
 LTD.  
 Thurlow J.  
 —