

BETWEEN:

SAMUEL DUBINER . . . . . PLAINTIFF;

AND

CHEERIO TOYS AND GAMES LTD. . . . . DEFENDANT.

Ottawa  
1965  
July 6, 7, 8  
1966  
Jan. 24

*Trade Marks—Infringement—Account of profits—Reference to officer of court—Appeal from—Accounting period—Exclusion of part of—Assessment of profits to date of reference—Whether permissible—What profits to be included—Exclusion of certain expenses—Cost of delivering up goods—No allowance permitted for unpaid services—Costs of reference—Exchequer Court Rules 185, 261.*

On March 13th 1963 plaintiff commenced an action against defendant for infringement of plaintiff's trademarks. By judgment dated July 29th 1964 ([1965] 1 Ex. C.R. 524) the court found that the defendant had infringed some of the plaintiff's trademarks since December 28th 1962 and directed a reference to establish, at plaintiff's option, either the damages sustained by plaintiff or the profits made by defendant. Plaintiff elected an accounting of profits. The referee made his report and both parties appealed therefrom under Exchequer Court Rule 185.

*Held*, dismissing the appeal:—

- (1) The Exchequer Court has jurisdiction under secs. 52 and 54 of the *Trademarks Act*, S. of C. 1953, c. 49 to grant the equitable remedy of an account of profits;
- (2) While the referee had the right to assess the profits to the date of assessment (*Bell v. Read*, 3 A.T.K. 592; *Barfield v. Kelly*, 4 Russ 359; *Bulstrade v. Bradley*, 3 A.T.K. 582), no error could be found with his decision to exclude the period subsequent to the date of judgment, during which defendant suffered a loss, by reason of his own tortious acts, due to the expense of litigation and delivering up to the court infringing goods. *John B. Stetson v. Stephen L. Stetson Co.* [1944] 58 Fed. Suppl. 586 approved;
- (3) Plaintiff was entitled only to an account of defendant's profits attributable to the use of plaintiff's trademarks in the accounting period and not to all defendant's profits during such period. *Cartier v. Carlisle* (1862) 31 Beavan 292, followed;
- (4) The referee did not err in disallowing as an expense the cost of delivering up infringing goods to the court: *United Telephone Co. v. Walker and Oliver*, 4 R.P.C. 63, followed; nor in disallowing an amount in lieu of salary for services rendered to defendant without remuneration by its controlling shareholder during the accounting period;
- (5) The accounting period was not limited to the period during which plaintiff had no notice of defendant's infringement; *Electrolux Ltd. v. Electric Ltd.* (1953) 70 R.P.C. 158 distinguished;
- (6) The court has power under Exchequer Court Rule 261 to deal with the costs of the reference.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.

MOTIONS to vary the findings of the Deputy Registrar on a reference.

*W. F. Green* for plaintiff.

*David Watson* and *C. R. Carson* for defendant.

NOËL J.:—This is an appeal pursuant to Rule 185 of the General Rules of this Court against the report of the Deputy Registrar, Mr. W. C. McBride, resulting from an inquiry into an accounting of profits of the respondent in pursuance of a judgment of this Court dated July 29, 1964<sup>1</sup>. The appeal was brought about by the notices of motion of both the plaintiff and the defendant herein for an order varying the findings of the Deputy Registrar.

The plaintiff by its notice of motion requests that the Deputy Registrar's report be varied on the basis that the latter erred in holding that the plaintiff was only entitled to a percentage of the total profit of the defendant resulting from the infringing sales of the defendant and that, consequently, instead of being entitled to the sum of \$25,743 for which the Deputy Registrar found the defendant accountable, the latter would be accountable to the plaintiff for the sum of \$128,717 which is all of its profits derived from the infringing sales during the accounting period; the plaintiff further requests the entry of judgment for costs of the reference to be paid by the defendant to the plaintiff forthwith after taxation thereof.

The defendant, on the other hand, by its notice of motion also moved for an order varying the finding of the Deputy Registrar in that the Deputy Registrar erred in the following matters:

1. Holding that the Plaintiff could carry on the reference up to and including the completion of the reference and then select a period of profit therefrom as the accounting period.
2. Not allowing as an expense the cost of goods delivered up to the Exchequer Court by the Defendant.
3. Not finding that to the extent that Mr. Krangle worked without salary a profit was realized which was not attributable to the use of the trade marks.
4. Not finding the period for accounting is dependent upon an equitable doctrine based on secret profits, and that the Plaintiff is entitled to an accounting with respect only to such period it can establish it was without notice.

<sup>1</sup> [1965] 1 Ex. C.R. 524.

5. Refusing to allow legal fees expended to protect the Defendant's right to sell its merchandise.

6. Failing to appreciate that the agreement of August 17, 1955, licensed the Defendant.

7. Not considering that if the agreement of August 17, 1955 is terminable, that a reasonable period of notice must be given.

8. Computing the percentage of the royalties attributable to the various trade marks.

9. Disallowing expenses which had not been questioned by the Plaintiff.

10. His rulings and findings with respect to the onus with regard to expenses.

11. Errors in the computation of the amounts due.

I should mention that the parties subsequent to the hearing of these appeals, in view of the fact that an entire transcript of the evidence on this reference had not been made, were requested by the Court and submitted a consent indicating the exhibits, examinations and documents upon which they relied in their appeals and it is upon such material that these appeals shall be determined.

The most important by far of the matters raised in these appeals is whether this Court has jurisdiction in an action for infringement of a registered trade mark to grant to a successful plaintiff the remedy of an account of profits which would give the plaintiff the right to recover all of the profits of the defendant derived from acts established, not only before the date of issue of the statement of claim and held to be an infringement of the registered trade mark, but also acts of the defendant established as infringements in the accounting of profits after the date of issue of the statement of claim and at least up to the date of judgment and even to recover defendant's profits for acts established in the accounting of profits as infringements after the date of judgment.

The relevant paragraph of the judgment rendered on July 29, 1964, as settled, comprised the following material paragraphs:

This Court Doth Further Order and Adjudge that the Plaintiff is entitled to recover from the Defendant those damages sustained by him by reason of the infringement of the said trade marks aforesaid, or the profits which the Defendant has made as the Plaintiff may elect.

This Court Doth Further Order and Adjudge that at the Plaintiff's election, enquiry may be made by the Registrar or Deputy Registrar of this Court to establish the damages sustained by the Plaintiff or profits

1965

DUBINER  
v.  
CHEERIO  
TOYS &  
GAMES LTD.  
Noël J.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

made by the Defendant as the case may be, which damages or profits so determined on the said enquiry shall be paid by the Defendant to the Plaintiff forthwith after the determination thereof;

On the 23rd day of October 1964, the defendant moved before the Deputy Registrar to require the plaintiff to make his election between an assessment of damages and an accounting of profits prior to the opening of the reference. The plaintiff, accordingly, filed a notice that he elected an accounting of profits. The hearing before the Deputy Registrar commenced on November 30, 1964, and then was adjourned and an opportunity to inspect the documents was given to the plaintiff. It then came on for hearing on January 18, 1965 and more or less continued until March 15, 1965 and his report was rendered on June 11, 1965. At the beginning of his report, the Deputy Registrar deals with a number of questions of law raised during the course of the inquiry and primarily with the determination of the proper accounting period, the period over which the plaintiff is entitled to examine the operations of the defendant and whether the plaintiff must accept an accounting of profits or losses for the whole accounting period. I can do no better than reproduce hereunder the decisions reached by the Deputy Registrar with regard to the above at pp. 3, 4, 5 and 6 of his report:

1. With respect to the limitation of the accounting period the parties share common ground that the date of commencement of the period is the date when the defendant's permitted use of the trade marks in question was terminated and that was December 28, 1962, as found by the judgment under which this reference was directed. The termination date of the accounting period has presented some difficulty and confusion. The defendant has insisted that it cannot extend beyond the date of judgment, July 29, 1964, but I was long under the impression that the plaintiff took the position that the accounting period extended to the date of the reference. No authorities have been cited to me by either party on this point. I adopted the view that the accounting period did extend to the date of the reference and I so ruled on at least three occasions during the course of the hearing. Of course, if the terms of the judgment were obeyed and the defendant ceased dealing with merchandise in association with the trade marks found to be valid and owned by the plaintiff, there would be nothing for which the defendant must account to the plaintiff after the date of judgment, but if the defendant did in fact deal with such merchandise after that date I can see no reason why it should not account for its profits, if any, arising therefrom. Neither can I see any reason why it should be necessary to hold a separate reference in order to accomplish this.

2. I ruled during the course of the inquiry that the plaintiff is not restricted in his examination of the witnesses to the operations of the defendant during the accounting period proper. The defendant is an incorporated company, the fiscal year of which was April 1 to March 31

until 1963, when it was changed to coincide with the calendar year. As a result, three fiscal periods of the defendant fall wholly or partially within the accounting period. They are, the fiscal year April 1, 1962 to March 31, 1963; April 1, 1963 to December 31, 1963 and January 1, 1964 to December 31, 1964. Accordingly, I felt it was necessary for the plaintiff to investigate the operations of the defendant during the three fiscal periods covering the total period from April 1, 1962 to December 31, 1964 in order that I might have as clear a picture as possible of the operations of the defendant during the accounting period proper and I permitted him to do so.

3. It was argued by the defendant that since I had ruled that the accounting period extended to the date of the reference, the plaintiff was compelled to accept an accounting to that date and that he could not waive his right to an accounting for any part of the accounting period. It may be that I misunderstood the position of the plaintiff for it appears from page 141 of the reference transcript that he indicated as early as the third day of the reference that he might not claim an accounting to the date of the reference. His position, I think, was a reasonable one. He was examining the operations of the defendant and until he had done so he could not be expected to know what would be the effect of including the period from the date of judgment to the date of the reference. In fact, the evidence has established that during this period the defendant suffered a loss, due primarily, I think, to the cost of litigation, and the expense incurred in delivering up merchandise in accordance with the terms of the judgment and perhaps also to the necessity of carrying on business without the benefit of the trade marks in question.

In my opinion it would be most unreasonable to saddle the plaintiff with these losses and force him to set them off against any profit for which the defendant is required to account to him which was earned by the defendant after December 28, 1962 and before the date of judgment.

The only authority cited to me in connection with this particular matter was *John B. Stetson v. Stephen L. Stetson Co.* (1944) 58 Fed. Suppl. 586, where Bright J. District Judge of the District Court, S.D. New York, affirmed the Master's decision, on a reference as to profits and damages in a trade mark infringement case, to permit the plaintiff to waive a part of the accounting period. In that case the accounting period was three years and nine months and the plaintiff had been permitted to waive the first five months thereof, during which there were losses.

It may be worth noting that in the present case, the losses suffered by the defendant from the date of judgment to the date of the reference were not ordinary business losses but losses directly attributable to the tortious acts committed by the defendant in continuing to use the plaintiff's trade marks after its legal right to do so had terminated. There being no reason, in my opinion, why the plaintiff should absorb these losses, I have permitted him to waive an accounting by the defendant for the period following the date of judgment.

From this it appears that the Deputy Registrar has determined that (1) the commencement of the accounting period is December 28, 1962; (2) the termination date could have gone beyond the date of judgment up to the date of the reference; (3) that the actual termination date of the accounting period in the present case was the date of

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

1965  
DUBINER  
v.  
CHERRIO  
TOYS &  
GAMES LTD.  
—  
Noël J.  
—

judgment, July 29, 1964; (4) the plaintiff, in the case of an accounting of profits is not restricted in his examination of witnesses to the operations of the defendant during the accounting period proper but may go beyond this in order to have as clear a picture as possible of the operations of the defendant during the accounting period proper; (5) although he had ruled that the accounting period extended to the date of the reference, the plaintiff was not compelled to accept an accounting period to that date and could still waive his right to part of an accounting period which he was allowed to do for the period after the date of judgment, July 29, 1964, during which the defendant sustained a loss, which the Deputy Registrar found was due primarily to the cost of litigation, the expense incurred in delivering up merchandise in accordance with the terms of the judgment and possibly also to the necessity of carrying on business without the benefit of the trade marks in question on the basis that it would have been most unreasonable to saddle the plaintiff with these losses.

At the reference, counsel for the plaintiff submitted that the Registrar should extend the inquiry period beyond the date of judgment, July 29, 1964, to the date of reference although, as pointed out by the Registrar at p. 5 of the report "he (counsel for the plaintiff) indicated as early as the third day of the reference that he might not claim an accounting to the date of the reference". Counsel for the defendant on the other hand took the position at the reference inquiry that the accounting period could not go beyond the date of judgment.

At the hearing of the appeal, however, there was somewhat of a reversal of positions in that counsel for the plaintiff submitted that the period could not go beyond the date of judgment and counsel for the defendant insisting that it should go down to the date of assessment, as it turned out that losses had been sustained since the date of judgment.

This matter was discussed at great length by both parties and became further involved when the Court pointed out that it was even doubtful that the accounting period could go beyond the date of the taking of the action as it is a general rule that at the trial of any action, judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the writ of summons or

the statement of claim initiating the proceedings. Such, at least, is the prevailing rule under the civil law, where if causes of action subsequent to the initiation procedure are to be invoked, a procedure called an incidental demand is used and once authorized allows these new causes of action to be dealt with at the same time as the original action. In a case such as here where we are dealing with the illegal use of trade marks, each time the infringement is repeated, there is a new cause of action, a new injuria or infringement of legal rights and a new *damnum* flowing therefrom and so where the acts continue, a plaintiff may, theoretically, issue a writ or a statement of claim every day for the new damage. For one who was brought up under the civil code, the granting of damages or profits as a result of infringements subsequent to the taking of the action is unacceptable. Indeed, a party has the right to have such questions, as they arise, tried according to the ordinary practice of the Court and there is no such procedure either under the civil law or under the common law that I know of under which a judgment can be obtained in respect of an anticipated wrong. It would appear, however, that under the law of Ontario, two exceptions have been made to the principle that at the trial of any action, judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the initiating proceedings. The first exception was by section 15(2) of the *Judicature Act*, R.S.O. 1960, c. 197 as amended by 1960-1961, c. 41 and 1961-1962, c. 65, where it is provided that "no action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right, whether or not any consequential relief is or could be claimed".

Under the practice which preceded the rule, no declaration would be granted unless the plaintiff was entitled to claim relief consequent upon the declaration, but the statute above quoted does away with this limitation, although, notwithstanding the above, a declaratory judgment or order can only be granted in respect of a right which existed at the date when the action was initiated.

The second exception to the general principle is covered by Rule 259 of the Ontario Rules of Practice:

Rule 259: Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment.

1965  
 DUBINER  
 v.  
 CHERRIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

This rule is similar to Rule 0.36 r 7 of the Rules of the Supreme Court under the English Act which reads as follows:

7. Where damages are to be assessed (whether under this order or otherwise) in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

This rule is available before our Court under Rule 42 of its General Rules and Orders which provides that in the absence of any practice or procedure provided for by any Act of the Parliament of Canada, or by any general rule or order of the Court, the practice and procedure should "conform to and be regulated as near as may be by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England".

The English rule 7 is merely declaratory of what was the practice in equity prior to the *Judicature Act*, but under it damages cannot be given in anticipation. In other words, the plaintiff, although entitled to actual damage, is not entitled to recover in respect to prospective damages, that is to say, anticipated damages expected to occur, but which have not actually occurred or which never may arise. This appears from a reading of *West Height Colliery Company Limited v. Turncliffe & Hampson Limited*<sup>1</sup> where it was decided that in assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account to recover damages. The surface owner must wait until the damage or inquiry caused by a subsidence has happened.

It however would seem that if at the trial in the above case a reference has been directed to the Master to ascertain the amount due to the plaintiff, the Master, in taking the account, could have brought it down to the date of the making of his report under the authority of *Read v. Wolton*<sup>2</sup> where damages were claimed from the defendants as a result of nuisances committed by the latter as lessors of the plaintiff's property. Sterling J. stated here at p. 174 of the above decision:

There is in the writ a claim for damages and under order XXXVI, rule 58 (which later became rule 0.36 r 7) where damages are to be assessed in

<sup>1</sup> [1908] A.C. 27.

<sup>2</sup> [1893] 2 Ch. 171.



respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

Consequently, if it is proved at the trial that there has been a breach of the contract under which the premises are held before action brought, continuing at the time when the action is brought, and down to the trial, damages may be assessed down to not only the issue of the writ, but to the time of assessment.

It is interesting to note that although these nuisances were not strictly speaking what is considered as a continuing cause of action, yet the reference was allowed to deal with the damages down to the assessment.

A similar situation was dealt with in the same manner in *Hole v. Chard Union*<sup>1</sup> where the plaintiffs had brought an action against the defendants for permitting sewage to fall into and pollute a stream running through the plaintiff's land and obtained judgment for a perpetual injunction and for damages. The defendants continued to pollute the stream and three years after the judgment, the chief clerk assessed the damages sustained by the plaintiffs carrying the assessment down to the date of his certificate. It was held by the Court of Appeal here (affirming a decision of Chitty J.) "that there was a continuing cause of action within the meaning of Order XXXVI, rule 58 and that the damages were rightly assessed down to the time of assessment".

.. The question raised in the appeal is, What are the damages since the death of the original Plaintiff to which the Plaintiffs are entitled? That depends upon the construction of Order XXXVI, rule 58. Mr. Justice Chitty having directed an inquiry as to damages, the Chief Clerk has assessed the damages down to the time of his certificate. The question is whether he was justified in taking account of damage sustained by the Plaintiffs since the date of the grant of the injunction, or rather since the 25th of August, 1890, the date when it came into operation. It is contended on behalf of the Defendants that it was not right in principle to do this; because any nuisance committed after the date when the injunction came into operation gave rise to a fresh cause of action, and was not a continuing cause of action in respect of which the damages could be assessed down to the date of assessment under Order XXXVI, rule 58, What is a continuing cause of action? Speaking accurately, there is no such thing; *but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule.* The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which rule 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the Defendants would be to render the rule altogether a nullity. I feel no doubt that the

1965

DUBINER  
v.CHEERIO  
TOYS &  
GAMES LTD.

Noël J.

<sup>1</sup> [1894] 1 Ch. 293.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 No 81 J.

present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial, and had been decided to constitute a nuisance. The Judge was, therefore, right in treating it as a continuing cause of action, and in assessing the damages down to the date of the Chief Clerk's certificate. (The emphasis is mine.)

Although the present case deals with an accounting of profits which is different from a reference on damages, there is some analogy in that in both cases the question is whether the calculation of damages or of an account of profits can be made with respect to infringing sales subsequent to the taking of the action, the judgment and even down to the assessment.

The matter of damages was dealt with here in order to show how the Courts in England have interpreted "a continuing cause of action" and have held in many cases that although strictly speaking they did not deal with continuing causes of action but repeated causes, they were to be held as continuing causes of action under the above rule and such an interpretation of a continuous cause of action under the rule became an exception to the rule that at the trial of any action, judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the initiating proceedings. It appears to have been accepted on the basis that it was more practical to allow such a procedure to be exercised than to force a plaintiff to be delayed in his relief and to put both parties to the expense of another action or to several actions before the plaintiff can get the relief to which the judgment in the action adjudges him to be entitled. A reference as to damages in patent cases has been granted in this country in numerous instances as well as in England. Cf. *Dominion Manufacturers Ltd. v. Electrolis Mfg. Co. Ltd.*<sup>1</sup>; *Colonial Fastener Co. Ltd. et al. v. Lightning Fastener Co. Ltd.*<sup>2</sup>; *The British Thomson-Houston Co. Ltd. v. Goodman (Leeds) Ltd and others*<sup>3</sup>; *Proctor v. Bennis Tool*<sup>4</sup>. It has also been granted in trade name or trade mark cases: *Edelsten v. Edelsten*<sup>5</sup>; in cases dealing with passing off by trade mark and get up of goods: *Draper v. Triste and Tristebestos Brake Lining Ltd.*<sup>6</sup> The matter of dealing with causes of

<sup>1</sup> [1939] Ex. C.R. 204.

<sup>2</sup> [1936] S.C.R. 37.

<sup>3</sup> 42 R.P.C. 75 at 305.

<sup>4</sup> 4 R.P.C. 333.

<sup>5</sup> 7 L.T. 768.

<sup>6</sup> 56 R.P.C. 429.

action subsequent to the initiating proceedings for which some particular defence or exception could be raised, appears to be assured an adequate treatment, at least, before this Court, by either the Registrar conducting the reference referring the matter to the Court by means of a certificate or if such a course of action is not taken, the matter can be dealt with by the Court upon an appeal against the Registrar's report or even possibly upon a motion for judgment to be entered.

The recourse chosen here, however, is an accounting of profits which is quite different from a reference as to damages and on which topic there appears to be very little written.

Halsbury's Laws of England, 3rd edition, at pp. 647 and 648, deals with the procedure as follows:

The Court grants an account of profits where one party knowingly marks his goods with the trade mark of the plaintiff or passes off his goods as those of the plaintiff. Also an account will be granted where one party owes a duty to another; the person to whom the duty is owed is entitled to recover from the other party every benefit which that other party has received by virtue of his fiduciary position if in fact he has obtained it without the knowledge or consent of the party to whom he owes the duty.

...

In taking an account of profits, which is an equitable relief, the damage which the plaintiff has suffered is totally immaterial; the object of the account is to give the plaintiff the actual profits which the defendant has made and of which equity strips him as soon as it is established that the profits were improperly made.

In *Draper v. Triste and Tristebestos Brake Lining Ltd.*<sup>1</sup> which was a passing off by trade mark and get up of goods case, Sir Wilfrid Green M/R stated at p. 439:

Of course in taking an account of profits which is the equitable relief, the damage which the plaintiff has suffered is totally immaterial. The object of the account is to give to the plaintiff the actual profits the defendants have made and of which equity strips them as soon as it is established that the profits were improperly made.

That such a remedy is available in Canada and that this Court has jurisdiction to grant it, would appear to be clear. Sections 52 of the *Trade Marks Act*, 1-2 Elizabeth II, c. 49 specifically refers to this remedy:

...the Court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits (the emphasis is mine).

<sup>1</sup> 56 R.P.C. 429.

1965

DUBINER  
v.  
CHEERIO  
TOYS &  
GAMES LTD.

—  
Noël J.  
—

Section 54 of the same Act clearly indicates that the Court

...has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.

Section 40 of the *Exchequer Court Act* states that the Court may "for the purpose of taking accounts or making inquiries . . . refer any cause, claim, matter or petition to the Registrar . . . for inquiry and report".

As the relief of an account of profits is an equitable remedy and since the *Judicature Acts*, a common law court can also give it on the same conditions as those previously recognized in equity alone, decisions regarding an accounting of profits in England are useful in determining the extent and manner of the accounting to be conducted in this country.

Before, however, looking at the English decisions in this regard, it might be apposite here to point out that there is a complete dearth of Canadian decisions on this topic and that even in England such little use has been made of this remedy that it is difficult to produce English decisions which determine its limits with precision. The fact that this remedy was a difficult one to work out may, however, explain the fact that very few litigants appear to have used it.

In *Siddell v. Vickers*<sup>1</sup> which dealt with an action for infringement of a patent, damages and an account of profits, the Court of Appeal, after expressing an opinion that an account of profit was extremely difficult to work out and should rarely be chosen, discharged the order of the judge below and the certificate, and ordered the defendants to pay the plaintiffs £3000 in satisfaction of all demands with all costs. Lindley L.J. at p. 126 then stated:

The Plaintiff having succeeded in his action for the infringement was entitled, as the law stands, to elect whether he would take damages or an account of profits I have been looking into that for reasons which I will state presently. The old form of decree in Chancery before Lord Cairns' Act, always was to give the Plaintiff an account of profits. They had no jurisdiction to give damages. After Lord Cairns' Act the jurisdiction to give damages was conferred upon the Court, and in *Hills v. Evans*, which is to be found in 4th De Gex Fisher and Jones, Lord Westbury pronounced a decree giving the plaintiff both damages and profits. As soon as attention was called to that, it was said to be wrong and that was put right in *Neilson v. Betts*, which is in law Reports, 5th English and Irish Appeals, page 1, and more pointedly in *De Vitre v. Betts*, which is in

<sup>1</sup> Cutter's Reports on Patent Design, Vol. 9, 1892, pp. 152-153.

6th English and Irish Appeals 319 The House of Lords then settled finally that the plaintiff in an action for infringement of a patent, having succeeded, is entitled at his election either to damages or an account of profits, and that is the state of the law. The Plaintiff therefore was perfectly within his right in electing, as he did in this case, to have an account of profits but I do not know any form of account which is more difficult to work out, or may be more difficult to work out than an account of profits. One sees it—and I personally have seen a good deal of it—in partnership cases where the capital of a deceased or outgoing partner has been left in the trade; an account has been directed of the profits made in respect of his capital, which is something like the profits made in respect of an invention, *and the difficulty of finding out how much profits is attributable to any one source is extremely great*—so great that accounts in that form very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained; so much so that in partnership cases I confess I never knew an account in that form worked out with satisfaction to anybody. I believe in almost every case people get tired of it and get disgusted. Therefore, although the law is that a Patentee has a right to elect which course he will take, as a matter of business he would generally be inclined to take an inquiry as to damages, rather than launch upon an inquiry as to profits. (The emphasis is mine.)

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

There have been, however, a few decisions in England regarding this remedy, cf. *Ford v. Foster*<sup>1</sup> and *Lever Brothers, Peat and Sunlight Limited v. Sunniwite Products Limited*<sup>2</sup> which dealt with an action for the infringement of a registered trade mark. In *M. Saxby v. Easterbrook*<sup>3</sup>, in the Court of Exchequer Chamber on appeal from the Court of Exchequer, Kelly, C. B. in giving judgment for the plaintiff stated:

From my own experience I can say that for at least thirty years past, it has been a matter of course in the Court of Chancery that upon a decree being pronounced in favour of a patentee in a suit in which complaint is made of infringement of the patent, application is at once made and granted that an account be taken of the profits made by means of infringement down to the time of the decree. In this case, the trial was before me; and upon the verdict being pronounced, I, at once, under the power given in the statute, granted an order for an account, meaning an account of profits from the time of the infringement to the time of verdict. Judgment was afterwards given in this court confirming the verdict.

It does appear that the plaintiff is entitled in an account of profits, to recover profits after the date of the institution of the action up to the date of the judgment or even thereafter, if an order extending the period remains unappealed.

<sup>1</sup> (1872) L.R. 7 Ch. 633.

<sup>2</sup> (1949) 66 R.P.C. 84.

<sup>3</sup> (1872) L.R. 7 Ex. 207.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 ———  
 Noël J.  
 ———

Two old decisions, *Bell v. Read*<sup>1</sup> and *Barfield v. Kelly*<sup>2</sup>, determine that the account may be carried on as long as the suit is pending between the parties and in *Bulstrade v. Bradley*<sup>3</sup> it was stated that though judgments for account do not contain future words, sums received after judgment must be accounted for.

It therefore follows that the decision of the Deputy Registrar to carry the accounting period in the present case to the assessment was in line with the procedure and practice followed in England in such matters and he was perfectly right in doing so.

I now come to the plaintiff's first ground of appeal to the effect that the Deputy Registrar erred in holding that the plaintiff could carry on the reference up to and including the completion of the reference and then select a period of profit therefrom as the accounting period.

I should point out here that in some cases the Registrar may be dealing with an inquiry period more extensive than the accounting period proper and necessary in order to properly evaluate the profits to be determined during the accounting period and although the Deputy Registrar here has not gone up to the date of assessment merely to be able to determine the profits during the accounting period which he has determined as ending on July 29, 1964, date of the judgment, he might well have done so here, as it was helpful for him to go as far at least as the end of the fiscal year of the defendant company, i.e., December 31, 1964, in order to properly assess the profits which the plaintiff was entitled to up to the date of the judgment. His decision not to include the period after the judgment in the accounting period is explained at p. 5 of his report where he states that:

The evidence has established that during this period the defendant suffered a loss, due primarily, I think, to the cost of litigation, and the expense incurred in delivering up merchandise in accordance with the terms of the judgment and perhaps also to the necessity of carrying on business without the benefit of the trade marks in question.

In my opinion it would be most unreasonable to saddle the plaintiff with these losses and force him to set them off against any profit for which the defendant is required to account to him which was earned by the defendant after December 28, 1962 and before the date of judgment.

<sup>1</sup> 3 A.T.K. 592.

<sup>2</sup> 4 Russ 359.

<sup>3</sup> 3 A.T.K. 582.

And at p. 6 he added:

It may be worth noting that in the present case the losses suffered by the defendant from the date of judgment to the date of the reference were not ordinary business losses but losses directly attributable to the tortious acts committed by the defendant in continuing to use the plaintiff's trade marks after his legal right to do so had terminated. There being no reasons in my opinion why the plaintiff should absorb these losses, I have permitted him to waive an accounting by the defendant for the period following the date of judgment.

I can see nothing wrong in the action taken by the Deputy Registrar in doing what he did when he permitted the plaintiff to waive the period subsequent to the judgment and it appears to me to have been the reasonable and equitable thing to do in the circumstances. If an argument of reason is required to sustain such a course of action, his reference to the case of *John Stetson v. Stephen L. Stetson Co.*<sup>1</sup>, although an American decision, appears to me to be a convincing enough authority to do so. In this case, the plaintiff in an accounting of profit had been permitted by the Master's decision to waive a number of months of the accounting period during which there had been losses.

I therefore see no reason why the decision of the Deputy Registrar in this respect should be disturbed.

I will now deal with plaintiff's submission that he is entitled to the sum of \$128,717 instead of merely \$25,743 as determined by the Deputy Registrar, the former being all of defendant's profit derived from the infringing sales during the accounting period. In order to properly understand this contention it is necessary to explain the basis of the Deputy Registrar's decision in this regard.

The difficulty the latter had to deal with in respect of determining the profit of the defendant was due to the fact that the total net profit of the defendant was composed of that derived from the sale of merchandise bearing one or more of the plaintiff's trade marks, some of which were infringing and others of which were not (Cheerio and Beginners could be used by the defendant whereas Pro, YoYo, Bo-Lo, 99 and Tournament could not and were infringements) or of merchandise otherwise sold in association with those trade marks and the sale of non-infringing merchandise. The plaintiff here takes the position that he is entitled to all of the profits made by the defendant during the

1965

DUBINER  
v.  
CHEERIO  
TOYS &  
GAMES LTD.  
Noël J.

<sup>1</sup> (1944) 58 Fed. Suppl. 586.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 ———  
 Noël J.  
 ———

accounting period, because it is the goodwill of the trade marks that the defendant has obtained and that he has traded upon, whereas the latter maintains that the plaintiff is only entitled to that portion of such profits directly attributable to the use of the plaintiff's trade marks.

It is my view that the Deputy Registrar's decision that the plaintiff is entitled to require the defendant to account for only that part of the profit it realized on infringing sales during the accounting period that is attributable to its use of the plaintiff's trade marks is the right one in the present instance and the authority he has cited in this regard to sustain this finding and his interpretation thereof is also in accordance with my view on the matter. Indeed, in *Cartier v. Carlisle*<sup>1</sup> a trade mark infringement case, the Master of the Rolls stated at p. 298:

I am therefore of opinion in this case, that the injunction must be made perpetual and that there must be the usual account, but, as I have stated, I do not propose, in taking the account in Chamber, to make the Defendants account for every species of profit during the last six years, but I shall consider how much of the profits are properly attributable to the user of the plaintiff's trade marks.

The Deputy Registrar here in determining what proportion of the profit realized can be attributable to the infringing use of the plaintiff's trade marks took into consideration a number of matters such as the value placed on plaintiff's trade marks by Krangle, the defendant's President, when he executed the agreement of August 17, 1955, Krangle's evidence during his cross-examination on an affidavit in September 1964, the fact that the defendant used its own trade marks during the accounting period and the way in which it used them and finally the significance of the sales achieved by the defendant during its promotion campaign in St. John's, Newfoundland in November 1964, which counsel for the defendant submitted was the first promotion campaign conducted by the defendant without the use of any of the plaintiff's trade marks. He then concluded, after due consideration to the evidence that was before him regarding the value of the plaintiff's trade marks, that 20 percent of the profit realized by the defendant on its sales made in the accounting period is attributable to its use of those trade marks and I must say that I fully

<sup>1</sup> (1862) 31 Beavan 292.



concur not only in the percentage he has arrived at in this regard, but also in the reasons given for arriving at this result.

To accept the submission of counsel for the plaintiff that, if an infringer is using infringing marks as well as other marks, the whole of the profits in an accounting of profits goes to the person whose rights he has been infringing even if some of the profits are attributable to the use of a trade mark which does not belong to such person would, in my view, lead to unconscionable results particularly in a case where use is made of several trade marks belonging to different owners. Indeed, one might ask whether, if the trade marks used together belonged to different people, the defendant should be compelled to pay an amount equal to all of his profits to each of the individual owners. To reach such a result would indeed be most unreasonable and would lead to unjustifiable abuses.

I now come to defendant's second submission that the Deputy Registrar erred in "not allowing as an expense the costs of goods delivered up to the Exchequer Court".

I can deal with this matter shortly by merely stating that if such a course of action was taken and the resulting expense was incurred after the date of judgment, it was because the defendant failed to take the alternative given to it in the judgment of either destroying the infringing wares or removing the offending labels or inscriptions and also because of the fact that it had attempted to avoid the judgment of this Court.

Having therefore determined that the Deputy Registrar had the right to allow the plaintiff to waive the losses during that period, these expenses should not be taken into account. But even if this period had been taken into account, these expenditures could not be considered in establishing the profits realized during such period. A similar situation occurred in a patent case in *The United Telephone Co. v. Walker and Oliver*<sup>1</sup> where an expense of a similar nature was refused:

It was stated by the defendant that there ought to be a set-off, as against these damages, of the value of the instrument which had been given up under the judgment. That appears to me to be absolutely untenable. The judgment is that those instruments should be delivered up and the plaintiffs have not to pay for them in any form. That is one of the penalties which the Patent law imposes on the infringer.

<sup>1</sup> 4 R.P.C. 63.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

Defendant's third submission is that the Deputy Registrar erred in "not finding that to the extent that Mr. Krangle worked without salary a profit was realized which was not attributable to the use of the trade marks".

Mr. Krangle drew a salary of \$8,500 in the fiscal period April 1, 1962 to March 31, 1963 and \$10,000 for the year 1964. He did not, however, draw a salary for the nine month fiscal period April 1963 to December 31, 1963, and counsel for the defendant submits that the value of his services during this period should have been taken into consideration by the Deputy Registrar in establishing the profits during the accounting period.

From the Report it would appear that the Deputy Registrar could not see why he should allow an expense greater than what was actually paid during the period in question and I am not prepared to say that he was wrong in this regard particularly in view of the fact that during the 9-month period during which Krangle received no salary, he used funds from the defendant company to pay for personal wearing apparel for himself and his family and for things such as repairing golf clubs which had nothing to do with the affairs of the company. The evidence discloses that there were credit charges amounting to \$4,000 covering Krangle's personal or family expenses during this period. It was also during this period that some of the profits of the defendant company were transferred to a company called Dulev of which Krangle's wife was the president, on the basis of some alleged promotion agreement between both companies. I also agree with the Deputy Registrar's additional reason for refusing to allocate or estimate a salary for Krangle during the 9-month period in that dealing as he was with the actual expenses incurred by the defendant during the accounting period, to allow an increased amount for management salary over that which the defendant actually paid, would be to artificially reduce its apparent profit because it would not be under any liability to pay the increased amount to Krangle.

Defendant's fourth submission is that the Deputy Registrar erred in "not finding the period for accounting is dependent upon an equitable doctrine based on secret profits, and that the plaintiff is entitled to an accounting with respect only to such period it can establish it was without notice".

Counsel for the defendant argued that in *Electrolux Ltd. v. Electrolux Ltd.*<sup>1</sup> Lloyd Jacob J. held that the right to an accounting having an equitable basis and being based upon agency applies only when a secret profit is made and that, therefore, the period of accounting should be only that during which the plaintiff did not have notice of the infringement, which would mean here that the plaintiff would have no claim to the profits earned by the defendant during the period commencing not later than the date of institution of the action and continuing to the date of the last act of infringement. I have read this decision and I agree with the Deputy Registrar that it is not authority for the above proposition as the Court in the *Electrolux* case was dealing with a situation where the plaintiff had deliberately stood passively by with full knowledge of the defendant's infringing activities for a period of several years and then after allowing the defendant to gain profits over that long period of time, had asked for an accounting of profits. Here, of course, the plaintiff sought his remedy with dispatch and can in no way be held to have acquiesced in any way to the infringing acts.

I now come to defendant's point five based upon the refusal of the Deputy Registrar to allow legal fees which had been expended to protect the defendant's right to sell its merchandise. The total amount under legal and audit adjusted to July 29, 1964, is \$26,394, a sum of course which as pointed out in the Report, is very much greater than the sum normally expended by the defendant. On the basis that most, if not all of the legal services covered by the account were rendered to Krangle personally, and that the defendant declined to give any particulars of even the most general nature (or in some cases even satisfactory proof—as the Deputy Registrar put it at p. 32 of the Report—of the services represented by these accounts on the ground that such information is privileged) he disallowed the amounts claimed and allowed for legal and audit for the accounting period, a sum of \$3,000. I am also of the view here that, under the circumstances, this was the only way these items could legally be dealt with.

As the matters which points 6 and 7 dealt with, i.e., the agreement of August 17, 1955, and the suggested reasonable

1965  
 }  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 \_\_\_\_\_  
 Noël J.  
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<sup>1</sup> (1953) 70 R.P.C. 158 at 159.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 ———  
 Noël J.  
 ———

notice of termination to be given have been dealt with by the Supreme Court in upholding the judgment of this Court, that the defendant on December 28, 1962, by not complying with its obligation to allow the plaintiff free access to inspect had infringed his user agreement, and from that date on had no longer the right to the use of the trade marks, the submissions which the defendant might have otherwise made in respect to these items can no longer be entertained.

Defendant's submission number 8 is that the Deputy Registrar erred in "computing the percentage of the royalties attributable to the various trade marks".

An agreement dated August 17, 1955, Ex. C. between the defendant and the plaintiff, provided for the payment by the defendant to the plaintiff of a royalty of 5 percent of the sales price. This agreement was amended twice by agreement dated August 30, 1955, Ex. D., and by agreement dated June 27, 1961, Ex. E. However, these subsequent agreements having been executed only in an attempt to settle a dispute between Krangle and one Gallo, a minority shareholder, the Deputy Registrar held that the undertaking of the plaintiff to accept for a period of two years the sum of \$2,000, and 10 percent of the defendant's net profit, cannot be used to establish the value of the plaintiff's trade marks.

He then, after examining the evidence of Krangle on the value of some of the trade marks and the fact that the defendant used during a certain period the plaintiff's trade marks in association with those of the defendant, and after considering the evidence before him, concluded that 20 percent of the profit realized by the defendant on its sales made in the accounting period was attributable to its use of those trade marks. Now, although the figure arrived at here is only approximate, it cannot be anything else under the circumstances. Looking at the relevant evidence, I cannot find any fault with his decision on this point.

I also cannot find fault with the Deputy Registrar's apportionment of the total profit attributable to the use of the plaintiff's trade marks by the defendant as set down at p. 19 of the Report. He there apportioned 70 percent to "Yo-Yo", 15 percent to "Bo-Lo" and 5 percent to each of the trade marks "Pro", "Tournament" and "99". I cannot find anything unreasonable in such a determination.

Before dealing with defendant's points 9 and 10, shall deal with defendant's submission that the report contains a number of erroneous figures which counsel for the plaintiff admitted and which should be corrected as follows: the figure \$50,039 on line 2, p. 21 of the Report is changed to \$68,223; \$150,197 in line 7 of p. 21 is changed to \$168,381 and \$322,002 in line 11 of the same page is changed to \$303,818; \$322,002 in the first line of p. 42 is changed to \$303,818; \$128,717 in the second line of the same page is changed to \$110,533 and \$25,743 in line 5 is changed to \$22,106 and \$128,717 in line 20 of the same page is changed to \$110,533.

A further adjustment should also, I believe, be made in the total amount of sales \$472,198.54 found by the Deputy Registrar from December 28, 1962 to July 29, 1964. The plaintiff was allowed to increase the amount of sales by the defendant by \$9,419.83 for goods sent out on consignment prior to the accounting period and although this was a proper thing to do in order to obtain the total sales during the period, it would follow also, however, that some deduction should be made for an amount of \$8,986.89 paid out by the defendant for returns after the period from consignment of wares sent out during the period.

I believe that in order to be consistent in this matter, this amount of \$8,986.89 less a credit note of \$279.18 for taxes (which is credit note No. 428 included in invoice No. 743), i.e., \$8,707.71, should be deducted from the total amount of sales of \$472,198.54 thus leaving a sum of \$463,490.83 as the total amount of sales of the defendant during the period. After deducting from this amount the corrected amount of the cost of goods sold during the period, i.e., \$168,381, the resulting gross trading profit of the defendant for the accounting period becomes \$295,109.83 instead of \$303,818.

By deducting the expenses of \$193,285 from the amount of \$295,109.83, a net profit of the defendant of \$101,824.83 is arrived at instead of \$110,533. By taking 20 percent of the net profit the sum of \$20,364.96 is arrived at for which the defendant is accountable to the plaintiff instead of the amount of \$22,106.

I can find no other item where the Deputy Registrar has disallowed expenses which should have been allowed and I

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

can find no fault with the manner in which he dealt with the matter of expenses. This was a most difficult assessment to make and the manner in which he discharged his duties in this regard must be commended.

The defendant submitted under point 10 that the Deputy Registrar erred "in his rulings and findings with respect to the onus with regard to expenses". Here counsel for the defendant complained that the Deputy Registrar not only imposed on the defendant the onus of proving expenses but that of proving that the expenses were proper expenses. He admits that this would have been proper if ordinary trial procedure had been followed in this inquiry but he says that the inquiry was conducted on an inquisitorial basis, the plaintiff being given *carte blanche* to explore the expenses. He further adds that the plaintiff was allowed to have things all his own way.

Under Rule 178 of the Court the Registrar is required to proceed in like manner as at a trial before a judge of the Court and so far as was possible in this case, the proper procedure seems to have been followed. Whatever deviations the Deputy Registrar may have adopted during this long and difficult investigation (to which, I understand, objection was taken only at the end of the inquiry by the many counsels for the defendant) do not appear to have prejudiced the defendant in any way. The difficulties met by the Deputy Registrar here were in no way caused by adopting any improper procedure but were mainly due to Krangle's reluctance to give out information regarding certain expenses in order not to damage his interests in an accounting action between him and one Gallo in another jurisdiction and on other occasions. They were due also to Krangle's attempt to bring forth extraordinary expenses such as payments made to his daughter allegedly as wages, the charging of capital cost allowance to the defendant for certain items in the home of Krangle and for an automobile used by his wife and the very large legal accounts paid by the defendant, for which particulars were refused on the basis that this was a confidential matter covered by privilege.

I now come to the matter of costs on this reference which the plaintiff submits should be paid by the defendant to the plaintiff forthwith after taxation. Counsel for the defendant submits on this point that the costs of the reference

were disposed of by the award regarding costs made in the judgment of July 29, 1964, and as the award made therein was that there would be no costs, there can be no costs either on the reference.

The decision of the Court of July 29, 1964, on the question of infringement and validity regarding the matter of costs and reference reads as follows: "Both parties having been partly successful in this case, there shall be no costs for either of them and as for the matter of damages or profits, they will be such as the Registrar of this Court may award on a reference to him, if the plaintiff elects such reference."

The above has been the usual and customary way of referring matters to be inquired into by the Registrar and does no more in my view than turn the matter over to him to be dealt with thereafter in accordance with Rules 176 and following of the Rules of this Court and once his inquiry is terminated, he then proceeds in accordance with Rules 184, 185 and 186 to deposit his report and give notice of such filing to the other parties to the proceeding. Within 14 days after service of this notice any party may, by a motion, appeal to the Court against the report and the Court may confirm, vary or reverse the findings in the report and direct judgment to be entered accordingly or refer it back to the referee for further consideration and report. If there is no appeal within 14 days after the service of notice of filing of the report, the latter becomes absolute. However, unless otherwise directed by the order of reference, judgment on such report cannot be entered without an order thereupon obtained upon motion for judgment of which at least eight days' notice shall be given.

The parties to the present proceedings dealt with this reference in accordance with the above procedure as both appealed to the Court against the report on various grounds of appeal mentioned in their respective motions.

On this appeal the Court is empowered to confirm, vary or reverse the findings of the report and to direct judgment to be entered accordingly. In so varying this judgment, the Court may also, in accordance with the discretion given it under Rule 261 of the General Rules of this Court deal with the costs. This rule provides that: "The costs of and incidental to all proceedings in the Court shall in the discretion of the Court and shall follow the event unless

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 ———  
 Noël J.  
 ———

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 Noël J.

otherwise ordered. The Court may also direct the payment of a fixed or lump sum in lieu of taxed costs.”

It could not, however, if by the award of costs in the decision of the Court of July 29, 1964, it had disposed of in advance of the costs of the reference. This, in my view, the Court did not however do; it merely decided that at the date of the judgment of July 29, 1964, no party was entitled to any costs as (and this is specifically mentioned in the conclusions of the judgment) both parties had been partly successful in the case. In *Underwriter's Survey Bureau Ltd. v. Massie & Renwick*<sup>1</sup>, which was an inquiry by the Registrar into damages for infringement of copyright and other relief in this Court, although, as here, the formal order of the Court did not reserve the question of costs on the inquiry, the Court exercised its inherent jurisdiction to award costs.

The proceedings at this stage are not terminated and in order to give the parties an appeal to the Supreme Court of Canada on the matters decided at that time, it is necessary to have a section such as 85(5) of the *Exchequer Court Act* which states that “A judgment is final for the purpose of this section if it determines the rights of the parties except as to the amount of damages or the amount of liability” otherwise there would have been no appeal.

The reference, however, is still part of the same case and the Court being still seized of the matter, the proceedings continue. The remedy chosen by the plaintiff, damages or account of profits, can be settled in several ways. In most cases the parties agree to an amount and the matter is ended and very little costs is involved. In some cases, however, the time and cost involved are considerable, and unfortunately this is the situation here where the inquiry degenerated into an inquiry of 37 days mainly because of, as pointed out by the Deputy Registrar, at p. 43 of his report:

...the virtual refusal of the witness Krangle (the President of the defendant corporation) to answer the questions put to him with anything even approaching candour, his failure to produce the required books and documents of the defendant at the opening of the inquiry and his production of some important documents late in the enquiry, and the almost incessant attempts made by the defendant, some of which seemed to me to border on desperation, to have the enquiry adjourned both before it commenced and during its course.



The Deputy Registrar, accordingly, recommended strongly that serious consideration be given to adoption of the normal rule that the costs should follow the event and, in my view, adopted the proper procedure if reference is made to *Lightning Fastener Company Limited v. Colonial Fastener Company Limited*<sup>1</sup>. In the Supreme Court Kerwin J. dealt with the Registrar's recommendation as to costs as p. 49 as follows:

1965  
 DUBINER  
 v.  
 CHEERIO  
 TOYS &  
 GAMES LTD.  
 ———  
 Noël J.

The Registrar recommended that the plaintiff be allowed the costs of the reference since it was entitled to damages and the defendants had contested each claim. That recommendation is adopted.

The Deputy Registrar, although he had no power to award costs, made a finding on the matter of costs and also a recommendation which he had the right to do.

I therefore have no hesitation in the present case in accepting the recommendation and awarding costs to the plaintiff on the reference proceedings. I do feel, however, that the ends of justice would be met by the payment to the plaintiff of a fixed sum of \$5,000 of the costs of the reference and of this appeal in lieu of taxed costs.

It then follows that judgment will be entered herein that the defendant is accountable to the plaintiff in the sum of \$20,364.96 and that the defendant will pay the plaintiff a fixed sum of \$5,000 in lieu of costs.

<sup>1</sup> [1936] Ex. C.R. 1; [1937] S.C.R. 36.

REPORT ON A REFERENCE before Mr. W. C. McBride, Deputy Registrar, to inquire into an accounting of profits of the Defendant Company in pursuance of Judgment of this Court dated July 29, 1964.

This reference has been held pursuant to the judgment handed down in this case on the 29th day of July, 1964 by the Honourable Mr. Justice Noël. The material paragraphs of the judgment as settled are:

“This Court Doth Further Order and Adjudge that the Plaintiff is entitled to recover from the Defendant those damages sustained by him by reason of the infringement of the said trade marks aforesaid, or the profits which the Defendant has made as the Plaintiff may elect;

“This Court Doth Further Order and Adjudge that at the Plaintiff's election, enquiry may be made by the Registrar or Deputy Registrar of this Court to establish the damages sustained by the Plaintiff or profits made by the Defendant as the case may be, which damages or profits so determined on the said inquiry shall be paid by the Defendant to the Plaintiff forthwith after the determination thereof;”

After having been set down for hearing on previous dates, the reference was

scheduled to commence in Toronto, Ontario, on the 3rd day of November, 1964. On the 23rd day of October, 1964 the defendant moved before me to require the plaintiff to make his election between an assessment of damages and an accounting of profits prior to the opening of the reference. I ordered that such election be made by the plaintiff at least two clear days before the commencement of the reference and the plaintiff accordingly filed a notice that he elected an accounting of profits. On more mature consideration I think that the plaintiff in such proceedings should be required to give perhaps two weeks' notice of his election. However, the short notice in this particular case worked no hardship on either party because the hearing was adjourned during the first day and was not resumed until the 18th day of January, 1965.

I might mention at this point that during the first day of the hearing the defendant offered to pay to the plaintiff the sum of \$7,000.00 in full settlement of his claim in this action and this sum was subsequently paid into Court.

Several questions of law were raised during the course of the inquiry and I propose to dispose of them before dealing with the details of the account of profits as such. These questions concerned primarily the determination of the proper accounting period, the period over which the plaintiff is entitled to examine the operations of the defendant, whether the plaintiff must accept an accounting of profits or losses for the whole accounting period, the nature of the evidence to be adduced, the burden of proof to be borne by the parties, and the profits, if any, to which the plaintiff is entitled. I might frame the questions as follows and deal with them *seriatim*:

1. Does the accounting period end at the date of judgment or does it continue to the date of the inquiry?
2. Is the plaintiff restricted in his investigation of the defendant's operations and its books of account to the accounting period as such?
3. The accounting period having been defined, is the plaintiff compelled to accept an accounting for the entire period, or may he elect to have the

actual accounting commence or terminate at some date within the accounting period?

4. Is it proper to adduce hearsay evidence in a proceeding such as an accounting of profits?
5. What burden of proof, if any, rests on the plaintiff or the defendant in such a proceeding?
6. Assuming that the defendant made a profit during the accounting period, to what part of it is the plaintiff entitled?

1. With respect to the limitation of the accounting period the parties share common ground that the date of commencement of the period is the date when the defendant's permitted use of the trade marks in question was terminated and that was December 28, 1962, as found by the judgment under which this reference was directed. The termination date of the accounting period has presented some difficulty and confusion. The defendant has insisted that it cannot extend beyond the date of judgment, July 29, 1964, but I was long under the impression that the plaintiff took the position that the accounting period extended to the date of the reference. No authorities have been cited to me by either party on this point. I adopted the view that the accounting period did extend to the date of the reference and I so ruled on at least three occasions during the course of the hearing. Of course, if the terms of the judgment were obeyed and the defendant ceased dealing with merchandise in association with the trade marks found to be valid and owned by the plaintiff, there would be nothing for which the defendant must account to the plaintiff after the date of judgment, but if the defendant did in fact deal with such merchandise after that date I can see no reason why it should not account for its profits, if any, arising therefrom. Neither can I see any reason why it should be necessary to hold a separate reference in order to accomplish this.

2. I ruled during the course of inquiry that the plaintiff is not restricted in his examination of the witnesses to the operations of the defendant during the accounting period proper. The defendant is

an incorporated company, the fiscal year of which was April 1 to March 31 until 1963, when it was changed to coincide with the calendar year. As a result, three fiscal periods of the defendant fall wholly or partially within the accounting period. They are, the fiscal year April 1, 1962 to March 31, 1963; April 1, 1963 to December 31, 1963 and January 1, 1964 to December 31, 1964. Accordingly, I felt it was necessary for the plaintiff to investigate the operations of the defendant during the three fiscal periods covering the total period from April 1, 1962 to December 31, 1964 in order that I might have as clear a picture as possible of the operations of the defendant during the accounting period proper and I permitted him to do so.

3. It was argued by the defendant that since I had ruled that the accounting period extended to the date of the reference, the plaintiff was compelled to accept an accounting to that date and that he could not waive his right to an accounting for any part of the accounting period. It may be that I misunderstood the position of the plaintiff for it appears from page 141 of the reference transcript that he indicated as early as the third day of the reference that he might not claim an accounting to the date of reference. His position, I think, was a reasonable one. He was examining the operations of the defendant and until he had done so he could not be expected to know what would be the effect of including the period from the date of judgment to the date of the reference. In fact, the evidence has established that during this period the defendant suffered a loss, due primarily, I think, to the cost of litigation, and the expense incurred in delivering up merchandise in accordance with the terms of the judgment and perhaps also to the necessity of carrying on business without the benefit of the trade marks in question.

In my opinion it would be most unreasonable to saddle the plaintiff with these losses and force him to set them off against any profit for which the defendant is required to account to him which was earned by the defendant after December 28, 1962 and before the date of judgment.

The only authority cited to me in connection with this particular matter was *John B. Stetson v. Stephen L. Stetson Co.*,<sup>1</sup> where Bright J., District Judge of the District Court, S.D., New York, affirmed the Master's decision, on a reference as to profits and damages in a trademark infringement case to permit the plaintiff to waive a part of the accounting period. In that case the accounting period was three years and nine months and the plaintiff had been permitted to waive the first five months thereof, during which there were losses.

It may be worth noting that in the present case, the losses suffered by the defendant from the date of judgment to the date of the reference were not ordinary business losses but losses directly attributable to the tortious acts committed by the defendant in continuing to use the plaintiff's trade marks after its legal right to do so had terminated. There being no reason, in my opinion, why the plaintiff should absorb these losses, I have permitted him to waive an accounting by the defendant for the period following the date of judgment.

4. The controlling shareholder, president and general manager of the defendant company and its owner, is one Albert Krangle. It is conceded by counsel that the defendant company is a one-man operation and the man who at all material times controlled every aspect of its operations was Krangle. The problem confronting the plaintiff was how best to get the evidence of the operations of the defendant before the inquiry. He accordingly started the inquiry by calling Krangle as his witness. I adopted the view that the inquiry was not strictly an adversary proceeding but was of an inquisitorial nature and that the rules governing the conduct of a trial need not be rigidly adhered to, and I therefore permitted counsel for the plaintiff to cross-examine Krangle without having first found him to be a hostile or adverse witness. No objection was made to this manner of proceeding by counsel for the defendant until much later in the inquiry.

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<sup>1</sup> (1944) 58 Fed. Suppl. 586.

The other procedural matter that has caused me some concern was the introduction of hear-say evidence, particularly through the witness, Krangle. Many questions were put to him concerning various accounts and book entries of the defendant which he could not answer, claiming he was not an accountant and knew little about bookkeeping. Counsel for the plaintiff directed him to inform himself from the defendant's accountant and bookkeeper, both of whom were present during most of the hearing. Krangle did so and then gave the answer as his own. Once again, counsel for the defendant raised no objection to this procedure until much later in the proceedings. Even on reflection I can think of no satisfactory alternative procedure that might have been adopted to get the required evidence before the inquiry.

5. The position I adopted at the opening of the inquiry was that the burden of proving that the defendant enjoyed an income from its operations during the accounting period rested on the plaintiff and that the defendant was required to bear the burden of proving that all or part of that income was derived from its operations not associated with use of the trade marks owned by the plaintiff, or that, in any event, there was no profit gained during the accounting period for which the defendant need account to the plaintiff.

There was a continuing dispute between the parties as to what was required of the defendant to establish the validity of certain extraordinary expenses incurred by the defendant during the accounting period. This is a case where admittedly the expenses claimed by the defendant against its gross income are very numerous and to require it to prove each one individually would be at least unrealistic. Not even the plaintiff has suggested that the defendant need to go that far. There is, however, a great difference, for the purpose of this inquiry, between establishing that an account was paid by the defendant and proving that it was a proper expense incurred by the defendant.

Now, there is no doubt that the bulk of the accounts paid by the defendant during the accounting period were the ordinary operating expenses one would expect

to be incurred by a merchandising company engaged in operations similar to those of the defendant. The purchase of stock, the expense of promoting sales of its merchandise and the normal overhead expenses are all the kind of expense incurred by the defendant to which no exception could be taken. It is my opinion that payment of these expenses is properly established by production of the audited books and statements of the defendant. In this connection counsel for the defendant relied on the authority of Wigmore on Evidence, 3rd Edition, Vol. 4, p. 434, s. 1230.

"1230.(11) Voluminous Documents (Accounts, Records, Copyright Infringements, Absence of Entries). Where a fact could be ascertained only by the inspection of a large number of documents made up of very *numerous detailed statements*—as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger—it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper. . . ."

However, this is not to say that all the defendant is required to do with respect to extraordinary expenses is to establish the fact of their payment, or even the fact that they have been approved or passed by its auditor. It must, I think, establish to the satisfaction of this inquiry that the payments, admittedly made by the defendant, were properly made and should be deducted from the defendant's gross revenue to establish its profit. Such extraordinary expenses include, in my opinion, the payment of \$1,600 to one G. F. Button in consideration, according to the defendant, of his refraining from slandering the defendant and its merchandise, the large lump sum payments

made to Krangle's daughter, allegedly as wages, the charging of capital cost allowance to the defendant for certain items in the home of Krangle and for an automobile used by his wife, the very large legal accounts paid by the defendant during the accounting period, and several others, all of which I propose to deal with in detail, later.

In the case of this particular company, there is a further factor to be considered. Krangle holds the controlling interest in three companies, the defendant, Dulev Plastics Limited or Contest Toys Limited. Under the circumstances, therefore, same office and factory or warehouse space during the accounting period and, in the main, employed the same personnel. However, the defendant's books and statements submitted to this inquiry indicate that consistently throughout the accounting period and before it the defendant paid most if not all of the overhead expenses for all three companies, such as rent, hydro, business taxes, wages and so forth. In addition, it appears that Krangle himself drew no salary from Dulev Plastics Limited or Contest Toys Limited. Under the circumstances, therefore, it was, I think, incumbent on the defendant to propose some reasonable allocation of these expenses among the three companies. This the defendant did not do until very late in the inquiry when a completely inadequate allocation was offered.

The final point I propose to deal with now with respect to the defendant's expenses concerns mainly the large legal accounts paid by the defendant during the accounting period. I pointed out to counsel for the defendant on several occasions during the course of the hearing that he was required to prove not only that the accounts were submitted to the defendant and paid by it, but that they were for services rendered to the defendant. After indicating for many days that evidence of the nature of the accounts would be presented to the inquiry, the defendant finally claimed that such information was privileged. I take the view that where a party seeks the benefit resulting from a claim of privileged communication or information, he must also

accept the consequences flowing therefrom. I will deal with the legal accounts in more detail later.

6. It has become apparent that, assuming the defendant made a profit during the accounting period, the most difficult problem facing me is, to what part thereof the plaintiff is entitled.

The profit of the defendant can be considered as being composed of several segments. The total net profit of the defendant is composed of that derived from the sale of merchandise bearing one or more of the plaintiff's trade marks or of merchandise otherwise sold in association with those trade marks, and the non-infringing sale of merchandise. As I understand it, the plaintiff claims an accounting only of the profit derived from the first type of sale, i.e. infringing sales. However, the defendant has argued that it need not account to the plaintiff for all of such profit but only that portion thereof directly attributable to the use of the plaintiff's trade marks. Counsel for the defendant went even further and argued that the plaintiff is not entitled to any of the profit of any kind, made by the defendant after the plaintiff became aware that the defendant was infringing his trade marks.

Dealing with the second point first, i.e. that the plaintiff is not entitled to any profit made by the defendant after the date on which the plaintiff became aware of the defendant's infringing use of his trade marks, counsel for the defendant cited the case of *Electrolux Ltd. v. Electric Ltd and Another*<sup>1</sup>, a decision of Lloyd-Jacob, J on an application for an Order for an accounting of profits. The material part of the learned Judge's decision is:—

"The principle upon which the Court grants an account of profits, as I have always understood it to be, is this, that where one party owes a duty to another, the person to whom that duty is owed is entitled to recover from the other party every benefit which that other party has received by virtue of his fiduciary position if in fact he has obtained it without the knowledge or

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<sup>1</sup> (1953) 70 R.P.C. 158.

consent of the party to whom he owed the duty. Had the present case fallen within that principle, in that the Defendants had secured profit to themselves without the knowledge of the Plaintiffs, I should have felt it my duty to leave to the Plaintiffs the election for which they prayed in their statement of claim; but on the facts as I found them (and, indeed, as the evidence, I think clearly showed without question) the Plaintiffs were aware for some period—a considerable period, if my recollection serves me aright—of the fact that the Defendants were utilising the mark complained of, and in those circumstances any profit that accrued to the Defendants by reason of that user could not have been profit accruing to them without the knowledge of the Plaintiffs.

“In those circumstances, put at its highest, the only account of profits that I could grant, consonant with that principle, would be of such profits as were made prior to the date when the Plaintiffs first became aware of the user by the Defendants. That was so long ago—if my recollection serves me aright again, I think it was in 1939—that the Statute of Limitations would in effect prevent them recovering anything under that head at all...”

Now, with respect, I do not accept that decision as binding on me in the present circumstances because there the learned Judge was dealing with a situation where the plaintiff had deliberately stood by, with full knowledge of the defendant's infringing activities, for a period of many years, and then, after allowing the defendant to gain profits over that very long period of time, the plaintiff asked for an accounting of those profits. In my view, there would have been something inequitable about affording the plaintiff this remedy. In the present case, the plaintiff sought his remedy with despatch. The first act of infringement could not have occurred before December 28, 1962 and this action was instituted in March 1963.

As I understand the defendant's argument based on the *Electrolux Ltd. v. Electrix Ltd.* decision, it is that in no case can a plaintiff in an accounting of profits

claim to be entitled to the profits made by the defendant after the plaintiff becomes aware of the infringement, and that at the very least, this means that the plaintiff has no claim to the profits earned by the defendant during the period commencing not later than the date of institution of his action and continuing to the date of the last act of infringement.

Since I have come to the conclusion that the *Electrolux Ltd. v. Electrix Ltd.* case is not authority for that proposition and counsel for the defendant has not been able to furnish me with any other authority in support thereof and because I think the proposition is wrong in principle, I cannot accept it.

The remaining matter to be considered with respect to the portion of the profits to which the plaintiff is entitled to an accounting is whether or not those profits are to be confined to that part of the profits realized by the defendant on infringing sales which is directly attributable to the use of the plaintiff's trade marks.

I have reviewed the many authorities cited by both parties with respect to this question and the only reported case cited to me, or of which I am aware, where this question appears to have been dealt with is *Cartier v. Carlisle*,<sup>1</sup> a trade mark infringement case where the Master of the Rolls said at p. 298:

“I am therefore of opinion, in this case, that the injunction must be made perpetual and that there must be the usual account, but, as I have stated, I do not propose, in taking the account in Chambers, to make the Defendants account for every species of profit during the last six years, but I shall consider how much of the profits are properly attributable to the user of the Plaintiff's trade mark.”

It is arguable that the “every species of profit during the last six years” for which the defendant in that case was not required to account comprised the total profit of the defendant during the period including that realized on sales made without the use or benefit of the plaintiff's trade mark. If that is so, then all the

<sup>1</sup> (1862) 31 Beavan 292.

learned Master of the Rolls has said is that the defendant need account for only that profit it realized on sales made in conjunction with the use of the plaintiff's trade mark. I doubt that the learned Master of the Rolls would have felt it necessary or desirable to record such an obvious proposition and I have come to the conclusion that he has in effect stated the law to be that with respect to the profits realized by the defendant on sales made in conjunction with the use of the plaintiff's trade mark, the defendant is required to account for only that part thereof that is attributable to the use of the trade mark.

Some authorities have likened the accounting required of the defendant to that which might be required of an agent by his principal. However, even in the case of an agency relationship, the agent would be entitled to a share of the profits gained through sales made on the principal's behalf, so that the principal could not claim all the profits made on those sales.

I have come to the conclusion that the plaintiff is entitled to require the defendant to account for only that part of the profit it realized on infringing sales during the accounting period that is attributable to its use of the plaintiff's trade marks.

There are four points raised by the evidence adduced during the inquiry which bear on this matter of just what proportion of the profit realized on a sale can be attributed to the infringing use of the plaintiff's trade marks. The first is the value placed on the trade marks by Krangle when he executed the agreement of August 17, 1955 by the terms of which he gained control of the defendant. The second is Krangle's evidence given during his cross-examination on an affidavit in September, 1964. The third is the way in which the defendant used its own trade marks in conjunction with the plaintiff's trade marks during the accounting period and this had an important effect on the fourth matter which is the significance of the sales achieved by the defendant during its promotion campaign in St. John's, Newfoundland in November, 1964, which, counsel for the defendant argued, was the

first promotion campaign conducted by the defendant without the use of any of the plaintiff's trade marks.

By paragraph 9 of the agreement of August 17, 1955, ex. C, which was executed by Krangle as one of the parties thereto, he agreed to pay to Dubiner 5% of the sale price of all bandalore tops sold by the defendant as consideration for a non-exclusive licence to use the patents and trade marks of the plaintiff and the promise of the plaintiff to supply the defendant with information regarding marketing systems and his knowledge in connection therewith. My recollection of Krangle's evidence is that the plaintiff's patents were not used by the defendant and that he received very little trade information from the plaintiff after he gained control of the defendant. In addition it is apparent to me that because paragraph 9 is only one of many provisions in a comprehensive agreement by which control of the defendant was transferred from the plaintiff to Krangle the valuation of the non-exclusive licence was probably affected by one or more of the other provisions of the agreement, but of course, I cannot say to what extent or in which direction. I should think it would be reasonable to say that of the 5% of sales to be paid to the plaintiff, 3% of the sales would be attributable to the value of the non-exclusive licence to use the plaintiff's trade marks, and this would be a much greater percentage of the defendant's net profits. No attempt was made by either party to relate the value of a non-exclusive licence to use the trade marks with the value of the trade marks themselves.

I am not unaware that the agreement, ex. C, was amended twice, by agreement dated August 30, 1955, filed as ex. D, and by agreement dated June 27, 1961 and filed as ex. E. The provisions of paragraph 9 of ex. C were not affected by ex. D but were amended by ex. E, wherein it was provided that in lieu of royalties and other benefits as provided in ex. C, the plaintiff agreed to accept for a period of two years the sum of \$2,000 and 10% of the defendant's net profit, and thereafter the original agreement, ex. C, was again to become effective. It is clear from a

perusal of ex. E in the light of the evidence of the parties thereto given at the trial and on the inquiry, that it was executed in an attempt to settle a dispute between Krangle and one Gallo, a minority shareholder and employee of the defendant. I do not think that either ex. D or ex. E has any effect on the value of ex. C as evidence of the valuation of the plaintiff's trade marks in 1955, and, indeed, until December 28, 1962.

In September, 1964 Krangle was cross-examined on an affidavit filed in support of an application by the defendant for a stay of execution under the judgment and particularly of the injunction granted thereby. On his cross-examination Krangle testified that in his opinion 75% of the sales of the defendant were due to the use by it of the plaintiff's trade mark "Yo-Yo". I realize that it was in the defendant's, and therefore Krangle's, interest to emphasize the importance to the defendant of the continued use of the trade mark "Yo-Yo", and I am satisfied, after the examination of Krangle, which occupied more than twenty days of this inquiry that he has a certain capacity to stray from the truth when it serves his purposes to do so. I accordingly do not accept at its face value his evidence that 75% of the defendant's sales were due to the use of the trade mark "Yo-Yo".

The defendant brought along its own trade marks such as, Big "C", Big Chief, Rainbow, Glitterspin, Whistler, Butterfly, and so on, in association with the plaintiff's trade marks and particularly the trade mark "Yo-Yo". To illustrate this, I might refer to ex. 44, 51, 235 and 236 to the inquiry. As I understand the evidence these sales brochures of the defendant were used more or less in the order in which they were filed as exhibits. The first one, ex. 44, is entitled "New Cheerio Yo-Yo Return Tops" and was used by the defendant probably as late as January, 1964. It was replaced by the brochure filed as ex. 51, entitled "New Cheerio Big-C Yo-Yo Return Tops", which was in turn replaced by the brochure filed as ex. 235, entitled "New Contest Big-C Yo-Yo's". I might pause here to mention that, as I understand the evidence, this brochure, ex. 235, was brought out by the defendant before judgment was rendered,

and when there was at least the possibility that the trade mark "Cheerio" would be found to be valid and owned by the plaintiff. It might also be noted that for the first time the word "Yo-Yo" is here used in a descriptive sense. After judgment the defendant used a new sales brochure, ex. 236, entitled "New Cheerio Big-C Tops" and for the first time the defendant does not use the term "Yo-Yo" anywhere on the brochure.

I think these sales brochures and the sequence in which they were used by the defendant illustrate the manner in which it developed acceptance of its products under its own trade marks by using them in association with the plaintiff's trade mark "Yo-Yo" after December 28, 1962, until, by November, 1964 it was able to hold a promotion campaign in St. John's, Newfoundland, apparently with little use being made of the trade mark "Yo-Yo" or any of the plaintiff's other trade marks, and to do so with comparative success.

However, to argue, as counsel for the defendant did, that the results of the St. John's campaign in November, 1964, prove the worthlessness of the plaintiff's trade marks, is, I think, in the circumstances, to ignore completely the value of the plaintiff's trade marks to the defendant in the development of acceptance of the defendant's own trade marks. This argument fails also because there is evidence that some use was made during that campaign of the trade mark "Yo-Yo" and the defendant conspicuously failed to call any witness who might have been able to testify as to how that campaign was carried out.

After giving due consideration to what evidence is available regarding the value of the plaintiff's trade marks, I have come to the conclusion that 20% of the profit realized by the defendant on its sales made in the accounting period is attributable to its use of those trade marks.

Counsel for the defendant posed a further problem when he argued that I should, in addition to determining the proportion of the total profit directly attributable to the use of the plaintiff's trade marks by the defendant, determine the relative values of the plaintiff's



trade marks, "Yo-Yo", "Bo-Lo", "Pro", "Tournament" and "99". Now, I have no doubt that by far the most important of these trade marks is "Yo-Yo". "Bo-Lo" is limited in importance because the sales of bats of the type bearing the "Bo-Lo" mark were rather modest compared to the sale of return tops. The trade marks "Pro", "Tournament" and "99" were not used nearly as extensively as "Yo-Yo" and, in my opinion, were of little real value to the defendant during the accounting period. In the result, I would apportion the total value of the five trade marks as 70% to "Yo-Yo", 15% to "Bo-Lo" and 5% to each of the trade marks "Pro", "Tournament" and "99".

Turning now to the computation of the net profit earned by the defendant during the accounting period, it seems to me that the best way of doing this is to find the gross sales for the period and subtract from that the cost of goods sold, which will give the gross trading profit. If, from this figure, the operating expenses of the defendant for the period are subtracted the result will be the net profit.

In determining the gross sales of the defendant I have adopted the compilation of sales set out in a statement furnished to me during the course of argument by counsel for the plaintiff, entitled "Sales According to Cheerio Sales Journal—General Ledger Account". I have verified from the books of the defendant that the sales shown on the statement for each month during the accounting period are accurate but there appears to have been a slight error in addition, resulting in the total sales for the period being shown as \$900 too much. I accordingly find that the sales of the defendant from December 28, 1962 to July 29, 1964 were \$472,198.54.

After examining the various financial statements of the defendant filed during the inquiry I have come to the conclusion that I can do no better than accept the defendant's figures for the cost of goods sold as shown in ex. S. The ratio of 36.87% used to calculate the cost of goods sold during the broken period of December 28, 1962 to March 31, 1963 may be somewhat high but I have no way of readily determining a more accurate figure. It will,

however, be necessary for me to calculate the cost of goods sold for the period January 1, 1964 to July 29, 1964 because ex. S was prepared for the period ending December 31, 1964. To accomplish this I propose to apply the ratio of 36.87% to the total sales of \$184,492.91 for the period January 1, 1964 to July 29, 1964, as shown in the statement furnished by the plaintiff during argument and referred to above. The resulting cost of goods sold for the period is \$50,039.00. Adding this amount to the cost of goods sold for the broken period, December 28, 1962 to March 31, 1963 and the nine-month fiscal period, April 1, 1963 to December 31, 1963, as shown on page 1 of ex. S, results in a total cost of goods sold for the accounting period of \$150,197.00. When this amount is subtracted from the total sales for the accounting period of \$472,199 (\$472,198.54), the resulting gross trading profit of the defendant for the accounting period is \$322,002.00.

There remains now the task of calculating the expenses of the defendant to be deducted from the gross trading profit to determine the defendant's net profit for the accounting period. I propose to accomplish this by making three amendments to the schedule of expenses as shown on page 2 of the defendant's ex. S. The first will be to recalculate the expenses set out in column 3 so that they relate to the period January 1, 1964 to July 29, 1964 rather than to the full calendar year 1964; the second will be to eliminate entirely from the schedule of expenses those claimed expenses or parts thereof that I find are not properly allowable, and the third will be to allocate a portion of some of the expenses charged to the defendant to one or both of the other two companies controlled by Krangle.

In recalculating the expenses for 1964 so that they relate only to the period from January 1, 1964 to July 29, 1964, I have adopted the defendant's auditor's classification of expenses into fixed, semi-fixed and variable expenses as shown on page 3 of ex. S, and I have computed the expenses for the shorter period in accordance with his "basis used in apportioning expenses" as set out on page 3. I recall

that Mr. Soberman, the defendant's auditor and the author of ex. S, testified at the inquiry that certain problems would exist in using his classification of expenses in recomputing the 1964 expenses for the period ending July 29, 1964, but he did not explain what the problems were or how they might be overcome. Accordingly, I have had no alternative but to use his classification and basis for apportioning the expenses. Even so, I have not been able to apportion the "advertising, promotion and selling" expenses with any degree of accuracy for, try as I might, I could not relate the total of these expenses for 1964 in the sum of \$23,939 00, with any ledger or account or combinations thereof in the defendant's books I have, therefore, allowed one-half of the full year's expense for the period ending July 29, 1964.

On the above basis the expenses of the defendant for the period January 1, 1964 to July 29, 1964 amount to \$99,388 00. The expenses for the entire accounting period, using the amounts shown in columns 1 and 2 on page 2 of ex. S and the sum of \$99,388 00 in lieu of the total shown in column 3, I calculate at \$274,231.00 I do not deduct from this total the amounts shown under notes (a), (b), (c) and (d) on page 3 of ex. S because they form parts of larger sums I intend to disallow as expenses of the defendant.

I think the most satisfactory way of dealing with the disallowance of expenses of the defendant during the accounting period is to discuss individually each expense as described by the defendant's auditor on page 2 of ex. S.

1. *Management Salary*—Mr. Krangle drew a salary of \$3,500 in the fiscal period April 1, 1962 to March 31, 1963 and \$10,000 for the year 1964. He did not draw a salary for the nine-month fiscal period April 1, 1963 to December 31, 1963. Counsel for the defendant argued that Krangle should be allowed not only a salary for the last mentioned period but, indeed, a much increased salary for the whole accounting period—of the order of \$25,000 per annum. I am at a loss to understand this argument. If the defendant thought that its president and general manager was worth \$25,000 per year, why

did it not pay him at the rate? On the other hand, it may well be that Krangle is convinced he is worth that much to the defendant. But it seems to me that is a matter to be settled between Krangle and the defendant company, who are, I need hardly say, separate legal entities, the latter being a party to this action, but not the former. Indeed, a perusal of the defendant's minute book would appear to indicate that the amounts paid to Krangle as management salary were not properly authorized in accordance with the by-laws of the company. But, although I am not disposed to allow the defendant more under this expense than it actually paid to Krangle during the accounting period I am not going to accede to the plaintiff's argument and disallow what was in fact paid. I might mention that a further reason for not allowing an increased amount under this head is that I am dealing with the actual expenses incurred by the defendant during the accounting period and to allow an increased amount for management salary over that which the defendant actually paid would be to artificially reduce its apparent profit because it would not be under any liability to pay the increased amount to Krangle. Accordingly, I allow this expense for management salary, which has already been reduced to \$7,958 to coincide with the accounting period.

2. *Promotion Fees*—These are the amounts paid by the defendant to Dulev Plastics Limited pursuant to a written contract allegedly executed on or about April 1, 1963 and allegedly providing for it to be effective from January 1, 1963. The contract apparently provided for Dulev Plastics Limited to assume all promotion work formerly done by the defendant in return for payment by the defendant of a commission of 23% of the defendant's gross sales, the commission to be payable on the first of the month, calculated on the previous month's sales. Unfortunately, I was never favoured with the opportunity to examine the document. I understand that the original contract was in the possession of counsel for the defendant, or was available to him throughout the inquiry, but despite repeated invitations to file it as an exhibit he declined to do so until late in the

inquiry, when he offered to prove it and introduce it through a witness who obviously could not properly identify it or prove its due execution, and this even though the person who I understand was the witness to the signatures on the document was present at the inquiry at the time and virtually throughout its course.

The evidence established that the original oral agreement made allegedly on or about January 1, 1963 was that the commission payable by the defendant was 20%. This rate of commission was in fact paid for the sales of the defendant in January, February and March, 1963. Then, according to Krangle, the rate of commission was increased in April to 23%, retroactive to January 1, 1963. Later, in the fall of 1964, the rate was changed to 26% on the first \$50,000 of sales, 29% on the next \$50,000 and 32% on the sales in excess of \$100,000, retroactive to January 1, 1964.

Although I have had serious doubts about when this agreement between the defendant and Dulev Plastics Limited was actually made, particularly in view of the vague evidence given by Krangle and Soberman, I have come to the conclusion that it did in fact exist as an oral agreement, at least, from early March 1963. I base this conclusion on the fact that the two cheques ostensibly in payment of the commission of 20% of the sales of the defendant during January and February, 1963 are dated March 4th and March 14th respectively and were negotiated at the bank on March 6th and 14th, respectively. It may well be that the written contract apparently dated April 1, 1963 was not executed until October, 1963. Certainly the only evidence that it was executed in early April 1963 was that of Krangle. Soberman, the defendant's auditor, could testify only that he saw the contract sometime between April 1, 1963 and the middle of October, 1963, when he finished work on the March 31, 1963 financial statement of the defendant. In addition, the comprehensive adjusting entry made to re-allocate to Dulev Plastics Limited a whole series of promotion expenses actually paid by the defendant between April 1, 1963 and September, 1963 and which should have been paid by

Dulev Plastics Limited under the terms of the agreement appears on Folio 5 of the defendant's general journal under date of November 5, 1963. If it were a material fact, I would be prepared to find that the written contract allegedly dated April 1, 1963, was not executed until sometime in late September, or early October, 1963. But what difference does this make to an accounting of profits? There is evidence which to me is sufficient to establish that the commission agreement between the defendant and Dulev Plastics Limited was in existence, in an oral form at least, from March, 1963 and, in any event, it appears to have been effective from January 1, 1963. I, therefore, find that the commissions paid by the defendant to Dulev Plastics Limited as set out in columns 1 and 2 on page 2 of ex. S are proper expenses of the defendant. However, in the amount of \$65,819 shown in column 3 on page 2 is included the sum of \$12,104.36 paid by the defendant to Dulev Plastics Limited on account of its sales from January 1, 1964 to July 29, 1964 as a result of an alleged increase in the commission rate from 23% to 26% on the first \$50,000 sales, 29% on the next \$50,000, and 32% on the sales in excess of \$100,000. This new arrangement is indicated on the statement or invoice of Dulev Plastics Limited to the defendant, dated October 1, 1964, and showing the re-calculation of commission on sales for the period January 1, 1964 to September 30, 1964 "as per Agreement". Such agreement was never filed as an exhibit but may have been one of those counsel for the defendant tried unsuccessfully to put in through the witness Soberman after the plaintiff had completed his examination of him. In any event, I do not consider it reasonable to permit the defendant to, in effect, greatly increase its expenses for the last seven months of the accounting period by means of the alleged retroactivity of an agreement apparently made sometime after the accounting period ended. I therefore deducted \$12,104 from the sum of \$65,819 before I recalculated the promotion fees expense for the period January 1, 1964 to July 29, 1964. The revised total for promotion fees for the accounting period is \$105,174.

3 *Depreciation on Automobile*—As I understand the evidence, the defendant owned three cars until the end of the fiscal year ending March 31, 1963. One was used by Krangle, another was used by Mrs. Krangle, although during the first three months of 1963 she was not an employee of the defendant and was the president of Dulev Plastics Limited, and the third car was one which had been used by Gallo until about June, 1962 and had not been used since that time. I think I should allow full depreciation on the car used by Krangle but none for the other two cars, for the first three months of the accounting period. I have estimated this at \$250 so that \$338 will be deducted from the sum of \$588 claimed under this head in column 1 on page 2 of ex. S. The amounts claimed for depreciation in columns 2 and 3 are apparently for only the car Krangle used—a Buick convertible. Although I rather doubt that it is customary for comparatively small companies to provide such elegant means of transportation for their chief executives, I think it proper to charge full depreciation as an expense of the company I therefore deduct from the total depreciation allowed for the accounting period, which is \$1,885, the sum of \$338, leaving a revised total under this head of \$1,547, all of which relates to the automobile used by Krangle.

4 *Travelling and Car Expenses*—It has been difficult for me to arrive at a reasonable mode of dealing with this item. As I understand the evidence, this includes the travelling expenses incurred by Krangle on his many trips but not the cost of his accommodation, and the amounts of the expense vouchers he submitted to the defendant.

I propose to deal with only a few of Krangle's trips under this head, viz several trips to New York, one to Boston and two to Puerto Rico and the Virgin Islands. Most of his other trips made during the accounting period were, I believe, made in connection with the various promotion campaigns held by the defendant, and certainly the cost of his fare on these trips is a proper expense of the defendant. I do not think the defendant should be charged with the cost of

Krangle's wife accompanying him or these business trips because the business in connection with which they were made was at least as much the concern of Dulev Plastics Limited, of which she was president, as it was of the defendant. Now, with respect to the two trips in January, 1963, and January, 1964 to Puerto Rico and the Virgin Islands, there is evidence that Krangle transacted some business there. I think therefore that his air fare is a proper charge against the defendant, but I disallow the fare for his wife. The amount paid for their air fares on the first trip as indicated by ex. 79 to the inquiry was \$406.80. I deduct \$203.40 from the expenses charged to the defendant under this head. The account rendered by the Virgin Isle Hilton for Mr. and Mrs. Krangle's 11-day stay there on the first trip is ex. 169 and is in the amount of \$660.31. I realize that Krangle and his wife stayed at the hotel for less than twice as much as Krangle alone would have been charged so I reduce that account, which was paid by the defendant and charged to "travelling expense" by \$225 to \$435.31. In addition, Krangle submitted an expense voucher in the amount of \$482 with respect to the first trip, which amount was paid to him by the defendant. There are no receipts supporting his claimed expenditures, which in itself is not surprising, but in addition, the defendant offered no evidence as to what this not inconsiderable sum was spent for. I think an expense allowance of \$35 per day in addition to payment by the defendant of Krangle's full air fare and hotel accommodation, the account for which last expense, incidentally, includes some meals, bar expenses, purchases of clothing and several long distance telephone calls is immoderately generous. I reduce it to \$20 per day, which is a total of \$280 for the 14-day trip. This is a reduction of \$202 from the amount claimed by the defendant. There is also on this trip, Mr and Mrs. Krangle's stay in New York for two days. Since I propose to disallow entirely any expense incurred by the defendant for Krangle's trips to New York unless there has been adduced some evidence that such trips were at least partly for business, I disallow the expense incurred on this occasion

in the amount of \$86 88. I have also disallowed the amounts charged to the defendant for the second trip to Puerto Rico in January, 1964, on the same basis I have used with respect to the first trip.

Ex. 85 and one or two other documents not filed as exhibits indicate that Krangle made four trips to New York City during the accounting period in addition to the one already dealt with. It was only with respect to his trip to New York on December 30, 1962, that Krangle even attempted to establish that it was for business reasons, and on my reading of the transcript he failed in his attempt. I therefore disallow any expenses incurred by the defendant on account of these New York trips. The documents produced by the defendant indicate that the total expenses incurred by the defendant for payment of Dominion Travel Office Ltd. Accounts for air fares, hotel bills, and Krangle's expense vouchers in connection with these New York trips and the trip to Boston in August, 1963 were approximately \$2,800 and I disallow this amount. I have taken into consideration the evidence of Krangle that on one of his trips to New York he went by automobile with the defendant's patent agent, Leon Arthurs. I am aware that some of the expenses I have disallowed under this head may have been allocated in the defendant's books to Promotion expense rather than Travelling, and, of course, I will not deduct these expenses a second time.

The total amount I disallow under the heading "Travelling and Car Expenses" is \$3,517

5 *Office Salaries*—Included under this head are the sums of \$1,500 and \$3,000 paid to Miss Wendy Krangle, the daughter of Albert Krangle. The pay records of the defendant for 1963, filed as ex. 112, indicate that Miss Krangle worked for the defendant from January to August, 1963 and she appears to have been paid a generous weekly salary, considering her experience and qualifications. Nevertheless, the sum of \$1,500 was paid to her, in addition thereto. With regard to 1964, I can find no evidence that Miss Krangle was employed by the defendant at all except that in September she received

\$200. However, she also received from the defendant the sum of \$1,000 in each of the months of March, April and May, 1964. Since the defendant has not adduced any evidence at all to support these large payments I disallow the sum of \$4,500 under this head.

Similarly, I disallow the sum of \$1,600 paid to one G. F. Button and charged to office salaries, the defendant having failed utterly to justify payment of this amount.

In the result, the total amount I disallow under "office salaries" is \$6,100.

6. *Legal and Audit*—The total amount under this head, adjusted to July 29, 1964 is \$26,394, a sum which is very much greater than the normal expense of this kind incurred by the defendant. I reminded counsel for the defendant on several occasions during the course of the inquiry that I was not disposed to allow extraordinary amounts under this head, any more than under any other, in the absence of satisfactory evidence that the services for which the sums were paid were, in fact, rendered to or for the benefit of the defendant. The only evidence adduced by the defendant was with respect to the accounts rendered by Messrs. Gauld, Hill, Kilgour and Friend and this was to the effect that no part of these services was rendered to Krangle personally and that, with the exception of the adjustment made in note (a) on page 2 of ex S, all the legal work was done for the defendant. With respect, I cannot accept this evidence. I am satisfied that much of the advice contained in the letter to Krangle dated January 7, 1963 and which was filed as ex 84, as a sealed exhibit, to which the plaintiff has not had access, was actually advice given to Krangle personally, not all of which was such as to benefit the defendant. Other than that the defendant has declined to offer any particulars, of even the most general nature, of the services represented by these accounts, on the ground that such information is privileged. Under the circumstances, I propose to disallow the amounts of these accounts as expenses of the defendant.

The same situation obtains with respect to the many accounts submitted by several

other law firms during the accounting period and paid by the defendant. The defendant did not even deign to mention most of them at all.

I think, therefore, that all the defendant is entitled to be allowed for legal and audit expenses is a sum similar to its normal annual legal and audit expenses which appear to me to be about \$1,000. I allow the defendant the sum of \$3,000 for legal and audit expenses during the accounting period and therefore disallow the sum of \$23,394 on the simple ground that the defendant failed to prove these accounts, and aside entirely from the question of whether or not they would be allowable in whole or in part if they had been proved.

*7. Advertising, Promotion and Selling*—There was evidence that although the two payments to G. F. Button totalling \$1,600 are shown in the defendant's books as being charged to "salaries" the auditor re-allocated this expense to "promotion". However, I have disallowed this item under "Office salaries", so, of course, I shall not deduct it again under this head.

Krangle's credit cards, i.e. Diners' Club, American Express and Carte Blanche, were never properly explained during the inquiry. It is obvious that Krangle could draw expense money from the defendant at any time and that when travelling he was in the habit of charging a number of his meals to his hotel account. In addition, he was in the habit of charging the defendant at a rate of as much as \$60.00 per day over and above his travel fares and hotel bills. Surely under these arrangements he would have had little use for dining credit cards while travelling. On the other hand, there are among the productions of the defendant several accounts from dining establishments in Toronto which were paid by the defendant.

I have calculated the total amount paid by the defendant during the accounting period for charges made through use of the American Express, Diners' Club and Carte Blanche credit cards to be \$3,868 and in the absence of any evidence by the defendant as to what these charges were incurred for, I disallow the whole amount.

During the accounting period the defendant paid accounts rendered by the Oakdale Golf & Country Club Ltd. in the amount of \$2,402, if my examination of the defendant's books of account has been accurate, and these accounts were all as a result of Krangle's use of the Club's facilities. I cannot recall any evidence put forward on behalf of the defendant that would indicate that these expenses were incurred for the benefit of the defendant and not for Krangle's personal enjoyment, not connected in any way with the business of the defendant. However, I am prepared to allow Krangle's membership fees in the Club, which amount to \$475. I therefore deduct the sum of \$1,927 under this head, being the total golf club expense incurred by the defendant, less the amount of Krangle's membership and locker fee. I should have thought that Dulev Plastics Limited might have paid its president's membership fee.

The amount paid by the defendant during the accounting period for photographic work and camera equipment and supplies appears to be about \$1,500. While there was some evidence given by Krangle that would indicate that some photographic work was done for the defendant it falls far short of establishing that the sum of \$1,500 was paid by the defendant for work done for, and camera equipment supplied to, the defendant. I reduce this amount as a proper expense of the defendant, to \$750 and deduct \$750 from the amount claimed.

The last item I propose to deal with under this head is the matter of gift certificates. As nearly as I can determine from an examination of exs. 165, 183 and 184 and the books of the defendant, a total of \$5,800 was expended on gift certificates during the accounting period. When questioned on the disposition of the certificates, all of which seem to have been in \$5 and \$10 denominations, with the exception of those purchased from Revitch Men's Shop Ltd., which were for as much as \$20, Krangle stated they were used as prizes in the defendant's promotion campaigns and, in addition, some were given to the defendant's employees as Christmas bonuses one year. He had no record of the disposition of

any of them but the documents in ex. 52(2) indicate, if anything, that the defendant sent six certificates to be awarded as prizes on a campaign. There is no evidence that any greater number was sent out on any campaign. There were thirty-one campaigns held during the accounting period, some of which embraced more than one city or town, but there is no evidence that certificates were used as prizes in all of them. In fact ex. 52(2) would indicate the very reverse. I estimate that certificates for which the defendant paid \$1,200 were disposed of as prizes during the accounting period and certificates costing the defendant \$300 were disposed of as Christmas bonuses. The inventory of the defendant for October 31, 1964 included gift certificates valued at \$1,160, but this would include certificates costing \$1,080 purchased in September, 1964. It follows that the defendant paid \$4,220 for gift certificates that are unaccounted for, and I disallow that amount.

The total amount I disallow under the head of Advertising, Promotion and Selling is \$10,765.

8, 9 and 10. *Packing and Shipping Salaries, Rent and Warehouse Expenses.*—The books of the defendant indicate that the amounts claimed under these heads were paid by the defendant and I have no reason to believe otherwise.

11 *Telephone and Telegraph.*—The Bell Telephone accounts paid by the defendant during the accounting period include the charges for the telephone in Krangle's residence. Although, admittedly he transacts some business from his residence, I should think he and his family derive the usual benefit from having a telephone in their residence. There is also no evidence that all the long distance calls charged to his residence telephone related to business. I think it would be reasonable to charge Krangle with \$25 per month for his residence telephone. I therefore deduct \$475 from the total claimed under this head.

12, 13 and 14. *Office Expenses, General Expenses and Donations.*—I can see no reason to disallow any of these expenses.

15. *Bank Charges and Interest.*—Included in this item is the interest charged by Dulev Plastics Limited to the defendant on the loan made to the defendant many years ago and the balance of which varies from time to time as funds are moved from one company to the other. As I understand the evidence, no interest at all was charged by Dulev Plastics Limited until, I think, 1961, when the rate was set at 6%. Then, in 1962 the rate was increased to 12% and in 1963 it was reduced to 6%, where it remained for the balance of the accounting period.

There is no evidence whatever that Dulev Plastics Limited ever notified the defendant that it proposed to charge interest on the loan, or that the defendant ever agreed to pay it. Furthermore, the evidence of Krangle is that the defendant started paying interest because he, Krangle, did not see why Gallo, who was entitled to a share of the defendant's net profits and with whom strained relations existed, should benefit through the defendant having the use of this money without interest. I disallow entirely the interest payments made by the defendant to Dulev Plastics Limited during the accounting period, which amount to \$6,622.

16. *Postage.*—The amount paid by the defendant for postage in 1964 appears to be far in excess of the normal expenses incurred by the defendant in previous years. However, the books of the defendant indicate that rather large sums were paid for postage in January, April, July and December, 1964. This does not indicate to me that the large postage expense had anything to do with the date of judgment herein, the recall of infringing merchandise or the distribution and subsequent recall of relabelled merchandise. There is the evidence of Krangle that late in 1963 and in early 1964 the defendant undertook the expense of free distribution through the mail of a large number of return tops in connection with its promotion campaigns. This could have caused the great increase in postage expense in 1964. In any event, I am not prepared to disallow any of this expense.

17, 18, 19 and 20. *Insurance, Freight and Cartage Outward, Unemployment Insurance and Business Taxes.*—With the

exception of Freight and Cartage Outward, these expenses appear to be part of the normal expenses of the defendant and I know of no reason why the amounts thereof should be varied.

The amount claimed for freight and cartage appears to be high in 1964 in relation to sales but the books indicate the amount was paid by the defendant and I am not aware of any evidence before the inquiry that would support a disallowance of part thereof. There is also no indication that the amount was increased by any of the operations of the defendant resulting from the judgment herein.

**21. Depreciation on Furniture and Equipment**—This item, although small when compared with many of the others, includes depreciation on rugs and draperies purchased and used in Krangle's residence and such things as the colour television set and the "globe bar", both also used in Krangle's home I therefore reduce this amount to \$1,000, thereby disallowing \$275.

**22. Purchase Discounts**—As far as I am aware, this amount has not been disputed by the plaintiff.

**23. Bad Debt Provision**—Although the large increase in 1963 in this provision and its subsequent decrease to a normal amount was certainly not explained to my satisfaction, I do not think that manipulation of the provision had any effect on the defendant's expenses for the accounting period. No change will be made in this expense.

**24. Sundry Income**—This item was not dealt with by the parties to any extent and I see no reason to vary the amount claimed.

**25. Overhead Charges to Affiliated Companies**—I am going to disallow this so-called negative expense under the schedule of expenses because I propose to consider it with the \$2,000 allowed under note (c) on page 2 of ex. S, in the light of the proper general apportionment of several of the defendant's expenses among the three companies controlled by Krangle.

The total of the expenses claimed by the defendant as set out in the schedule

of expenses on page 2 of ex. S, and which I have disallowed, is \$51,513.

In my opinion, the expenses charged to and paid by the defendant and a portion of which should properly have been charged to Dulev Plastics Limited and Contest Toys Limited, the other two companies controlled by Krangle and sharing the defendant's office and factory accommodation and staff, are all of those listed in the Schedule of Expenses on page 2 of ex. S except management salary, promotion fees, bank charges and interest, freight and cartage—Outward, bad debt provision and sundry income. I have already eliminated the overhead charges to affiliated companies from the schedule.

I realize that the proportions of the various expenses that should be transferred to the other companies will vary with the nature of the expense and the relative degrees of activity of the various companies at different times during the accounting period. However, any reapportionment can be nothing more than an estimate, so I do not propose to deal with each expense in detail.

I estimate that 30% of the depreciation on automobile and travelling and car expenses should be allocated to Dulev Plastics Limited and Contest Toys Limited. I am aware that one automobile used by Mr Krangle and formerly owned by the defendant was transferred to Dulev Plastics Limited early in the accounting period. However, the evidence is clear that it was Krangle himself who constituted the management of all three companies, all of which should share these expenses, which were incurred primarily as a result of his activities.

I think the same proportion, 30%, of advertising, promotion and selling expense, telephone and telegraph and general expenses, should be allocated to the other two companies.

With regard to office salaries, rent, office expenses, donations, postage, insurance, business taxes, depreciation on furniture and equipment and purchase discounts, the allocation should be 60% to the defendant and 40% to the other two companies.



The expenses identified as packing and shipping expenses, warehouse expenses and unemployment insurance relate mainly to the actual distribution of merchandise, partly by Contest Toys Limited, but primarily by the defendant. I would allocate 80% of these expenses to the defendant and 20% to the other two companies.

The legal and audit expenses I have largely disallowed, but even so, I take it that certain normal legal and auditing services were rendered to Dulev Plastics Limited and Contest Toys Limited during the accounting period and charged to the defendant. Although there is no evi-

dence directly in point, I think such an inference is almost irresistible in view of all the evidence of the manner in which Krangle operated the three companies, charging virtually everything he possibly could to the defendant. I therefore allow 70% of this expense as a charge against the operations of the defendant.

In the result, I calculate the total allowable expenses of the defendant for the accounting period to be \$193,285.

The following table indicates the process by which I have arrived at the total of the allowable expenses of the defendant for the accounting period:

CALCULATION OF PROPER EXPENSES OF DEFENDANT FOR ACCOUNTING  
PERIOD DECEMBER 28, 1962 TO JULY 29, 1964

Description of expense as in Ex. S, page 2	Expenses claimed as in Ex. S, page 2	Claimed expenses adjusted to relate to accounting period ending on July 29/64	Expenses after deduction of portions held to be improper	Expenses of defend- ant after allocation among affiliated companies
1. Management salary.	\$ 12,125	\$ 7,958	\$ 7,958	\$ 7,958
2. Promotion fees	130,507	105,174	105,174	105,174
3. Depreciation—automobile	2,073	1,885	1,547	1,083
4. Travelling and car expense	11,010	10,055	6,538	4,577
5. Office salaries	22,780	19,158	13,058	7,835
6. Legal and audit	37,382	26,394	3,000	2,100
7. Advertising, promotion and sell- ing expense	50,542	38,483	27,718	19,403
8. Packing & shipping salaries	27,571	19,473	19,473	15,578
9. Rent	5,750	4,500	4,500	2,700
10. Warehouse expense	3,722	3,123	3,123	2,498
11. Telephone and telegraph	5,714	4,113	3,638	2,547
12. Office expense	5,304	4,092	4,092	2,455
13. General expense	407	372	372	260
14. Donations	743	708	708	425
15. Bank charges and interest ..	11,847	7,731	1,109	1,109
16. Postage	1,547	1,317	1,317	790
17. Insurance	1,407	1,115	1,115	669
18. Freight & cartage outward	17,310	15,303	15,303	15,303
19. Unemployment insurance	582	440	440	352
20. Business tax	417	355	355	213
21. Depreciation—furniture and equipment	1,574	1,275	1,000	600
22. Purchase discounts	(985)	(966)	(966)	(580)
23. Bad debt provision, increase or (decrease)	284	402	402	402
24. Sundry income	(166)	(166)	(166)	(166)
25. Overhead charges to affiliated companies	(3,000)	(3,000)	—	—
TOTAL	\$ 346,357	\$ 269,321	\$ 220,808	\$ 193,285

When the expenses of \$193,285 are deducted from the defendant's gross trading profit for the accounting period which I have already calculated to be \$322,002, the net profit of the defendant for the period is \$128,717.

I have found that the defendant is accountable to the plaintiff for 20% of its net profit for the accounting period and this amounts to \$25,743. This follows from two conclusions I have already reached in addition to the actual calculation of the defendant's net profit during the accounting period. These are that the total net profit of the defendant during that period was derived from sales of merchandise made in association with the use of one or more of the plaintiff's trade marks and that the defendant is accountable to the plaintiff for only that portion of its profit realized on infringing sales which is attributable to the use of the plaintiff's trade marks. Needless to say, if I am wrong in this latter conclusion, and the defendant is required to account for all of its profit derived from infringing sales during the accounting period, the total amount it would be required to account for would be \$128,717. With respect to the question of whether or not some of the sales of the defendant during the accounting period may have been non-infringing, the evidence is clearly to the effect that at least very nearly all of such sales were infringing and there was no evidence adduced that would indicate that any of the sales made during the accounting period were of a non-infringing nature. This matter is concluded, I think, by the argument advanced by counsel for the defendant to the effect that the sales made during the November, 1964 campaign in St. John's, Newfoundland, were the first to be made by the defendant without the use of the plaintiff's trade marks, and particularly the mark "Yo-Yo".

The final matter I propose to deal with is that of costs. I am aware that I have no jurisdiction to award costs on a reference of this kind, but the matter was argued at length before me and the amount of costs if taxed in the normal way will obviously be very large. For these reasons I thought I might not be out of order in commenting on this aspect of the reference.

While there is no doubt that the inquiry would have been shortened somewhat if the plaintiff had examined Krangle, or some other officer of the defendant, for discovery prior to the commencement of the reference, and counsel for the defendant sought to make much of this; particularly during argument, there is one impression that stands out more clearly in my mind than any other, and that is that the overriding reasons why this inquiry occupied some 37 days are the virtual refusal of the witness, Krangle, to answer the questions put to him with anything even approaching candour, his failure to produce the required books and documents of the defendant at the opening of the inquiry and his production of some important documents late in the inquiry, and the almost incessant attempts made by the defendant, some of which seemed to me to border on desperation, to have the inquiry adjourned both before it commenced and during its course.

I, accordingly, have no hesitation whatever in recommending that serious consideration be given to adoption of the normal rule that the costs should follow the event. In fact, the conduct of the defendant during the inquiry has been such that should I have found no profit for which the defendant need account to the plaintiff, I would have recommended that no costs be awarded to either party.

All of which is respectfully submitted.