



Neutral Citation Number: [2022] EWHC 652 (IPEC)

Claim No. IP-2020-000049

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

**Judgment handed down by email**  
**Date: 22 March 2022**

**Before:**

**MR NICHOLAS CADDICK Q.C.**  
**(sitting as a Deputy High Court Judge)**

**B E T W E E N:**

**BEI YU INDUSTRIAL CO.**

**Claimant**

**- and -**

**(1) NUBY (UK) LLP**  
**(2) MS MARIA LOUISE BURNELL**

**Defendants**

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**MICHAEL HICKS** (instructed by **Shakespeare Martineau LLP**) for the Claimant  
**THOMAS ST QUINTIN** (instructed by **HCR Hewitsons**) for the First Defendant

Hearing date: 8<sup>th</sup> March 2022

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**JUDGMENT**

**Nicholas Caddick Q.C. (sitting as a Deputy High Court Judge):****Introduction**

1. This is a trial of an account of profits. I will refer to the Claimant as “Bei Yu” and to the First Defendant as “Nuby”.
2. The underlying claim was that Bei Yu’s registered Community design (No.001553701-001) and, post-Brexit, its corresponding UK re-registered design (No.9001553702001) had been infringed by Nuby’s importation and sale of a baby bath (the “Nuby Baby Bath”).
3. After disclosure and the exchange of witness statements, Nuby accepted liability and, on 22 June 2021, a Consent Order was made by HHJ Melissa Clark providing for there to be an enquiry as to damages or, at Bei Yu’s option, an account of profits. On 28 July 2021, after being provided with financial information by Nuby, Bei Yu elected to pursue an account of profits against Nuby but not against the Second Defendant (“Ms Burnell”, a former managing director of Nuby) on the basis that she had not personally profited from the infringing activities, Ms Burnell, therefore, played no part in this trial.
4. At the trial, Bei Yu was represented by Michael Hicks of Counsel and Nuby by Thomas St Quintin, also of Counsel.

**The applicable law**

5. There was little, if any, difference between the parties as regards the principles of law to be applied in relation to the claim for an account of profits on the facts of this case. I would summarise the relevant principles as follows:
  - a. The purpose of the account of profits is to deprive Nuby of the profits which it has improperly made by its wrongful importation and sale of the Nuby Baby Bath and to transfer those profits to Bei Yu – see *Hotel Cipriani v Cipriani Grosvenor Street* [2010] EWHC 628 (Ch) per Briggs J at [8]. In this regard, it is Nuby’s actual profit that the court has to identify rather than the profit that Nuby could or ought to have made. In effect, Bei Yu must take Nuby (and its profit) as it is – see *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2016] EWHC 626 (Ch), at [10]).
  - b. The relevant profits are the sum left after deducting Nuby’s allowable expenses from the sums received or receivable by Nuby in respect of its infringing acts.
  - c. The allowable expenses will include any costs that were associated solely with Nuby’s infringing acts. Those costs might be direct costs (e.g. the costs of purchasing and importing the relevant products) or any increased overheads specifically related to the infringing acts. Such expenses may be deducted in their entirety – see *OOO Abbott v Design and Display Ltd* [2017] EWHC 932 (IPEC), per HHJ Hacon at [57(1) and (2)].

- d. The allowable expenses can also include a proportion of Nuby's general overheads unless (a) the relevant overhead would have been incurred anyway (i.e. it would have been incurred even if the infringing acts had not occurred) and (b) the sale of infringing products would not have been replaced by the sale of non-infringing products – see *OOO Abbott* per HHJ Hacon at [57(3)].
- e. Where a deduction can be made in respect of a general overhead, the amount deducted is such proportion of the overhead figure that can fairly be attributed to Nuby's infringing activities as opposed to its non-infringing activities. This apportionment is done on a broad brush basis - see *Jack Wills* at [53].<sup>1</sup> However, it may be appropriate to use different bases of apportionment for different types of overhead. A basis that is fair and appropriate in relation to, for example, an expense relating to the business premises may not be fair and appropriate when applied to, say, wages - see *Jack Wills* at [53]. As noted by Lewison LJ in *OOO Abbott* [2016] EWCA Civ 95 at [39], the question posed by the court as regards deductible overheads is a relatively simple one to ask, even if it may not be easy to answer.
- f. The evidential burden rests on Nuby to support a claim that it is appropriate to make a deduction on account of a sum said to be an allowable expense under the principles set out in (b) to (e) above – see *OOO Abbott* [2017] EWHC 932 (IPEC) at [57(4)].

### Witnesses

6. A number of witnesses provided witness statements and were cross examined at the trial.
7. The first witness was Mr Anthony Tempest who gave evidence on behalf of Nuby. Mr Tempest has been a Product Development Manager at Nuby since 2015. He had no involvement in Nuby's dealings with Amazon, the well-known retailer whose query regarding baby bath tubs at a trade fair in Cologne in September 2017 led ultimately to Nuby embarking on what turned out to be its infringing activities. However, he was involved in Nuby's attempts to source a product (ultimately the Nuby Baby Bath) that was supplied by Nuby to (inter alia) Amazon.
8. The second witness, also for Nuby, was Mrs Susan Bowman. Mrs Bowman is now Nuby's Head of Finance and was previously a consultant contracted to produce Nuby's management accounts and to oversee its financial systems. She gave evidence about those systems, about Nuby's direct costs and increased overheads relating to the Nuby Baby Bath, about its general overheads and how she apportioned them between its infringing and non-infringing activities. She also dealt with Nuby's sales of a different bath after it stopped selling the Nuby Baby Bath in mid-2021.

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<sup>1</sup> The same point was made as regards any apportionment that needs to be made between profits attributable to infringing and non-infringing activities – see *Hotel Cipriani* at [8].

9. Nuby's third witness was Mr Mark Dolan. He joined Nuby in May 2016 as its Sales Director. In October 2017 he became its Sales and Marketing Director and is now its acting Managing Director in place of Ms Burnell. He gave evidence about how Nuby operates. Unlike Mr Tempest (and Mrs Bowman), he had had some involvement in the initial discussions with Amazon.
10. On behalf of Bei Yu, Mr Hicks noted that Nuby had not adduced evidence from certain individuals who had been more involved in Nuby's dealings with Amazon. However, he did not criticise any of the witnesses actually called. In my judgment, he was right not to do so and I find that they were all helpful witnesses doing their best to assist the court.
11. The final witness was Mr Martin Chapman. Mr Chapman is a Chartered Accountant who was called by Bei Yu to comment on the evidence and material provided by Nuby. On behalf of Nuby, Mr St Quintin said that he did not criticise Mr Chapman as a witness but he nevertheless criticised Mr Chapman's evidence saying that it had been carelessly prepared and was an attempt to maximise Bei Yu's position without proper analysis. Whilst there are areas where (as set out below) I have accepted Nuby's evidence notwithstanding Mr Chapman's comments, I find that he was a good and considered witness and that his evidence was provided fairly and honestly in order to assist the court. Indeed, he was able to correct various errors in Nuby's figures.

### **Sales**

12. The starting point is to ascertain the value of Nuby's sales of its infringing Nuby Baby Baths. In this regard, Bei Yu does not challenge Nuby's evidence as to the quantity and value of Nuby Baby Baths sold in the period from 2019 to 2021. As the figures are confidential, I will not refer to them in this judgment.

### **Direct costs**

13. Nor is there any issue as regards Nuby's direct costs to be deducted from the sales figure. The figure put forward by Nuby in its Points of Defence is, again, confidential. However, Mr Chapman identified errors in Nuby's calculations which meant that that figure had been overstated by £9,317.43. Nuby accepts Mr Chapman's analysis in this regard. Accordingly, I will proceed on the basis that Nuby's direct costs, which can be deducted in full, were the sum referred to in Nuby's Points of Defence, less the figure of £9,317.43.

### **General overheads – can any deduction be made**

14. There were a number of issues in relation to Nuby's general overheads. The first issue was whether Nuby is entitled in principle to make any deduction at all in relation to its general overheads. In this regard, it was common ground that, to be so entitled, Nuby must establish that, if it had not imported and sold the infringing Nuby Baby Baths, it would have incurred the same overheads in relation to the sale of non-infringing products.

15. Mr Hicks submitted that Nuby could not discharge this burden. He pointed to a number of emails which Nuby had sent in March 2018 to two potential suppliers of baby baths (Dongguan Babycare Products, trading as Super Shapes (“Super Shape”) and Jieyang Defa Industry Co. (“Defa”)). In these emails, Nuby stated that Amazon was insisting on being supplied with a bath that was, effectively, the same as the registered designs. On this basis, Mr Hicks argued, any product supplied by Nuby would have infringed. He also noted that Nuby had failed to adduce evidence from any of its then employees (such as Ms Burnell, Ms Oliveras or Ms Reed) who might have been able to give evidence as to what Amazon’s position had truly been in this regard or, indeed, evidence from Amazon itself. He also noted that Mr Dolan had said, in cross examination, that if the issue had been raised with Amazon, it is possible that Amazon would have put the supply of an alternative design out to tender. Finally, Mr Hicks argued that the fact that Nuby had continued to sell the infringing product to Amazon after receiving Bei Yu’s initial complaint showed that it and Amazon were wedded to that product.
16. Notwithstanding these submissions, for the reasons set out below, on the balance of probabilities, I find that if Nuby had not dealt with the infringing Nuby Baby Bath, it would have dealt with another non-infringing product and, therefore, that it is entitled in principle to make a deduction in respect of its general overheads.
17. First, Mr Dolan was at the initial meeting with Amazon in Cologne (between 14<sup>th</sup> and 17<sup>th</sup> September 2017) and he was copied into Amazon’s email of 19<sup>th</sup> September in which they invited Nuby to “follow up on the ‘Tippitoes’ opportunity” (the ‘Tippitoes’ product being one made according to the registered designs). Whilst I accept that Mr Dolan did not play a leading role in the discussions, his understanding was that Amazon was merely seeking something similar. Amazon was not making, he said, “a specific request to have an exact replacement for the Tippitoes product”.
18. Second, the way in which Nuby initially went about sourcing a product to meet Amazon’s request supports Mr Dolan’s understanding. In its email to Super Shapes on 19 September 2017, Nuby expressly stated that it was looking for a product “similar” to one shown in an image, it then referred to other products that “look similar”, namely items BB3048, BB3035, BB3045 and BB3046. I do not think that I can conclude that a product that “looks similar” means that that product would satisfy the test for infringement (i.e. that it would produce in the mind of the informed user the same overall impression as the registered design). Indeed, the other products referred to by Nuby appear different (sometimes significantly different) in both size and shape to the registered design (and to the Tippitoes product). Then, in a later email of 21 September 2017, Nuby asked Super Shapes for samples not only of item BB3047 (which appears to be effectively the same as the registered design) but also of item BB3048 (which is not). Similarly, in an email to Defa on 2 October 2017, Nuby not only sought a price for a product (item N1033) that was

effectively the same as the Tippitoes product, but also for other baby baths (items N1035 and N1038) that were of a different design and size.

19. Third, whilst on 5 October 2017, Nuby told Super Shapes that it was very interested in the BB3047, there was no suggestion that this was because Amazon was insisting on that precise design. Moreover, in this email, Nuby asked Super Shapes whether there was a patent on that product. In this regard, I accept Mr St Quintin's submissions that this was really a query as to the existence of some form of intellectual property in the BB3047 design and that it was only after it was informed on 9 October that there was no patent, that Nuby committed itself to that design. In my judgment, it is probable that, if the answer had been different, Nuby would have reverted to one of the other different designs of bath that it had been considering.
20. Fourth, whilst Nuby's later emails did assert that Amazon was insisting on the design that turned out to be infringing, I accept Mr Tempest's evidence that this was a negotiation tactic whereby Nuby sought to obtain better terms from its suppliers. In particular, the email of 8 March 2018 from Ms Burnell to Super Shapes seems to me to be so confused and inconsistent that it is difficult to place any other interpretation on it.
21. Fifth, given that Nuby was (on Mr Dolan's evidence) looking to move into larger types of infant products, that it had identified a clear opportunity to supply a baby bath and that there were plenty of designs for baby baths readily available on the market (whether from Super Shape or Defa or from the other suppliers named by Mr Tempest, such as Bena, Bronco Baby or Do it Baby), it is probable that, if Nuby had not supplied the infringing products, it would have supplied non-infringing products instead. As Mr St Quintin pointed out, Nuby's evidence suggests that it has a constantly changing portfolio of products (with more than 60 new products a year), so the adoption of a different design would have presented no difficulties.
22. Sixth, whilst (apart from Mr Dolan's evidence) there was no direct evidence as to Amazon's intentions, it is difficult to see why Amazon would have insisted on Nuby supplying it with an exact replica of the Tippitoes product or, if it was not possible for Nuby to supply an exact replica, why Amazon would have decided to put the supply of an alternative product out to tender. Amazon's email shows that it wished to work with Nuby as a "NPD" (new product designer) and it seems to me, on the balance of probabilities, that it would have agreed for Nuby to supply it with something similar (but non-infringing). Indeed, that is exactly what happened in 2021 when Nuby withdrew the infringing Nuby Baby Bath and started supplying Amazon and all but two of its other customers with a different design of bath. I do not accept Mr Hicks' suggestion that this only happened because Nuby had been able to build on a relationship with Amazon over the three years that it had supplied Amazon with the Nuby Baby Bath. It seems much more likely that it happened because Amazon (and Nuby's other customers) did not require an exact replica of the Tippitoes product.

23. Finally, in response to what Mr Hicks admits is a small point, I cannot see that the fact that Nuby continued selling the Nuby Baby Bath for two or three years after Bei Yu's first complaint really suggests that Nuby (and Amazon) were so wedded to that design that no other design would have been acceptable. Quite apart from the various reasons why Nuby might have thought that it had a defence to an infringement claim, the fact is that a different design *was* subsequently supplied.

**General overheads – what sums can be taken into account**

24. Assuming Nuby is entitled to make a deduction in respect of its general overheads, the next issue is to determine which overheads can be taken into account. In relation to this issue, a list of the sums claimed by Nuby was included at Confidential Annex 4 to the Points of Defence. It appears that, subject to the following exceptions, Bei Yu accepts that these can be the subject of a deduction.

*Gross wages*

25. The list included Nuby's expenses in respect of gross wages. These were broken down into job areas in a further list provided by Nuby's solicitors. In closing, Mr Hicks accepted that, with one exception, he was not in a position to challenge Mrs Bowman's evidence that these figures were, in part at least, referable to Nuby's dealings in respect of the Nuby Baby Bath and should, therefore, be the subject of a deduction. The one exception was with regard to salaries relating to product development and design (in the sums referred to by Mr Chapman in his report). In this regard, Mr Hicks' argument was that it was wrong to make a deduction for such costs in 2019, 2020 and 2021 given that any development and design work done in relation to the Nuby Baby Bath would have to have been done in 2017 and/or 2018. I accept that argument. Moreover, as I have no evidence as to the figure for 2017 and 2018 and as it is not clear to me that Nuby would have incurred any development or design costs given that the Nuby Baby bath was a pre-existing third party design, it seems to me that it is not appropriate to make any deduction for this part of Nuby's salary costs.

*Consultancy costs*

26. The list of general overheads also included certain figures in respect of consultancy costs. On behalf of Bei Yu, Mr Chapman queried the inclusion under this head of (i) certain costs in respect of Duelle, (ii) other costs in respect of R2R and (iii) certain improper payments.
27. It is now common ground that items (i) and (ii) identified by Mr Chapman were in no way related to the Nuby Baby Bath and that Mr Chapman was right in saying that no deduction should be made in respect of them.
28. As regards item (iii), however, Mr Hicks argued that improper payments could not be treated as deductible because, by definition, they had not been made in support the business activities of Nuby and he pointed out that "supported" was the word used by Lewison LJ in *OOO Abbott* [2016] EWCA Civ 27 at [42] in describing the general overheads that are

deductible. It seems to me that this reads too much into the word “support”. In my judgment, the court is not required to enter into an inquiry into the extent to which a particular item of expense was justified or was of benefit to Nuby. I cannot, for example, accept that it would be necessary for the court to enquire into the details of an employee’s expense account with the company to see whether an item claimed by an employee had been justified, overstated or even improper. It seems to me that the exercise is to identify Nuby’s actual profit from its wrongful activities. If Nuby did in fact pay out these sums, then they form part of its general overheads and they served to reduce its profits.

29. Mr Chapman’s objection to making a deduction in respect of the improper payments was slightly different – namely that the sums were recoverable. However, when questioned, Mrs Bowman confirmed that these payments had been treated as a general overhead from which it seems probable that they have not been recovered. In my judgment, therefore, a deduction can be made in relation to these improper payments.

*Bad debt write off*

30. The list of general overheads also included a figure by way of a bad debt write off in 2019. I cannot see any reason why the decision to write off a bad debt in 2019 should be attributed in any way to the Nuby Baby Bath given that Nuby only started supplying that product in 2019. In my judgment, there should be no deduction in respect of this item.

**General overheads – the correct approach to apportionment**

31. To the extent that Nuby is entitled in principle to make a deduction in respect of its general overheads, there is an issue as to what approach the court should take when seeking to apportion those overheads as between Nuby’s infringing activities and its non-infringing activities.

*The rival approaches*

32. Nuby’s approach was the so-called “sales revenue” approach. This involves working out the percentage of Nuby’s total sales revenue that was referable to its infringing activities and apportioning the general overheads according to that percentage. In her evidence, Mrs Bowman provided the figures which she said were the relevant percentages for 2019, 2020 and 2021 and she applied those figures to every class of the general overheads in the relevant year.
33. By contrast, Bei Yu accepted that the sales revenue approach might be appropriate for certain types of overhead but, as recognised by HHJ Pelling in *Jack Wills* (see [5](e) above), might not be the best approach for others. Its case was that for many of the overheads, a fairer approach would be to make an apportionment by reference to the fact that the Nuby Baby Bath was one product out of 280 products being marketed by Nuby. According to Mr Chapman’s calculations, this led to a permitted deduction of 0.36% of the relevant overheads. Another possible basis of apportionment suggested was the volume approach, based on the number



of infringing products sold as against total number of products sold by Nuby in the relevant period.

*The pleading point*

34. In response to this, Mr St Quintin raised a pleading point. He pointed out that a statement of case in the IPEC is required to set out concisely all of the facts and arguments on which the party serving it relies (see CPR r.63.20(1)). Here, Bei Yu's Points of Claim asserted that Nuby's sales revenue approach to apportionment was "incorrect" (see paras.[19]-[20]) but did not say what other approach would have been correct. In response to this, Mr Hicks pointed out that the question of apportionment had been raised at the CMC. Indeed, Issue 4(b) of the List of Issues annexed to the CMC Order was "on what basis should the apportionment of those overheads be made". Mr Hicks also pointed to his Skeleton for the CMC which referred to the need for disclosure in order to see whether "some other approach" was appropriate and whether "a different approach should apply to different overheads".
35. In the circumstances, I do not think that it would be appropriate to prevent Bei Yu raising any other possible bases of apportionment. However, I bear in mind Mr St Quintin's point that the evidence and disclosure at trial was given on the basis of what was pleaded and that it would be unfair to allow Bei Yu to rely on a basis of apportionment that would require evidence and disclosure beyond that which was actually given at trial. On this basis, I will allow Bei Yu to argue that it is appropriate to use the one in 280 basis of apportionment but I will not allow it to rely on the volume approach referred to above as that would go beyond the scope of the evidence and disclosure materials before me.

*The appropriate apportionment in the present case*

36. As mentioned above, it may be appropriate to use different approaches to apportionment depending on the nature of the overhead. For example, in *Jack Wills*, the premises costs were apportioned according to the proportion of the square footage of the premises that had been used in relation to the infringing goods, whereas the sales revenue approach was used in relation to the employment costs. However, as pointed out by HHJ Pelling in that case, each approach was an artificial mechanism adopted for pragmatic reasons and the choice between them really involved asking which approach provides "the least unrealistic outcome" (see [2016] EWHC 626 (Ch), at [52]-[57]). On the facts of *Jack Wills*, HHJ Pelling used the sales revenue approach to apportion the employment costs largely because that was how those costs had been treated under the defendant's own internal accounting policy.
37. In the present case, Mrs Bowman's approach was to use the sales revenue basis in respect of each item of the general overheads. Whilst she accepted that there was no exact way of carrying out an apportionment, her evidence was that she was extremely familiar with how Nuby's financial systems worked (having written many of them and having worked on them since 2010) and, on this basis, she was confident that the sales revenue

basis was the “most logical basis” to use and was the basis that she had always used.

38. Mr Chapman’s comment was that the sales revenue approach had the advantage of being simple but assumed that sales of a product are directly proportional to the overheads relating to it. Whilst that is true, it may not be a reason to reject the sales revenue approach given that the court is involved in a broad brush exercise and, particularly, given Mrs Bowman’s evidence that:

*“...I always come back to the sales value because as a company we have a margin that we work towards and we want to get similar margin for all of our products. And in an ideal world, obviously, the overhead cost would be the same for each pound spent on a product. Whilst we cannot guarantee that, we would, if we had products that were particularly burdensome because of the size or their complexity, we would from our experience of that type of product know that and seek to get a better margin at the top end to accommodate that ....”.*

In contrast, when questioned about the one in 280 approach, she commented that it would be a difficult metric, especially given Nuby’s varying product lines and the varying numbers of products and given the fact that its products were not all of a similar value or size.

39. In closing, Mr Hicks accepted that the sales revenue approach was appropriate in relation to Nuby’s factoring costs but he queried whether it was appropriate in relation to a number of other “big-picture” items included in Nuby’s list of general overheads. He queried, for example, its use in respect of the costs in respect of penalties, relevant marketing, baby shows, gross wages, legal fees, premises and repairs. However, with the exceptions referred to below, I am satisfied that it was appropriate for Mrs Bowman to use the sales revenue approach for these items in the sense that it was the least unrealistic way to apportion those costs. In reaching this conclusion, I bear in mind that this is intended to be a reasonably broad brush exercise and that a detailed analysis of all Nuby’s financial records would not be proportionate. I can see that in many cases (such as penalties, gross wages, and costs of premises) there may be little clear correlation between the cost claimed and the value of sales of the Nuby Baby Bath as a proportion of the sales as a whole. However, it seems to me that the same is true of the alternative bases of apportionment put forward by Bei Yu and that those alternatives might be even more unrealistic. Mr St Quintin argued that the other bases may actually produce a worse result for Bei Yu. However, whether that was so would depend on whether he was right in saying that the Nuby Baby Bath was a lower price item in Nuby’s range, which I am not in a position to find.
40. A point made by Mr Hicks was that any difficulty which the court faces in determining what is the fairest method of apportionment is because Nuby had failed to provide it with the information necessary to reach a more informed view. For the most part, I do not accept this because the court is involved in a necessarily broad brush exercise and also because Nuby’s alleged failure has to be seen against the fact that Bei Yu’s pleading did

not put forward any positive case as to any particular alternative basis of apportionment. Also, I accept Mrs Bowman's evidence that the sales revenue approach is (in general) a fair broad brush approach and is the approach in fact adopted by Nuby in its own internal accounting policy.

41. The exceptions to this and where, in my judgment, a different approach is justified are with regard to the following items of general overheads - (i) the website, (ii) telephone and IT and (iii) the stationery and office equipment. Mr Hicks argued that, for these items, the sales revenue approach was unlikely to be realistic and that the one in 280 approach would be fairer. For the reasons set out below, I agree.
42. In relation to item (i), Mr St Quintin argued that the one in 280 approach could not be justified. In pressing for the sales revenue approach, he relied on what he said was Mrs Bowman's unchallenged evidence – namely that the website costs included commissions for web sales and payments to Nuby's website platform provider for hosting, platform maintenance and development support as well as for search engine and conversion rate optimisation. I do not accept this. Whilst Mr Hicks did not expressly challenge each aspect of Mrs Bowman's evidence, he certainly challenged her use of the sale revenue approach in relation to the website costs and he pointed out that the cost of putting details of a product on to the website was not affected by the value of the sales of that product and would be broadly the same for all products. I agree and it seems to me that this also applies to the hosting, maintenance and support costs to which Mrs Bowman referred. Further, in the absence of any other explanation from Nuby, I cannot see why costs relating to search engine or conversion rate optimisation should be treated any differently. Finally in relation to the element of commissions for web sales, Mrs Bowman's own evidence was that *"we would ideally sell to another retailer so the website is a small proportion of our sales"*. This would suggest that the commission element of the website costs figure is likely to be small.
43. As regards items (ii) and (iii), there was no evidence as to why the level of these costs is dictated by the value of the sales of particular products and, taking a broad brush approach, I cannot see any good reason why these should be apportioned on the sales revenue basis. It seems to me that the one in 280 approach is more realistic.
44. I should mention another head of expenses where a slightly different apportionment has been applied by Nuby, this was in relation to warehousing costs. In this regard, the deduction applied by Mrs Bowman was somewhat higher than those generally applied under sales revenue approach to reflect the fact that goods bought by Nuby on free on board ("FOB") terms would not have passed through its warehouse and so a higher proportion of the warehousing costs can be attributed to the Nuby Baby Baths (which did require warehousing). As I understand it, this approach was not disputed by Bei Yu.

### **Interest**

45. The final issue relates to the appropriate rate of interest that Nuby should pay on the sums found due on the account. In this regard, Bei Yu argues

that the rate should be 2.5% to 2.75% over Bank of England Base rate<sup>2</sup> whilst Nuby asserts that the rate should be the base rate only.

46. The relevant principles with regard to interest were set out in *Carrasco v Johnson* [2018] EWCA Civ 87 at [17] where, having reviewed the authorities, Hamblen LJ stated that:

17. The guidance to be derived from these cases includes the following:

(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.

(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.

(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.

(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.

47. I also note that at [19] and [25], Hamblen LJ emphasised that the court has a broad discretion in relation to an award of interest.

48. Applying these principles, I have concluded that this is a case where Nuby is correct and that interest should be awarded at the base rate only. At paragraphs 28 and 29 of its Points of Defence, Nuby expressly pleaded that the base rate was appropriate given that savings are earning negligible interest and that Bei Yu had not set out any case as regards why a rate based on the cost of its borrowing would be appropriate. That remained the position at trial and no evidence was adduced by Bei Yu that would assist (even on a "broad brush" basis) in determining the appropriate rate of interest in this case. In my judgment, given that the issue had been clearly raised in the pleadings, Bei Yu is not entitled simply to rely on the general presumption referred to in *Carrasco* at paragraph 17(3) (see above) and it would not be appropriate to order interest to be paid at the rate Bei Yu might have had to pay to borrow.

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<sup>2</sup> Bank of England base rates being 0.75% until 11 March 2020, 0.25% until 19 March 2020 and 0.1% until 16 December 2021

## **Conclusion**

49. For the reasons set out above, I will order Nuby to account for its profits in a sum that reflects my findings in this judgment and I ask the parties to draw up a form of order accordingly.