

In The Matter Of:

*John Alfred Donovan v.
Shell UK Ltd*

*Day 1
June 15, 1999*

*Smith Bernal Reporting Ltd
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[1] Tuesday, 15th June, 1999
[2] (10.30 am)
[3] **MR JUSTICE LADDIE:** Yes.
[4] Opening Submissions by MR COX
[5] **MR COX:** May it please you, my Lord, I appear on behalf of
[6] the claimant, together with Ms Lindsey Lane and my
[7] learned friend, Mr Geoffrey Hobbs, together with
[8] Mr Philip Roberts, appears on behalf of the defendant.
[9] My Lord, I hope and believe that your Lordship has
[10] had copies of the skeleton arguments, the various
[11] reading lists, chronologies and bundles of authorities
[12] but there are, before entering into the substance of the
[13] matter, a number of preliminaries which I have to
[14] trouble your Lordship with. Unless your Lordship has
[15] any other particular matter, may I introduce those to
[16] your Lordship now?
[17] **MR JUSTICE LADDIE:** Yes.
[18] **MR COX:** My Lord, they are contained in brief at the end of
[19] the claimant's outline of argument at pages 42 and 43.
[20] May I first deal with page 43 but I am reminded that
[21] before I do, I ought to tell your Lordship one thing.
[22] **MR JUSTICE LADDIE:** Can you repeat, where do I find it?
[23] **MR COX:** I beg your pardon, your Lordship has the
[24] page numbers that I will not.
[25] **MR JUSTICE LADDIE:** I am quite prepared to look at page 42,

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[1] the next few minutes. I am informed that he is on his
[2] way from Liverpool Street.
[3] **MR JUSTICE LADDIE:** What is the first application that we
[4] have to deal with?
[5] **MR COX:** The first is an application for extension of time
[6] to serve -
[7] **MR JUSTICE LADDIE:** That is not going to affect him.
[8] **MR COX:** No, we can deal with that.
[9] **MR JUSTICE LADDIE:** Let us deal with that.
[10] **MR COX:** Thank you very much.
[11] **MR JUSTICE LADDIE:** Sit down, Mr Cox. Mr Hobbs, we have had
[12] a month to see this. Why should it not go in?
[13] **MR HOBBS:** Your Lordship has read it, I think.
[14] **MR JUSTICE LADDIE:** I have it available. I think I may have
[15] read it at home but I have lost the file. Why should it
[16] not go in?
[17] **MR HOBBS:** I agree.
[18] **MR JUSTICE LADDIE:** Right. Paragraph 24.
[19] **MR COX:** Paragraph 23. This may be something your Lordship
[20] decides that can be dealt be equally swiftly. One can
[21] see that there may be an argument to wait until I have
[22] opened.
[23] **MR JUSTICE LADDIE:** Could be. I cannot force the defendants
[24] to put any witnesses in the witness-box. We have got
[25] rid of Star Chamber, it is a great mistake, but I cannot

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[1] if I had one.
[2] **MR COX:** Yes, paragraph 23 and paragraph 24, that should be
[3] an accurate guide. I apologise. Do you have a
[4] paragraph 23 and 24?
[5] **MR JUSTICE LADDIE:** I do.
[6] **MR COX:** I am very grateful. My Lord, it is paragraph 24
[7] that I wanted to go to first but before I do, I am
[8] reminded of something I should have told your Lordship
[9] straightaway; that is, Ms Lane and I do not represent
[10] the company who are defendants to the counterclaim. The
[11] company is at the moment, as I understand it, without
[12] representation in court.
[13] **MR JUSTICE LADDIE:** It has gone up the spout, has it not?
[14] **MR COX:** No, it has not. It is still in existence and its
[15] secretary, as I understand it, is on his way this
[16] morning but has not yet arrived.
[17] My Lord, it is true to say that originally those
[18] instructing me and I, as I understand it, were
[19] instructed on behalf of the company but some time ago
[20] notice was served changing that situation, so that the
[21] position is that the company is without any
[22] representation. It will only be able to be represented
[23] by its company secretary and he is not here.
[24] My Lord, I regret to inform your Lordship that but
[25] it may affect what your Lordship thinks we should do in

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[1] force him to put witnesses in the witness-box.
[2] **MR COX:** I am not asking your Lordship to do that. What
[3] I am asking your Lordship to do.
[4] **MR JUSTICE LADDIE:** Is to grumble.
[5] **MR COX:** No, not to grumble. What I am asking for is that
[6] your Lordship should say that these hearsay notices
[7] should not entitle witnesses to be read and that these
[8] witnesses should attend for cross-examination. That, as
[9] I understand, your Lordship can say.
[10] **MR JUSTICE LADDIE:** Do I have the power to stop somebody
[11] relying on a hearsay notice?
[12] Let me put it to you this way, Mr Cox: two things
[13] appear to me to arise out of the fact that there are
[14] Civil Evidence Act Notices filed in respect of 12 out of
[15] the 14 witnesses, including, as far as I can see, every
[16] witness referred to in the defendant's skeleton
[17] argument. If they intend to run a defence but are not
[18] prepared to put up the witnesses to be cross-examined,
[19] I will inevitably construe that against them.
[20] Secondly, if they decide to say to you, "We are
[21] not sure who we are going to call, if anybody", and you
[22] have to proceed - you must therefore proceed on the
[23] basis that you must prepare to cross-examine all of
[24] them, if, at the end of the day, they withdraw some of
[25] those witnesses without having given you adequate notice

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[1] in advance, that will no doubt have consequences in cost
[2] which will be visited on them, whatever the outcome of
[3] this case.

[4] The idea that you are not sure you are going to
[5] see any witnesses at all until 30 seconds before they go
[6] into the box is not an attractive way of conducting
[7] efficient litigation but I do not see that we can do
[8] anything about it at the moment. Mr Hobbs knows about
[9] these things; he knows what the consequences will be if
[10] he plays hard to get. Do we need to go any further than
[11] that?

[12] **MR COX:** We do not.

[13] **MR JUSTICE LADDIE:** Now everybody is sitting down.

[14] **MR COX:** Yes, my Lord, I am just anxious about Mr Gill, who
[15] is on his way from the company.

[16] **MR JUSTICE LADDIE:** What time is his train supposed to
[17] arrive?

[18] **MR COX:** I am told he was at Liverpool Street half an hour
[19] ago. I do not know whether those instructing me are
[20] able to give me a better update than that. I think he
[21] has probably arrived.

[22] **MR JUSTICE LADDIE:** Is this Mr Gill?

[23] **MR COX:** It is.

[24] **MR JUSTICE LADDIE:** Mr Gill, would you like to take a seat
[25] somewhere in the front row? You will be happy to know

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[1] focus on matters that I believe to be relevant. I know
[2] from past experience that my view of what is relevant
[3] does not coincide necessarily with everyone else's. It
[4] does help to have some clear guidance as to what we can
[5] agree is not relevant.

[6] My learned friend has been kind enough to indicate
[7] his initial batting order and that can be done over the
[8] short adjournment.

[9] **MR JUSTICE LADDIE:** We do not need to stop now.

[10] **MR HOBBS:** No, we do not.

[11] **MR JUSTICE LADDIE:** Your junior and Mr Cox's junior can set
[12] about extracting bits which are offensive to you.

[13] **MR HOBBS:** My Lord, yes.

[14] **MR COX:** We really are moving very swiftly indeed.

[15] **MR JUSTICE LADDIE:** Would you like a judgment now?

[16] **MR COX:** I am afraid I have not provided my skeleton on disc
[17] but I will, if it will assist your Lordship. We will do
[18] that today. I apologise for not having done so before.

[19] **MR JUSTICE LADDIE:** As I think your clerk was told my clerk,
[20] I would like to have, if it is available, the pleadings
[21] and the witness statements on disc as well.

[22] **MR COX:** We will do our very best to achieve that.

[23] I know your Lordship has had the outline and,
[24] therefore, it would probably be redundant for me to go
[25] through in great detail the nature of the case that we

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[1] that nothing of any significance has happened in the
[2] first ten minutes or so of the trial. You have missed
[3] nothing.

[4] Now that Mr Gill is here, we can carry on.

[5] **MR COX:** We can. My Lord, there are one or two other
[6] matters which I have not had a chance to discuss with
[7] Mr Hobbs, raised in his skeleton argument. They need
[8] not detain us

[9] **MR JUSTICE LADDIE:** Are they the questions of which passages
[10] I should notionally cut out?

[11] **MR COX:** Exactly. I was rather hoping that Ms Lane and
[12] Mr Roberts could get together with a blue pencil.

[13] **MR JUSTICE LADDIE:** Do you want to do that now? Do we want
[14] to continue? The trouble with all of this, Mr Hobbs, is
[15] that if I was a jury the damage has been done, because
[16] I have read it all. On the contrary, from your point of
[17] view, it may have exactly the reserve effect; it may be
[18] that it makes me think that they are all hysterical.

[19] **MR HOBBS:** It may do, my Lord.

[20] **MR JUSTICE LADDIE:** Does it make much sense cutting out
[21] things like this?

[22] **MR HOBBS:** Yes, it does. One cannot do this to the nth
[23] degree, but it does, because it puts down a clear marker
[24] as to what is not in issue for the purposes of
[25] cross-examination. I am going try, as I always try, to

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[1] set out there. There are a number of matters which, by
[2] way of amplification and examination of certain parts of
[3] the discovery, I would like your Lordship to have in
[4] mind prior to embarking upon hearing the evidence.

[5] **MR JUSTICE LADDIE:** Can I tell you what I have done in the
[6] way of reading because I have not read all of the
[7] matters in the reading guide, particularly in view of
[8] the defendant's statements that they might not call 12
[9] of their 14 witnesses. You can take it that I have not,
[10] so far, paid a great deal of attention to the
[11] defendant's witnesses of fact. I have skim-read the
[12] experts' reports. I was not going to get excited over
[13] people who are not going to be called.

[14] **MR COX:** I am grateful for that.

[15] **MR JUSTICE LADDIE:** Secondly, even on the basis of material
[16] that I have seen, I think it would be advantageous for
[17] you to encapsulate your client's case to me on the
[18] nature of the proposal he put forward because, by the
[19] time you have got through the experts' reports, there is
[20] an awful lot of jargon about and you can end up, I think
[21] in all of these things, either identical or quite
[22] different and at some stage I will have to distinguish
[23] between them.

[24] **MR COX:** Your Lordship will be familiar with the story of
[25] Moses before Pharaoh and his difficulty in persuading

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[1] Pharaoh of the authenticity of the miracles that he
[2] wrought because of the similar tricks able to be
[3] performed by the magicians. It may well be that the
[4] distinction between the authentic and the parallel, but
[5] not the same, is a fundamental part of your Lordship's
[6] judgment in this case.
[7] My Lord, may I deal with ¶
[8] **MR JUSTICE LADDIE:** Just so that I have it right, as
[9] I understand your case, you do not object, so to speak.
[10] Let us see if I have the outline right. There are, in a
[11] breach of confidence action, at least as you put
[12] forward, the following: there has to be information
[13] which is capable of being treated as confidential. It
[14] has to have been communicated to the defendant and it
[15] has to have been misused by the defendant in one way or
[16] another.
[17] As I understand it, you do not lay claim, or your
[18] clients do not lay claim to originality in the patent
[19] sense for their project. They say that even if
[20] individual features are discernible elsewhere, the
[21] package as a whole, whatever that package may be, is
[22] sufficiently non-trite to be capable of being the
[23] subject of a breach of confidence action.
[24] **MR COX:** Exactly.
[25] **MR JUSTICE LADDIE:** It does not have to be inventive but if

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[1] pleadings and Mr Hobbs' helpful outline that if it is
[2] capable of being confidential information it is accepted
[3] that the circumstances gave rise to an obligation.
[4] I see that from the various written forms of the setting
[5] out of their case that they have put forward.
[6] Your Lordship, I think, will not, unless I am much
[7] mistaken, be considered with confronting that issue.
[8] The essential issues that -
[9] **MR JUSTICE LADDIE:** That is not quite right.
[10] **MR COX:** Subject obviously -
[11] **MR JUSTICE LADDIE:** Because although Mr Hobbs may concede
[12] that the transmission - let us leave that to one side.
[13] The third point is whether or not it is being used.
[14] **MR COX:** Yes.
[15] **MR JUSTICE LADDIE:** Once again, the question of whether or
[16] not the features in the package handed over were unheard
[17] of before, completely new or not, may throw light upon
[18] the defendant's case that they got it somewhere else
[19] because, of course, if these are features which are
[20] readily known, it makes it less likely that they took
[21] them from your clients. That is the argument.
[22] **MR COX:** Yes.
[23] **MR JUSTICE LADDIE:** It also seems to me that that question,
[24] that is the commonness of the features, may also reflect
[25] on the question of whether these were handed over with

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[1] it is trite ¶ there is a point at which something is so
[2] trivial and so common knowledge that it is not capable
[3] of being confidential information.
[4] **MR COX:** Yes.
[5] **MR JUSTICE LADDIE:** As I understand it, you are going to
[6] say, or at least you may well say that individual
[7] features can be found in other packages but what you are
[8] saying is the whole body of proposals your client put
[9] forward.
[10] **MR COX:** I am certainly saying that. I am also saying that
[11] certain features were unique and, in particular ¶
[12] **MR JUSTICE LADDIE:** The package is unique and some of the
[13] features within it are unique.
[14] **MR COX:** Yes.
[15] **MR JUSTICE LADDIE:** Package qua package is unique and some
[16] of the features within it are unique.
[17] **MR COX:** Exactly so.
[18] **MR JUSTICE LADDIE:** Secondly, you say that that was
[19] communicated to the defendants under terms of
[20] confidence.
[21] **MR COX:** Yes.
[22] **MR JUSTICE LADDIE:** I am not sure to what extent there is
[23] even a dispute ¶
[24] **MR COX:** I was going to say to your Lordship that it may
[25] very well be from what I understand from both the

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[1] an obligation of confidence, in the sense that it may be
[2] that if something was absolutely trite, absolutely
[3] obvious, the sort of thing that anybody would have
[4] known, as soon as the obligation of confidence was
[5] explained and was taken on board and as soon as the
[6] recipient saw it he said, "There is nothing in this".
[7] **MR COX:** Yes.
[8] **MR JUSTICE LADDIE:** It may be throw light on it that way.
[9] **MR COX:** Or indeed the reverse. The conduct of those who
[10] received the information, if they -
[11] **MR JUSTICE LADDIE:** If they had really thought it was trite,
[12] you would not have expected - it may be said. I just
[13] want to check all the factors.
[14] **MR COX:** I quite understand.
[15] **MR JUSTICE LADDIE:** It may have something to do with that,
[16] even though the issue of handing over in confidence is
[17] conceded, the reaction to it may be relevant to the
[18] question whether or not it is a confidential package.
[19] **MR COX:** As reflected in certain of the authorities that,
[20] with your Lordship's permission, I shall show you
[21] perhaps early on. It may be helpful to see how others
[22] have approached the task, in not wholly dissimilar
[23] circumstances, but obviously each one turning on its
[24] facts.
[25] My Lord, may I first introduce it simply by way of

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[1] setting the scene because although I know your Lordship
[2] will have it, there are various other matters that
[3] I wanted to draw your Lordship's attention to.

[4] This was between the claimant and the defendant
[5] not a case, we say, of the foisting of unsolicited
[6] information upon a large company. To an extent, if you
[7] read the witness statements of the defendant, you will
[8] get the impression, often in passing rather than
[9] explicitly spelled out, that Mr Donovan, the claimant,
[10] was treated to an extent ¶ this may be a slight
[11] exaggeration ¶ as somebody who was one of the general
[12] common run of nuisances who would pester them with
[13] valuable, as they saw it, or invaluable information.

[14] This was a situation where the claimant had a long
[15] trusted and successful record with Shell as a deviser of
[16] promotions; a record that went back as far as the early
[17] 1980s and your Lordship will have seen the broad setting
[18] out of what occurred.

[19] So satisfactory had that relationship been to
[20] those then responsible for the promotions in what was
[21] called the Promotions Department at Shell-Mex House,
[22] that those in charge, chiefly Mr Paul King, National
[23] Promotions Manager, had got into a habit, when he could
[24] not use a particular idea put forward by this claimant,
[25] of attempting, by one means or another, to secure the

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[1] **MR JUSTICE LADDIE:** Volume what?

[2] **MR COX:** My Lord, the first will be volume 1.

[3] **MR JUSTICE LADDIE:** Yes.

[4] **MR COX:** At page 42. My Lord, an example of what I mean is
[5] set out here. This related to a "Let's go racing"
[6] promotion, a promotional game and an option that had
[7] been sought by Mr Danson, the then sales development
[8] manager of Shell UK Oil Ltd, on 8th November 1985.

[9] Mr Donovan responded to Mr Danson's request and he said:

[10] "Following our discussions this morning ..."

[11] **MR JUSTICE LADDIE:** I have read it.

[12] **MR COX:** Your Lordship will see that the option was to be
[13] enforced for a period of two years and Shell would have
[14] the right to mount the promotion.

[15] Here is what is important: of course there is a
[16] level here of two parties trying to do their best to
[17] satisfy each other. Shell did not have a budget. If
[18] you read Stuart Carson's witness statement, who was in
[19] 1990 in the Promotions Department, you will see that
[20] Mr Carson refutes the idea generally that options were
[21] ever granted ¶ we say that is just plainly wrong ¶ and
[22] secondly, that they could have been ever granted. Your
[23] Lordship will have the significance of this because it
[24] comes in 1990, as I shall draw your Lordship's attention
[25] to in due course, and that options could not have been

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[1] idea. In other words, the track record of success,
[2] spectacular in the case of a particular promotion called
[3] Make Money, which we may have to look at in a little
[4] while, had meant that Shell had become used to
[5] believing, we submit, that an idea from that source was
[6] inherently, or likely to be inherently valuable.

[7] On various occasions throughout the 1980s, Shell
[8] had sought to retain for its disposal an idea that it
[9] could not otherwise at that stage use. May I give your
[10] Lordship just an example or two, hoping that your
[11] Lordship sees where I am coming from, because it is
[12] important to set, when one considers the various
[13] allegations and counter-allegations that are made as we
[14] move into 1989, 1990 and 1992, just to set this in its
[15] proper context, to set both the conduct of Shell, its
[16] attitude towards this claimant and the way it had
[17] received other information and treated it in confidence
[18] and sought to secure it, knowing its obligations, for
[19] the future, though it could not then use it.

[20] My Lord, the first document may I invite your
[21] Lordship to have, whether your Lordship does I hope so,
[22] but it may be necessary for this exercise to have at
[23] your hand the discovery bundle section E, various of
[24] them, I am afraid, as I go through and chart for your
[25] Lordship ¶

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[1] granted because there was no budget. That is perfectly
[2] true. We accept there was no budget within the Shell
[3] Promotions Department.

[4] **MR JUSTICE LADDIE:** I understand the point that your clients
[5] make. Your clients say, "We had such a good track
[6] record that when we came along with a good idea, whether
[7] there was a budget or not, Shell would say, "That looks
[8] like a good idea. If we cannot use we will make sure
[9] nobody else uses it for a little while and if, within
[10] the next however long it may be, we decide to use it, we
[11] will use it." It is an indication of whether they
[12] thought your chap was a good man, doing his job.

[13] **MR COX:** A way was found in this case of using the balance
[14] of an outstanding transfer of monies from Shell to Don
[15] Marketing of producing and providing consideration for
[16] that option. In fact, there was no extra money used but
[17] there was a balance that would have been due back to
[18] Shell and, therefore, it was agreed that that balance
[19] would remain with Don Marketing.

[20] **MR JUSTICE LADDIE:** I understand all this, Mr Cox. I do not
[21] want to deflect you from the course you are adopting
[22] but, to some extent, this is consistent with what the
[23] defendants concede in their defence. They concede ¶ at
[24] the end, the precise financial terms of other promotion
[25] suggestions are secondary, it seems to me.

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[1] The defendants accept that over the years they
[2] have accepted and have utilised projects put forward by
[3] your client. There are one or two where they deny that
[4] the idea was from your client but they say that your
[5] client did the work of putting it into operation ¶
[6] there may be a little dispute about that ¶ but at the
[7] end of the day, that your client put forward a number of
[8] projects which were adopted by Shell, or secured by
[9] Shell, and in one or two cases were apparently very
[10] successful is not really in doubt.

[11] **MR COX:** My Lord, it may be because what is in doubt and
[12] what is denied is the option in 1990.

[13] **MR JUSTICE LADDIE:** Whether there was an option in 1990 on
[14] this idea will depend upon evidence relating to this
[15] idea, or are you saying it was always done by way of an
[16] option?

[17] **MR COX:** No, what I am saying is that contrary to what is
[18] asserted by the only witness who can give real evidence
[19] on this, Mr Carson, there was in the past a precedent,
[20] indeed, more than one, for giving options.

[21] **MR JUSTICE LADDIE:** I understand the point. You do not need
[22] to really show me all of these because you can put them
[23] to Mr Carson and make him feel uncomfortable, on the
[24] assumption that he is going to be called as a witness.
[25] Work on that assumption throughout, otherwise this trial

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[1] unquestionably been devised by Mr Donovan, it was one of
[2] the top five promotions of all time, I understand. He
[3] was credited on all of the documents and printed
[4] leaflets as being the author of it. He won awards, as
[5] did Shell. This was the formative and crucial,
[6] successful promotion which established Mr Donovan's
[7] reputation and your Lordship will have seen throughout
[8] the 1980s that he devised a good number of others, not
[9] only for Shell but also for other main High Street
[10] retailers.

[11] My Lord, in about 1985, about a year or so after
[12] Make Money had reached its zenith of success, it was a
[13] game ¶ your Lordship may remember, I do not know ¶
[14] where you could go and get a half of a money note and
[15] then, if you were lucky, you got one later when you made
[16] a transaction that matched. If it matched, you got the
[17] value.

[18] **MR JUSTICE LADDIE:** I probably would have remembered it if
[19] I had ever won any money.

[20] **MR COX:** It was extraordinarily popular. Mr Donovan then
[21] began thinking ¶ he is, we say, a man of original mind,
[22] a man extremely good at inventing both games and
[23] promotional ideas. He came up with an idea for a
[24] multipartner game. It was going to be called Megamatch
[25] and it involved the playing of Make Money in

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[1] is not going to last very long.

[2] **MR COX:** That may be a happy thing.

[3] May I take your Lordship then, because if I may
[4] I want to trace a story for your Lordship. I know that
[5] I am dealing here with, if I may say so, a mind already
[6] several steps in advance of my own.

[7] **MR JUSTICE LADDIE:** I thought you were going to say a mind
[8] made up.

[9] **MR COX:** That I would never accuse your Lordship of.
[10] My Lord, the story to an extent, although may
[11] I take your Lordship's guidance on what I may go
[12] fortissimo and what I may go slightly less so -

[13] **MR JUSTICE LADDIE:** I suspect me trying to stop you will
[14] slow everything down.

[15] **MR COX:** I am very willing to be stopped if your Lordship
[16] has a point and I am seeming to belabouring it, if I may
[17] say so.

[18] The next stage of events, if I can come through
[19] the 1980s relatively quickly, is to take your Lordship
[20] to something that is important, and that is volume 1,
[21] page 67, because the very successful - again, I will
[22] not dwell on it, save to introduce your Lordship to the
[23] document - Make Money project which had been devised
[24] by, we say, this claimant, at least to this extent, that
[25] the lawful way of playing the game in the UK had

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[1] national-represented High Street retailers all around
[2] the country. It would have been the largest game ever
[3] to have been played and with Shell's enthusiastic assent
[4] at that time, Mr Donovan chaired a number of meetings
[5] between potential partners in that ¶

[6] **MR JUSTICE LADDIE:** Was this the one that was actually
[7] aborted at the last minute and resulted in the original
[8] company folding in?

[9] **MR COX:** Yes. My Lord, page 67, because it is important to
[10] track. One of the issues that your Lordship will have
[11] to decide is whether this idea was simply an aspiration
[12] on which no brain work, no ingenuity, no intellectual
[13] effort had been expended in order to produce it. This
[14] is one of the relevant features that I will certainly
[15] take your Lordship to in the authorities.

[16] One of the things that may assist your Lordship in
[17] deciding that this idea was capable of being protected
[18] by the obligation for confidence is to see the way in
[19] which the mental process through which the claimant had
[20] to go in order to produce the idea ¶ it was not simply
[21] the work of a moment's inspiration in the bath, albeit
[22] good ideas are often borne that way. It was the work
[23] and product of a background of intellectual application
[24] and research and ingenuity.

[25] Without seeking to dwell upon it, may I take your

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[1] Lordship briefly ¶
[2] **MR JUSTICE LADDIE:** Before you do that, once again, I am
[3] very anxious to know where the battleground between you
[4] and Mr Hobbs is. Let us assume that your client,
[5] without any effort, completely by good luck, struck upon
[6] something which had never been done before.

[7] **MR COX:** Yes.

[8] **MR JUSTICE LADDIE:** And said, "Gosh, I could commercialise
[9] this". Because of the nature of the case, let us assume
[10] it is a proposal for a game. It was something which
[11] came to him in a dream. There was no conscious effort
[12] at all. Let us assume for the moment that it was indeed
[13] novel, so nobody else in the world knew it. He went to
[14] Shell and said, "I have this fantastic idea, it took me
[15] zero effort to produce it, do you want it?" Is that not
[16] confidential information?

[17] **MR COX:** Yes, of course.

[18] **MR JUSTICE LADDIE:** I am a little bit concerned about
[19] whether we are going to end up with a quasi patent
[20] action on how much effort was put into designing this.

[21] **MR COX:** When one looks at the authorities, any judgment of
[22] this kind, as your Lordship knows better than I, is a
[23] matter of balancing various factors and one of the
[24] things that may ¶ we say exactly to your Lordship that
[25] the idea in this case was of just such a kind,

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[1] somebody else. He comes along with a project which, in
[2] fact, is very similar to other people's projects, not
[3] identical, but similar. He says, "This is
[4] confidential", and he goes along to Mobil and says,
[5] "Here is my promotion, you can have it in confidence".
[6] Assuming that it happens to be different to everything
[7] that has gone before and was presented to Mobil in
[8] confidence, can Mobil use it without regard to his
[9] wishes, even though it is not a breakthrough, not a ¶

[10] **MR COX:** No, they cannot.

[11] **MR JUSTICE LADDIE:** I thought that would be your position.

[12] **MR COX:** It is my position.

[13] **MR JUSTICE LADDIE:** The question of whether or not this is
[14] very similar ¶ there comes a point, we will see it no
[15] doubt in due course in *Coco v Clark*, that you cannot
[16] protect trivial tittle-tattle and you cannot protect
[17] stuff which is already public. We can see that in
[18] *Spycatcher*, amongst other things.

[19] **MR COX:** Yes.

[20] **MR JUSTICE LADDIE:** I think you can probably see it in *OSI*,
[21] that long case about contact lenses. All of that
[22] I understand, and the question of how close you are to
[23] other things readily available may throw light upon
[24] whether the similarities between what the donor gave and
[25] what the donee used indicates misuse of the information

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[1] immediately commercially attractive, immediately a
[2] saleable proposition, one that could be seen to put a
[3] new twist or slant upon existing schemes and one that
[4] was taken up with enthusiasm by those at Shell and
[5] indeed, first when Shell received it, an option sought
[6] on it.

[7] However, if your Lordship should be foxed, as we
[8] would put it, by a lot of other schemes being cast upon
[9] the ground and said to be similar and share individual
[10] features, we say that one of the factors your Lordship
[11] may consider is that it was not just that kind of idea
[12] that could emerge from the ether. It did require an
[13] insight into the way the relationships might work, for
[14] example, between High Street retailers and major
[15] national brands and the background of this idea in this
[16] case was a lot of exhausting, patient work, trying to
[17] bring people together who had never been brought before
[18] in a particular relationship before.

[19] **MR JUSTICE LADDIE:** Yes. Let me explain the problem ¶ not
[20] a problem, the things that are crossing my mind after
[21] reading a fair amount of the evidence, the witness
[22] statements and the skeletons. Assume that the claimant
[23] had not been Mr Donovan, it had been somebody
[24] frightfully less capable than him. Mr Donovan does not
[25] need to worry about what we are saying now, it is

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[1] handed over or is consistent with spontaneous,
[2] independent derivation.

[3] **MR COX:** Yes.

[4] **MR JUSTICE LADDIE:** I can see all of that. I can understand
[5] why you would wish to persuade me that this was
[6] earth-shattering. If there was a category of Nobel
[7] prizes for forecourt promotions this would have achieved
[8] one, or two.

[9] **MR COX:** If one listens to the rhetoric of Shell and one
[10] also takes into account the awards that this scheme won,
[11] one might think that those claims were not entirely
[12] unjustified.

[13] **MR JUSTICE LADDIE:** No doubt you are going to have fun if
[14] you are given anybody to cross-examine; fair enough.
[15] All I am wondering is whether I need any of this for the
[16] purpose of deciding whether there was material which was
[17] capable of being treated.

[18] **MR COX:** If one examines the authorities, and I am only
[19] anxious to assist your Lordship, various learned judges
[20] over the years have found this a helpful factor to take
[21] into account. I will never be one not to listen to the
[22] words of the wise.

[23] **MR JUSTICE LADDIE:** You do not want to just persuade me.
[24] For example, the last thing you want me to do is find in
[25] your favour on the wrong basis so that you lose in the

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[1] Court of Appeal or the House of Lords or the European
[2] Court of Justice, or the Hague Tribunal.
[3] **MR COX:** Exactly, any one of those, but I know that your
[4] Lordship's judgment will, I am sure, weigh heavily with
[5] us all in relation to any further proceedings.

[6] Project 100, at paragraph 60, page 67, helps by
[7] setting out the kind of explicit confidential assertion
[8] of condition with which all of Mr Donovan's proposals to
[9] Shell were habitually covered.

[10] In this case, your Lordship ¶ I will not go
[11] through it ¶ sees that it is a fairly comprehensive
[12] warning that the contents of the document are to be held
[13] in confidence and, in this case, more strongly set out
[14] because the consortium, as it is referred to at
[15] paragraph 2, or the proposed consortium, was already in
[16] the process of being assembled.

[17] My Lord, if I can take your Lordship through it
[18] very quickly, your Lordship will see, this was the
[19] normal way which Mr Donovan and his company would put
[20] proposals. It is a document of about 40 pages. It sets
[21] out definitions of the particular matching halves.

[22] I make this point because it is said by some of
[23] the experts that the form in which Mr Donovan put
[24] forward the multibrand loyalty concept with which your
[25] Lordship is dealing is deficient in some way or would

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[1] good deal of work and patient assimilation of experience
[2] in the putting together of these partners, and he says
[3] at page 110:
[4] "Successful cooperation in this promotion may also
[5] lead to future joint promotional projects for premium or
[6] continuity programmes which could also take advantage of
[7] the vast purchasing power of the project 100 consortium
[8] to minimise unit costs. Such a joint venture would
[9] provide consumers with an opportunity to collect a
[10] particular premium item or a full set of items in a
[11] relatively short time."

[12] My Lord, the proposed members of the consortium at
[13] that time were set out in page 75 ¶ can I take you back
[14] very quickly ¶ and 76 as being Woolworths, Shell, Bass,
[15] Sketchley; in other words, High Street retailers
[16] providing different services or products. 75 and 76.

[17] This game was original. It had never been done
[18] before. It was held in confidence by Shell but plainly,
[19] it gave rise to other thoughts and thinking by this
[20] claimant.

[21] My Lord, the next phase of this is simply this:
[22] that that project, as your Lordship rightly observed,
[23] folded because Shell withdrew from it after some months
[24] of work by the claimant. He has no complaint about
[25] that. That was a commercial decision they could take.

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[1] not have been taken seriously commercially. That form
[2] was by no means incompatible with the way he put forward
[3] other schemes or ideas to Shell.

[4] My Lord, he sets out in this document the way the
[5] game was to be played. He says at page 74 that Don
[6] Marketing were the instigators of the concept and are
[7] acting as coordinators for the project ¶ page 74.

[8] **MR JUSTICE LADDIE:** Yes.

[9] **MR COX:** Top of page 73, if I can invite you back to it:

[10] "The proposed multibrand promotion will involve
[11] several major High Street multiples, operating in
[12] complementary but non-competitive retail trades, each
[13] with national or near national representation,
[14] participating at the same time in the same colossal
[15] game."

[16] Once you start reading those phrases, one begins
[17] to see how the germ of the idea for a long-term scheme,
[18] not dependent upon a game, began to occur to this
[19] claimant.

[20] At the end of the document, at page 110 of the
[21] bundle, having set out various advantages of the game
[22] that he is proposing, it speaks of the possibilities for
[23] the future. Bearing in mind that your Lordship on
[24] looking at this document a little more closely, which we
[25] need not do now, will see that it is the product of a

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[1] As a consequence, the predecessor of Don Marketing, as
[2] it now exists, folded. It was put into liquidation.

[3] Some years went by. Shell operated a fairly
[4] straightforward standard collection scheme called
[5] Collect and Select.

[6] **MR JUSTICE LADDIE:** In your chronology ¶

[7] **MR COX:** My Lord.

[8] **MR JUSTICE LADDIE:** ¶ is the folding of Make Money referred
[9] to here?

[10] **MR COX:** Autumn 1986, page 1.

[11] **MR JUSTICE LADDIE:** Autumn 1986.

[12] **MR COX:** Yes.

[13] **MR JUSTICE LADDIE:** I have the wrong chronology.

[14] **MR COX:** This should be one in table form for the claimant,
[15] if your Lordship has it.

[16] **MR JUSTICE LADDIE:** LE 2436.2 at the bottom.

[17] **MR COX:** No. Your Lordship has another one. There are
[18] usually two versions of history in a case. That one is
[19] the defendant's. My Lord, this is ¶

[20] **MR JUSTICE LADDIE:** I have it.

[21] **MR COX:** I do propose to move as swiftly as I can, if
[22] I may.

[23] My Lord, Shell began to run a Collect and Select
[24] scheme. This was a simple scheme in which you collected
[25] for a number of goods which were set out in a

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[1] catalogue. The problem with it was that you could not
[2] accumulate points to get the higher, better type of
[3] gifts. So motorists and consumers became frustrated.
[4] The policy, we say, the scheme was being seen to fail
[5] increasingly over the next few years. It is against
[6] that background that Mr Paul King, the National
[7] Promotions Manager at Shell, approached the claimant
[8] again.

[9] By that time a gap of about two years, two and a
[10] half years, had gone by. He had been engaged in work
[11] for other people. Shell had adopted this long-term
[12] scheme and, therefore, were not running short-term or
[13] gaming promotions anymore. That is why, being based
[14] upon Shell, Mr Donovan's original company went into
[15] liquidation. But Mr King approached the claimant, and
[16] this is an important moment, we respectfully submit,
[17] because it demonstrates that Shell's attitude at that
[18] time, and also the way in which this idea was not only
[19] not unsolicited but was commissioned by the defendant,
[20] because Mr King contacted Mr Donovan in September 1989
[21] and said that there was now consideration, because of
[22] Collect and Select's problems, of returning to
[23] short-term promotions and he gave Mr Donovan a
[24] three-fold brief: first, could he devise some short-term
[25] promotions; second, could he think of a way of ¶ I hope

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[1] know.

[2] **MR JUSTICE LADDIE:** Is this right: essentially, it may be a
[3] bit of an oversimplification, Mr Cox, but what
[4] Mr Donovan suggested was, "Let us expand those places
[5] where you can get qualifying points or currency, as it
[6] is called, but without damaging Shell by having
[7] competing petrol businesses in it", so a whole group of
[8] non-competing businesses, all providing points, and they
[9] would share in increased joint loyalty. So if you go to
[10] Sainsbury's to get points, you could also go to Shell to
[11] get the points, and so on, so that all of them benefit
[12] from the speedier acquisition of large numbers of
[13] points, without, unlike Greenshield stamps, competing
[14] with each other.

[15] **MR COX:** Your Lordship has the point, save that there are
[16] other ¶

[17] **MR JUSTICE LADDIE:** Other points as well.

[18] **MR COX:** One would have liked to amplify your Lordship's
[19] exegesis of it just a little, if I may, because it is
[20] important to have it in mind.

[21] The idea we say was of something rather more
[22] interesting, perhaps, than simply as your Lordship put
[23] it. It was to be, albeit any formulation sometimes
[24] often does not capture its essence, my Lord, it was to
[25] be an exclusive consortium of major High Street

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[1] your Lordship will permit this colloquialism ¶ jazzing
[2] up Collect and Select, reviving it, because of its
[3] apparent fading perception in the forecourts.

[4] **MR JUSTICE LADDIE:** Just a moment. Yes.

[5] **MR COX:** Third, would he think about a long-term replacement
[6] for Collect and Select? The fundamental weakness of
[7] Collect and Select, as Mr Donovan himself had identified
[8] over the intervening years before Mr King had returned
[9] to him, was the problem of frustration because of a long
[10] time it took to collect for the better goods.

[11] Mr Donovan had been thinking, based upon his experience
[12] with Megamatch, how to cure those ills.

[13] When Mr King came to see him, he asked him
[14] directly that question, "Give me an answer to the
[15] problems of Collect and Select. Short-term answers were
[16] games, trying to make it more interesting by introducing
[17] games and other ideas into Collect and Select, but think
[18] about a replacement for Collect and Select as a
[19] long-term loyalty scheme". This was a direct request,
[20] we submit, from the defendant to Mr Donovan.

[21] In response to that, he produced what your
[22] Lordship has seen as one of the focal documents in this
[23] case. It is in the core bundle, my Lord, but it is also
[24] in the volume before your Lordship now at page 331. It
[25] may be useful to continue with that volume, I do not

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[1] retailers in non-competing fields, redeeming and issuing
[2] a common promotional currency.

[3] Now, the exclusivity was important because, as
[4] your Lordship rightly observes, Greenshield stamps died,
[5] in effect, we submit as one of the reasons, because it
[6] was promiscuous in its distribution of the stamps; in
[7] other words, you could perhaps find it at three petrol
[8] forecourts in the same local locality, different
[9] companies.

[10] **MR JUSTICE LADDIE:** Just a second. Putting it down to basic
[11] terms, that was unsatisfactory because it cost the
[12] petrol companies, not a lot, but it cost them, the
[13] petrol companies, or retailers, for the amount involved
[14] in supplying Greenshield stamps to people but they did
[15] not get loyalty in exchange. So it cost them something
[16] for little return.

[17] **MR COX:** Yes. The marketing appeals was less. If you have,
[18] as Mr Donovan conceived it, a card which gave you a
[19] ticket of entry to a club, an exclusive consortium, you
[20] would not be going to two supermarkets, two oil
[21] companies, five ironmongers, whatever it may be. That
[22] would give you a ticket of entry to an exclusive
[23] consortium. You would, if you wished to accumulate
[24] those points, have to go either to Sainsbury's ¶

[25] **MR JUSTICE LADDIE:** This is all an advantage to the

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[1] retailer, it is not an advantage to the cardholder. For
[2] example, nowadays, you can get a NatWest Visa card which
[3] gives you Air Miles. You can go to any shop you like
[4] and get Air Miles. That is an advantage to the consumer
[5] because he effectively can say, "I know that I can buy
[6] all my requirements with Air Miles, can get Air Miles.
[7] It does not mean that I am tied to Sainsbury's or
[8] anybody. I cannot go to Marks and Spencers because they
[9] do not take credit cards but other than that, I can go
[10] just about everywhere". The advantage to the consumer
[11] is the same. The advantage to the retailer is much
[12] reduced because Mobil have got no advantage over Shell,
[13] and vice versa, and Harrods have no advantage over
[14] Fortnum and Mason and vice versa.

[15] **MR COX:** Exactly but, of course, Mr Donovan was advising
[16] Shell.

[17] **MR JUSTICE LADDIE:** So all the advantages you are talking
[18] about are advantages to the promoter, not to the
[19] consumer. The consumer would be happy to get free gifts
[20] from everywhere.

[21] **MR COX:** It was an advantage to the partners. It was an
[22] idea that we submit was powerful and we will see in
[23] documents that that is the way it was described by Shell
[24] itself, as well many others, in its ability to mobilise
[25] loyalty to particular brands. It had this advantage as

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[1] way in which people are placed in the market. Not only
[2] could you manage that, together with the other partners
[3] you selected and chose, and control your own scheme, you
[4] could also share the goldmine of information that would
[5] be captured by the smart card. When you use your smart
[6] card, you are giving the company into whose machine you
[7] insert it a whole range of information about yourself:
[8] your customer habits, your purchasing habits, what you
[9] buy with your petrol, so that Shell could learn how to
[10] stock its Select shops from your Lordship punching a
[11] card, or rather getting the man at the desk to put it
[12] in.

[13] That was interesting because it meant that that
[14] small, select consortium could share this vast database
[15] of information and, thus, adjust and adapt their
[16] marketing strategies to the information that they
[17] received.

[18] So it had this central idea of an exclusive
[19] consortium sharing this single currency, this common
[20] promotional currency, non-competing, across mass appeal
[21] retailers. We are not talking here about frequent
[22] flyers or merely travel-based or airline-based. We are
[23] talking about major High Street retailer operations. It
[24] had a vast and massive marketing appeal, we submit.
[25] That it did is contained in every line that Shell wrote

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[1] well: the idea of an exclusive club, the partners could
[2] be selected. There is some talk, for example, in the
[3] documents of Shell regarding Tesco as too down-market.
[4] Sainsbury's was perceived as being a suitable partner
[5] for Shell, Tesco's was perceived as being not so
[6] suitable, so that they could manage the brand, the
[7] combination of brands that came into the consortium.
[8] You could not do that with a third party operated scheme
[9] like Air Miles because each of them were clients.

[10] **MR JUSTICE LADDIE:** As I understand it, once again, picking
[11] it up from what I have read in the papers, the
[12] advantage, I am not saying whether it was an advantage
[13] which was exclusive to this, but let us see what the
[14] advantages were. The advantage was you gave the
[15] consumer a card that allowed him or her to acquire a
[16] very large range of goods and rather than having a Shell
[17] card, a Fortnum and Mason card, a Harrods card, a John
[18] Lewis card, a Marks and Spencer card, you have one card
[19] which allows you to a wide range of purchases but yet
[20] ties the consumer in to a limited number of retailers,
[21] therefore advantaging those retailers.

[22] **MR COX:** Yes, and giving you numbers of other advantages
[23] too. Not only could you manage the brand, it is very
[24] important these days commercially, as your Lordship
[25] knows, for managing the perception of the public and the

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[1] about this after 1992, after they, we say, pinched the
[2] claimant's idea and then, right up the way to 1997, when
[3] it announced in various terms, the successful completion
[4] of its final ambition which was to put this idea into
[5] operation. This idea has impacted and page 345 of the
[6] bundle, though it had been confidential, when Mega Match
[7] had been under discussion, it was as a direct response
[8] from the responsible officer of the defendant who
[9] addressed a concept for the document presented on 23rd
[10] October. We say to Mr. Paul King, but also to Mr.
[11] Hallagan who has no recollection and that your Lordship
[12] will find to be a significant feature if they ever come
[13] to the court, of the defendant, they have achieved a
[14] remarkable corporate amnesia or loss of recollection of
[15] the disclosures made by Mr. Donovan to Shell. Mr.
[16] Hallagan was present, we submit, we say on 23rd
[17] October, 1989, and so was Mr. King when this idea was
[18] discussed, when this idea was presented and at concept 4
[19] it was set up and perhaps I need not trouble your
[20] Lordship with every line of it ¶¶

[21] **MR JUSTICE LADDIE:** What you say is it is
[22] something special?

[23] **MR COX:** And could be seen to be special at
[24] the time. Was seen by the responsible officers of the
[25] defendant as being special. We can see that. May I

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[1] invite your Lordship to have this in perspective.
[2] Sometimes one loses one's sense of perspective as one
[3] reads the defendant's evidence. This is a request from
[4] shareholders. Who is thinking for us? It is put
[5] forward Shell then proceeds, perceives its value
[6] because what then happens next as we submit is that it
[7] is put forward, bearing in mind that the whole of Shell
[8] is undergoing something of a revision, Collect and
[9] Select is fading. This is the background to what is
[10] coming.

[11] Mr. Hannagan introduces these ideas to Mr. King and
[12] thereafter this document is put forward in October. My,
[13] Lord, that meeting is admitted by the defendant on 23rd
[14] October ¶¶

[15] **MR JUSTICE LADDIE:** It is admitted that Mr.
[16] Hannagan was present?

[17] **MR COX:** No, it is denied that Mr. Hannagan
[18] was present. Mr. Senior King was present; Mr. King
[19] received this and it is a feature of this case that one
[20] hand does not know what the other is doing. This
[21] defendant ¶¶

[22] **MR JUSTICE LADDIE:** No, no. You just
[23] criticised Mr. Hobbs' clients for collective amnesia.
[24] Amnesia is what happens when you forget something which
[25] occurred when you were there. You make up your mind.

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[1] the bundle, because Mr. King decided to explore the
[2] possibility of running the Mega Match game that had
[3] folded in 1996, your Lordship will recall, and at page
[4] 31, Mr. Donovan wrote to Mr. King dealing with the
[5] discussions as they were then moving forward for the
[6] replacement of the failing Collect and Select scheme.

[7] When I say 'failing', perceived to be
[8] failing as an appealing proposition to the consumers and
[9] Mr. King had named what had been called Project 100 in
[10] 1986, Project Harbour. It is a letter dated 19th March,
[11] 1990. It is headed: Re: Project Harbour.

[12] **MR JUSTICE LADDIE:** That is Mega Match?

[13] **MR COX:** That is Mega Match. The name we
[14] say Mr. King gave it and what this letter demonstrates
[15] is that Mr. King was actively taking forward the
[16] proposition of running Mega Match after it had been shut
[17] down in 1986, running Mega Match and your Lordship will
[18] see:

[19] "On your instructions, we are now considering the
[20] implications of a 16 week promotional period commencing
[21] presumably in mid-August. We will take into account the
[22] desire to introduce seasonal prizes in the run-up to
[23] the Christmas period"
[24] and discussions what appropriate gifts would be for
[25] that period. It is then discussed about the appropriate

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[1] Are you saying they were there and there was amnesia or
[2] is it disputed they were there?

[3] **MR COX:** I fear I was ironic. It will be a
[4] matter for your lordship to judge.

[5] **MR JUSTICE LADDIE:** Are there any documents
[6] indicating who was present at this meeting?

[7] **MR COX:** May I take your Lordship, at this
[8] meeting, as I recollect, there is no document other than
[9] the one that your Lordship has, setting out the date,
[10] but there are in other cases and some helpful
[11] indications ¶¶

[12] **MR JUSTICE LADDIE:** As I understand it, your
[13] clients say Hannagan is there. Mr. Hannagan says he was
[14] not there and Mr. King was not there?

[15] **MR COX:** Sadly not. Mr. Sotherton says Mr.
[16] Hannagan was there who was Mr. Donovan's then colleague
[17] in the company and we will come to that issue with your
[18] Lordship in due course, no doubt. There were then a
[19] series of meetings after the 23rd October, 1989 meeting
[20] in which Mr. Sotherton and Mr. Donovan met Mr. King in
[21] November, 1989 and in February, 1990. On 19th February,
[22] Mr. King visited the Stowmarket offices of the company
[23] and discussed what should be the response of Shell to
[24] the document put forward by Mr. Donovan and his company
[25] and, my Lord, that is helpfully evidenced at page 381 of

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[1] responsibilities for games and marketing.

[2] Over the page, some discussions on the
[3] Christmas period and discussions about what appropriate
[4] gifts would be for that period. It is then discussed
[5] about appropriate responsibility for games on marketing.
[6] Over the page, some discussions about fees, the multi-
[7] brand matching halves concept, the second last paragraph
[8] down under: Active consideration:

[9] "This was acknowledged by Ken Danson on behalf of
[10] Shell. We did, in fact, make a presentation to the
[11] current proposed partner@

[12] they are talking there about, as we understood it,
[13] Tesco at a senior level:

[14] "but on Ken's instructions, wrote to them saying the
[15] timing was not right. We then spent nearly 6 months in
[16] developing the project for Shell with other potential
[17] partners, before Ken decided to shelve the project and
[18] run 'Collect and Select'".

[19] Then he says:

[20] "If the promotion is mounted, we propose to charge the
[21] standard agency commission fee to cover our input, as
[22] listed in items 1 to 9 above. For simplicities sake,
[23] this will include handling major prize verification. We
[24] would also ask for a concept fee of #25,000, half to be
[25] invoiced to Shell and the balance to the partner. This

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[1] is half the fee paid for Bruce's Lucky Deal because we
[2] view the multibrand matching halves concept as being an
[3] important innovation which will create vastly more
[4] interest and participation than a normal matching halves
[5] game, rather than being a completely new concept."
[6] because it was an expansion on the 'Make Money'.
[7] "We would guess that a considerable amount of time
[8] would need to be spent in developing a satisfactory
[9] prize fund to suit both partners."

[10] My Lord, it concludes with the hope that the
[11] fees would be reasonable. Now, Mr. King then is
[12] considering, we submit, with this company and with Mr.
[13] Donovan, a revival of Shell's promotional fortunes.
[14] They have come back to the man who had been successful
[15] in the past. They have given him a specific brief to
[16] reflect on a placement for 'Collect and Select' and he
[17] has come up with this idea but they decide to move
[18] forward Mr. King with Mega Match a closely related
[19] idea, game idea.

[20] I take your Lordship forward in time. What
[21] then occurs as we submit is that Mr. Slappin a senior
[22] manager at Shell, decided that Tesco was not a good
[23] partner for Shell within Mega Match, too down market as
[24] we understood it, but Mr. Donovan's re-introduction to
[25] Shell was successfully established and this is an

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[1] MR JUSTICE LADDIE: I have read it.

[2] MR COX: 419. Mr. Sotherton sends the
[3] standard terms and conditions and your Lordship will
[4] have seen those set out in the pleadings. They are the
[5] clearest indication of confidentiality in material given
[6] to the defendant, we submit. Mr. Carson gets them
[7] through Mr. Sotherton on 1st May, 1990.
[8] Now, my Lord, at that point, Mr. Donovan is
[9] informed that one or two of the ideas he put forward,
[10] for example a Disney idea I am truncating this as much
[11] as I can, could not work because the licensing of Disney
[12] had failed and Mr. Donovan, and this is now approaching
[13] a focal point of your Lordship's decision, decides to
[14] send out to other companies other than Shell, to see
[15] whether or not he might have a response for any of the
[16] ideas he has now been developing since Mr. King returned
[17] in 1989.

[18] One of those was Sainsbury's. Sainsbury's
[19] in the marketing field is understood to be a prize
[20] partner and a supermarket to be a very valued partner in
[21] any kind of scheme. Sainsbury's, anyway, was approached
[22] at page 420 and Mr. Horley, the advertising and
[23] marketing manager wrote back, simply indicating that it
[24] was difficult to make an appropriate comment in the
[25] information in his letter:

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[1] important point. By early 1990s, Mr. Donovan had re-
[2] established contact and his relationship with Shell was
[3] functioning well and that is shown by the fact although
[4] there had been this hiatus of a couple of years or so,
[5] that is shown, my Lord, for example, at volume 1, page
[6] 417, where Mr. Donovan's company put forward an idea
[7] again at the request of the defendant, we submit, for
[8] Sherlock Holmes and Mr. Carson, who is a potential
[9] witness for the defendant, replies to him at page 417
[10] and says:

[11] "Thank you for your letter of 14th May" ¶

[12] MR JUSTICE LADDIE: Can we look at 419?

[13] MR COX: Regrettably it is not in
[14] chronological order. I have taken you forward in time, I
[15] promise you, even if not in the bundle. 30th May, 1990.

[16] He is expressing interest in a Sherlock Holmes.
[17] Tracking what happens up to July which is a crucial
[18] element, Mr. Carson is wanting to make use of Sherlock
[19] Holmes, using the idea of Sherlock Holmes. He asks Mr.
[20] Donovan to bear with him until 4th June when he will
[21] have a clear idea about the possibility. Mr. Carson
[22] asks also for the standard terms and conditions of Don
[23] Marketing. That is at 418:

[24] "Please find attached a formal response to the Sherlock
[25] Holmes Game proposal."

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[1] "but if you would like to send me the written
[2] presentation you refer to, I will of course give it my
[3] consideration."

[4] It is important to note that what Mr.
[5] Donovan was putting forward or the company was putting
[6] forward to Sainsbury's, was a number of ideas but in
[7] particular I think the Mega Match idea and it was really
[8] to see whether Sainsbury's might be interested in
[9] considering a promotion put forward by Don Marketing,
[10] but the fact that Sainsbury's responded was significant.

[11] Sainsbury's, as in the past, as at 1990, had never
[12] been interested in running promotional games or
[13] cooperating with anybody else. It was a prize and the
[14] fact of that nibble was significant and so Mr. Donovan
[15] told Mr. Carson and Mr. King about Sainsbury's'
[16] interest. My Lord, what happened was that Mr. Sotherton
[17] took over the role of ¶

[18] MR JUSTICE LADDIE: Who did he tell?

[19] MR COX: He told Mr. Carson and Mr. King
[20] that Sainsbury's had expressed some interest in having
[21] promotional ideas put to them and Mega Match in
[22] particular. Page 421 indicates that because Mr. Donovan
[23] writes to Mr. Carson on 25th June, 1990 and says: "Dear
[24] Stuart, Re: J Sainsbury Plc." This becomes important
[25] and relevant in 1992, for your Lordship's consideration:

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[1] "Sainsbury's have never before expressed the
[2] [slightest] interest in promotional games. I was
[3] therefore very surprised to receive a letter this
[4] morning from Brian Horley, their Advertising and
[5] Marketing Manager, taking us up on an offer to make a
[6] presentation. I therefore thought it might be worthwhile
[7] taking advantage of the opportunity to mention the
[8] multibrand game concept to them; hence my call to you
[9] this morning requesting permission to do so. I will
[10] make it clear to Sainsbury's that the approach in regard
[11] to the multibrand game, is at our instigation and purely
[12] to explore the possibility of joint promotional activity
[13] between Shell and Sainsbury's, without any commitment
[14] from either party."

[15] Mega Match still being considered, as your
[16] Lordship has seen, under the name of the Project Harbour
[17] with Mr. King considered with Tesco but Tesco considered
[18] as down market. On 10th July there is a letter that
[19] need not concern us too much because it is a letter to
[20] Mr. Horley about some possible short-term promotional
[21] games that could be run by Sainsbury's and if we go over
[22] the page, my Lord, at this time Mr. Donovan has put
[23] forward an idea to sell for a short-term promotional
[24] game called Star Trek, with a Star Trek theme. Mr.
[25] Carson was enthusiastic about Star Trek and indeed

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[1] on the defendant's case and in our submission is not in
[2] any way changed by anything the defendants put forward,
[3] is that Mr. King became concerned when he saw that Don
[4] Marketing was interesting Sainsbury's in the whole idea
[5] of promotion which it had not been interested in before
[6] and particularly when he was informed that Don Marketing
[7] was proposing at that stage to raise the question of the
[8] consortium-based idea. He asked Don Marketing, 'Will
[9] you hold, before you speak to Sainsbury's, before you
[10] form an identity in writing and have further
[11] discussions, will you hold that idea?', the very idea
[12] which your Lordship is looking at, at the disposal of
[13] Shell because of the relationship.

[14] **MR JUSTICE LADDIE:** That was Mr. King?

[15] **MR COX:** That was Mr. King, because Mr.
[16] Donovan was used to Shell and was used to a trusting and
[17] confidential relationship with Shell because of the
[18] unusual relationship with them; Mr. Donovan was prepared
[19] and indeed had been in the past, to allow such
[20] arrangements to come into being.

[21] At this time it was agreed between the
[22] defendant, Mr. King before, for the defendant and Mr.
[23] Donovan and Mr. Sotherton for the plaintiffs, plaintiff
[24] for the company, that a letter would be written to Mr.
[25] Horley, which would be approved by Shell and, my Lord,

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[1] agreed to run it. But this background is important,
[2] without going through all the documents, when one
[3] considers that happened to the multibrand loyalty
[4] concept because at page 425 on 13th July, 1990, Mr.
[5] Donovan puts forward the idea of Star Trek again. I
[6] need not take your Lordship through it all. It is
[7] science fascinating and it is based upon Mr. Spock and
[8] Leonard Nimoy

[9] **MR JUSTICE LADDIE:** The late Leonard Nimoy,
[10] they go where no promotion has ever gone before!
[11] **MR COX:** Indeed, my Lord, and Mr. Carson
[12] loved it and he enthusiastically took it and indeed it
[13] did one in 1991, we say, successfully. There may be
[14] some minor grousing, rather ungenerously, but it as a
[15] good promotion, and it was at just this time that
[16] because Mr. Donovan took over the Star Trek which looked

[17] as though it were now a commercially viable proposition,
[18] Mr. Sotherton took over the tentative connection with
[19] Sainsbury's and Mr. Sotherton, during a 'phone
[20] conversation with Mr. Horley of Sainsbury's, mentioned
[21] the Mega Match, discussed the Mega Match idea with him
[22] but also and this is important my Lord, mentioned the
[23] possibility of the multibrand loyalty concept, concept 4
[24] and explained it in confidence to Mr. Horley.

[25] Now, my Lord, what transpired at this stage

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[1] that letter is on 24th July, 1990 and it is the second
[2] core document in the plaintiffs' case. It is at 449 in
[3] the bundle, addressed to Mr. Brian Horley and it is
[4] extremely important to note that this letter was written
[5] having been amended by Mr. King.

[6] **MR JUSTICE LADDIE:** Written to Sainsbury's?

[7] **MR COX:** By Don Marketing.

[8] **MR JUSTICE LADDIE:** With approval and
[9] textual input?

[10] **MR COX:** By King. My lord, this letter is
[11] important to consider in my submission. No doubt your
[12] Lordship has already read it:

[13] "Dear Mr Horley, I am writing to confirm the main
[14] points of the telephone discussions which John Donovan
[15] and I have had with you."

[16] This is Mr. Sotherton writing. It deals with the
[17] Disneytime and Mega Match proposals:

[18] "You have decided that the timing would not be right
[19] for Sainsbury's to move into promotional game activity
[20] in 1991. You are willing to reconsider the opportunity
[21] at a later date."

[22] Under the heading: A Multibrand Loyalty Programme:

[23] "When the timing is suitable for Shell, Sainsbury's
[24] will be willing to consider the consortium based
[25] customer loyalty promotion which (with Shell's approval)

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[1] we disclosed to you in strictest confidence."
[2] This letter, your Lordship, of course, recalls, is
[3] approved by King and some minor amendments are made.
[4] "Copies of pages 12, 13 and 14 of 'Concept 4', a
[5] section of a multiconcept proposal we presented to
[6] Shell, are attached for your information. We foresee a
[7] wide variety of redemption options (perhaps including
[8] 'Air Miles'). As mentioned, if the project proceeds,
[9] Shell would be the lead partner in organising the
[10] consortium, which would consist of a range of retailers,
[11] plus possibly fmcg brands"
[12] r which I understand means Fast Moving Consumer Goods
[13] "and other businesses, with each partner operating the
[14] scheme on an exclusive basis within their own market
[15] sector. The programme could even be set up as a
[16] separate business venture in which all of the partners
[17] issuing and redeeming the common promotional currency,
[18] could share the costs and the benefits. The partners
[19] could issue the currency against a different purchase
[20] value e.g. One point with every #5 spent at Shell
[21] Stations and one point with every #2 spent at
[22] Sainsbury's. Some other businesses might be linked to
[23] the scheme only to the extent of redeeming the
[24] promotional currency."
[25] May I pause to submit this is as Professor

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[1] **MR JUSTICE LADDIE:** I understand that.
[2] **MR COX:** Pausing again there, this is a
[3] moment in the case when it might be worth reflecting Mr.
[4] King on behalf of the defendant then conducting the
[5] promotional policy or at least on behalf of the
[6] defendant, engaged in negotiations, has approved a
[7] letter under terms of confidence.
[8] **MR JUSTICE LADDIE:** I understand.
[9] **MR COX:** Not a whisper of the ¶
[10] **MR JUSTICE LADDIE:** He was very happy for
[11] Mr. Donovan to say, "This is very confidential it is a
[12] great idea and Mr. Donovan has a great stake in it and
[13] it is going to invite money."
[14] **MR COX:** Not a whisper, it was not
[15] confidential and it is important to note this. May I
[16] invite you to do this in case you have read some of
[17] those stray references to Mr. King's illness which may
[18] be an attempt subliminally, we think. Mr. King should
[19] be treated less seriously. There is a tendency, if you
[20] have read it, Mr. King had been the national promotions
[21] manager for the defendants for years. He was the most
[22] experienced promotions manager that Shell had. If he
[23] had thought this idea was the ordinary currency, the
[24] daily stuff of the trade, he would have spotted it
[25] quickly. He had been collaborating on projects for

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[1] Worthington has opined, a succinct and very accurate
[2] description of the Shell/Smart scheme as it became in
[3] March, 1997. He goes on, in its uncannily similarity we
[4] say, very clear:
[5] "Being the originators of the idea, Don Marketing and
[6] our Managing Director, John Donovan, who has a personal
[7] stake in the project, would require an appropriate
[8] concept fee, a role in the promotion."
[9] May I invite your Lordship to pause a moment to reflect
[10] on those words:
[11] "Being the originators of the idea, Don Marketing and
[12] our Managing Director, John Donovan, who has a personal
[13] stake in the project, would require an appropriate
[14] concept fee, a role in the promotion, UK and
[15] International, royalties covering proprietary rights,
[16] plus agency commission on merchandise (instant gifts or
[17] otherwise) and on promotion and advertising."
[18] Can I tell your Lordship that the payments to Mr.
[19] Donovan in the past had been a concept fee and then
[20] royalties on a points run. So, whatever game card would
[21] have attached to it a commission fee.
[22] **MR JUSTICE LADDIE:** That would not apply to
[23] a Smart card?
[24] **MR COX:** No, it would not. But, just to
[25] give your Lordship an idea of how that happened ¶

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[1] Shell since the late 1970s, certainly 1980 or 1981 and
[2] he had been personally responsible for all of those
[3] promotions. He knew what he was doing.
[4] "Mr. Paul King of Shell has given me authority to
[5] disclose to you that he recently approached Tesco (via
[6] FKB) to explore the possibility of a joint promotion.
[7] This followed up a meeting which John Donovan had with
[8] Tesco directors some time ago on the Shell led
[9] consortium principle. Although Tesco apparently gave a
[10] favourable response to FKB, Shell senior management
[11] decided against pursuing the discussions with Tesco. We
[12] have reason to believe that Sainsbury's would be Shell's
[13] preferred partner. We informed Shell of our discussions
[14] with you and Mr. King subsequently approved the content
[15] of this letter, which was drafted following a long
[16] telephone conversation with him.
[17] "Either Don Marketing or Shell will be in contact with
[18] you at an appropriate date in the future to discuss
[19] making a detailed presentation to Sainsbury's (and other
[20] selected potential partners). Bearing in mind the
[21] cyclical nature of promotional activity on petrol
[22] forecourts, we anticipate that there is likely to be a
[23] substantial interval, perhaps 5 years or 6 years, before
[24] Shell decides that the timing is suitable. The proposed
[25] multibrand loyalty scheme could utilise plastic swipe

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[1] cards. In the not too distant future, a multipurpose
[2] 'smart' card could not only process the common
[3] promotional currency, but also provide other functions,
[4] including data capture"
[5] that is the information I spoke of to your Lordship,
[6] "and even financial transactions (we have already
[7] discussed possibilities with Barclays Bank). It is
[8] possible that the cards could, to some degree, be
[9] personalised in terms of design and function to suit the
[10] marketing objectives of individual partners"
[11] all that
[12] **MR JUSTICE LADDIE:** Like having a Visa card
[13] at Cambridge University a trout and salmon fishing
[14] farm. I know them well! (Laughter)
[15] **MR COX:** Although we are now in 1999.
[16] "... Who could reap the benefits of shared customer
[17] data, shared costs, and unprecedented advertising
[18] exposure at many thousands of retail outlets. All using
[19] the same basic continuous programme under a universal
[20] identity."
[21] It became Smart. There was the second option. My Lord,
[22] what happens about that not only is that letter,
[23] carefully worded so that Shell is reserving its position
[24] as entitled to be the lead partner, but it is
[25] accompanied by another letter which is at page 446, to

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[1] analysis carried out by Gill Shaw on the Fundraiser/FCB
[2] project."
[3] This refers to the marketing research carried out by Don
[4] Marketing.
[5] "Although we made some suggestions to enhance Collect &
[6] Select, a revolutionary concept along the lines proposed
[7] would put Shell miles ahead of the opposition if you
[8] decide to return to collection schemes at a later date.
[9] "Even though senior management accepted our
[10] recommendation to come out of long term schemes for the
[11] foreseeable future, it is nice to know that they want to
[12] keep our multibrand loyalty concept in the locker. It
[13] was also interesting to hear that at some stage it could
[14] have applications in other Shell markets."
[15] as we submit it is proved to be
[16] "The exercise has therefore been well worthwhile, even
[17] if there are no immediate dividends. And we do seem to
[18] have won a great consolation prize!"
[19] which is Star Trek.
[20] "I refer of course to the Star Trek project. We are
[21] currently analysing details with Stuart Carson and Sarah
[22] Harman.. It was especially good to hear from Stuart
[23] that we will be working with Alan Roman again. On the
[24] basis that Shell does adopt our proposal for a Star Trek
[25] themes 'blockbuster', we confirm our agreement (as you

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[1] Mr. Paul King, reflecting the discussions. Mr. Paul
[2] King on 24th July, Promotions Coordinator, Shell UK Oil,
[3] Shell Mex House, strictly confidential:
[4] "Dear Paul, Thank you for confirming by telephone
[5] Shell's approval of the letter to Sainsbury's which you
[6] have now cleared with Stuart Carson and senior
[7] management."
[8] That may be important, but certainly it is the
[9] understanding that that is what occurred.
[10] "As per instructions, we have deleted the reference to
[11] the research findings. The revised version (enclosed)
[12] has been mailed to Sainsbury's. The letter does get
[13] across the message you were keen to convey, that Shell
[14] views Sainsbury's as an ideal partner. They are
[15] apparently not considered to be 'too down market' /
[16] Sainsbury's unexpected interest at least spurred us on
[17] to put some flesh on the initial proposal we discussed
[18] with you and Tim some months ago."
[19] That refers to concept 4
[20] "Your brief challenged us to devise an innovative leap
[21] forward in loyalty schemes. We delivered the goods.
[22] The expanded proposal, as set out in the agreed letter
[23] to Sainsbury's, provides the answers to the failings in
[24] loyalty schemes which our research identified. The
[25] research was invaluable, as incidentally was the

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[1] requested), to forgo an option fee on the multibrand
[2] loyalty scheme. This is on the understanding that the
[3] rights to the multibrand scheme remain vested solely
[4] with Don Marketing. I should add that John Donovan has
[5] verified with John Chambers that Leo Burnett's agreement
[6] with Don Marketing was only in respect of the
[7] advertising campaign they devised for the Mega Match
[8] multibrand game. That agreement is mentioned in a memo
[9] regarding a discussion between Ken Danson and John
[10] Chambers".
[11] My Lord, that reflects as we submit, the
[12] situation as it had been reached in July, 1990. If one
[13] could have a clear, more compelling indication of the
[14] nature, we submit, confidential nature of the idea, it
[15] would surely be it is not only Shell treated it in
[16] confidence, but wanted to retain it in confidence and
[17] sought some method, created a method perhaps of binding
[18] the claimant and his company to holding it at the
[19] disposal of Shell, as I have told your Lordship.
[20] That is because the department did have a
[21] budget, they had to be creative, find a way of
[22] satisfying each other and in this case what was
[23] suggested was that Shell would go ahead with Star Trek.
[24] At that point, whether or not there was consideration
[25] given, perhaps does not particularly matter, we submit.

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[1] This is evidence of the response of the defendant and
[2]
[3] **MR JUSTICE LADDIE:** Whether it was important
[4] by contact it was a promise to keep this particular
[5] project to the option ¶¶
[6] **MR COX:** Solicited by Shell. Requested by
[7] Shell and carefully arranged by Mr. King and so, my
[8] Lord, we then come to the next and most curious stage of
[9] this whole affair, because Mr. King remains in the
[10] promotions department. Star Trek, to fill your Lordship
[11] in, is cancelled after an enormous amount of work has
[12] been done and the simple reason for that is that
[13] somebody had the bad taste to invade Kuwait and the Gulf
[14] War meant, my Lord, that it was thought by Shell that a
[15] game on the forecourts when the troops were fighting,
[16] was inappropriate and no doubt they were right.
[17] So, what happened was at page 456 an
[18] agreement was reached as to the costs to date of the
[19] work done in relation to the cancellation of operation
[20] Enterprise as it was then called, but at page 457, the
[21] relevant passage, perhaps of some significance, is the
[22] third paragraph at the bottom, a few lines up:
[23] "This arrangement would include Shell retaining the
[24] right to use the Star Trek concept at any time of their
[25] choosing up until the end of 1991, with no further

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[1] concept fee"
[2] ¶ so they were really dealing with the aftermath of the
[3] problems of the Gulf War. But, may I inform your
[4] Lordship that was run in 1991 after the war was ended.
[5] So, we then get to the point and could I just very
[6] briefly and lightly touch on them.
[7] At this time when Mr. Donovan had
[8] successfully put forward Star Trek, which was
[9] successfully done, Sherlock Holmes was enthusiastically
[10] taken up, Shell was recommending the claimant all round
[11] the world to other divisions of its own company as being
[12] the best man in the trade: I say with perhaps a little
[13] rhetorical flourish all around the world. Maybe
[14] Scandinavia, but he extended to New Zealand and all
[15] round the world as he has in the past. But on
[16] September 24th, 1990, at page 459 is an example, Shell
[17] recommended Mr. Donovan at this time to Norske Shell,
[18] Oslo.
[19] "We have been referred to you by Mr. Stuart Carson,
[20] Shell UK. As we understand that your company is one of
[21] the best companies specialising in promotional games and
[22] contents we hope you are able to help us with the
[23] following: Shell Noway wants to launch a promotion for
[24] the cash-paying private segment as soon as possible. Our
[25] main objective is to build loyalty and to increase

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[1] marketshares."
[2] May I pause there for one moment because it may be a
[3]
[4] **MR JUSTICE LADDIE:** Just a moment. (Pause)
[5] **MR COX:** My Lord, multibrand loyalty of
[6] course has a somewhat different connotation from games.
[7] Short-term games run for six weeks or a little longer
[8] but they are essentially limited. They are not
[9] continuous programmes. But you can built loyalty
[10] elements into a game and building loyalty is not
[11] necessarily the element of short-term games. So, when
[12] they say build loyalty to increase market shares, it may
[13] be there might be something there of relevance for your
[14] Lordship's later on consideration. They were not only
[15] considering Mr. Donovan as a games man which is
[16] sometimes said in the witness statement but they were
[17] recommending him for purposes of building loyalty and
[18] market share. It is a small point but an important one.
[19] **MR JUSTICE LADDIE:** What you are saying is
[20] whatever Mr. Donovan's expertise may be in relation to
[21] games concept 4 is expressly a loyalty building
[22] programme?
[23] **MR COX:** Exactly. The whole point is, my
[24] Lord, he was being accepted by Shell at that time as
[25] someone to put forward loyalty schemes. It might be

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[1] again as your Lordship enquiries more deeply in the
[2] evidence of the defendants, you detect to distinguish
[3] between a games man and a loyalty man. I would have
[4] regarded him as games and when one looks at these
[5] documents, one needs to have in mind that possible
[6] distinction the defendant may be seeking to draw.
[7] My Lord, by now there are eyes on him and
[8] the whole of the events in 1989, as we submit, relies on
[9] the problems with 'Collect and Select' and there is a
[10] letter where he is recommended. There is another at 461,
[11] Shell had referred, Finnish Shell of Finland to him and
[12] he was responding as Shell's station to an enquiry from
[13] Helsinki. My Lord, I can take you r Lordship further
[14] forward now because what occurred is that ¶¶
[15] **MR JUSTICE LADDIE:** Is that the end of that
[16] bundle?
[17] **MR COX:** My Lord, that is the end of that
[18] bundle. Star Trek is on hold, your Lordship. We have
[19] moved to volume 2, if we may. Star Trek is on hold and
[20] in March, 1991, 'Collect and Select' was withdrawn. So,
[21] Shell had this problem: 'Collect and Select' really
[22] expired of exhaustion and in March, 1991, Star Trek was
[23] launched as it were, to take its place albeit at short
[24] term. Mr. Donovan's idea for this was remunerated and
[25] there is no complaint. In July, 1991, Shell have a

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[1] position where there is now a problem. They have pulled
[2] out of 'Collect and Select' They have gone back into
[3] the short term and are running or going to run short-
[4] term games.

[5] Mr. Watson arrives in July and he becomes
[6] the retail brand communications manager. Mr. Watson
[7] comments in his witness statement, does your Lordship
[8] have the defendants' witness statements, bundle C2 at
[9] tab 3? Mr. Watson comments in his witness statement
[10] that the department was in a mess, as he put it. He was
[11] told by his boss, Mr. Sweeney and Mr. Slavin:

[12] "They explained that the Promotions Department was in a
[13] bit of a mess. The 'Collect and Select' had finished in
[14] March, 1991. There had been problems with customers
[15] getting irate about not receiving prizes"

[16] problems with the prizes not being distributed and he
[17] was asked to deal with it. Mr. Watson plainly came into
[18] that department and sometime in 1991, in the autumn of
[19] 1991, Mr. Watson's mind was plainly moving over the
[20] problems of his department and he gave to Mr. Hannagan
[21] on 13th September, 1991 a project, top of page 3 of the
[22] plaintiffs' chronology. He gave to Mr. Hannagan what he
[23] called or what became called project Onyx. This
[24] features in the defendants' pleadings as being a
[25] somewhat significant development. Mr. Hannagan was told

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[1] MR COX: Could you keep them to one side?

[2] MR JUSTICE LADDIE: Very well.

[3] MR COX: Page 623 in volume 2 is a note from
[4] Mr. Hannagan to Mr. Watson. Your Lordship will recall
[5] that Mr. Watson says that this was in secrecy. He
[6] wanted to improve Mr. Hannagan's communication skills.

[7] That was one of the objectives and the other
[8] objective was that he should look into this electronic
[9] points and what the objective was is set out there
[10] clearly at page 623. "To evaluate the use of Magnetic
[11] Stripe Cards and Smart Cards and any similar products in
[12] future promotional activity."

[13] Nothing about the promotional framework or the scheme at
[14] all. It was a really in any future activity, 'Can we
[15] use magnetic stripe cards or electronic points, Smart
[16] cards?'

[17] MR JUSTICE LADDIE: Smart Cards are

[18] MR COX: Yes, and the magnetic ones are the
[19] chip. The chip stores the information. I will not take
[20] your Lordship through all of it but as at March, 1992
[21] and this is very significant, my Lord, as we will see,
[22] as this inquiry into the facts as I am afraid it will
[23] require before your Lordship begins to uncover what we
[24] submit is the truth about this case because one of the
[25] versions given by the defendant over the years has been

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[1] by Mr. Watson or invited to look into long term
[2] promotions and the use of the electronic points.

[3] My Lord, something is made of this by the
[4] defendant and they say they have a case, it is apparent
[5] that the senior management of Shell did not want to go,
[6] were not interested in long-term schemes at all by now,
[7] they were fed up by now with and there is talk through
[8] the documents how it took and your Lordship will have
[9] read the witness statements, perhaps or some of them,
[10] how they had to persuade senior management to go back to
[11] a long-term scheme to abandon it because of the
[12] experience of the 'Collect and Select'. But, Mr.
[13] Watson, in secrecy, entrusted to Mr. Hannagan, this was
[14] long-range, we say. It was nothing like the scheme
[15] being proposed by Mr. Donovan in 1990, up to July,
[16] 1990. It was simply and broadly to look into long-
[17] term promotions generally and particularly the use of
[18] the electronic points in them.

[19] Now, my Lord, project Onyx, we say, has
[20] absolutely or very little relevance to the decision that
[21] your Lordship will have to make. We can see what
[22] project Onyx was because at volume 2, page 623, my Lord,
[23] his report is there for us to see.

[24] MR JUSTICE LADDIE: Can I put away the
[25] witness statements?

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[1] we had reached this idea by 12th May, 1992 when Mr.
[2] Donovan, the complainant, once again disclosed to our
[3] then project manager, his multibrand loyalty scheme but
[4] the facts show that that is very far from the truth. It
[5] is plainly wrong and they had reached no more than the
[6] barest investigative exploratory stage with no formed
[7] conclusions or even ideas about how the future scheme
[8] should progress. What they had was a third party
[9] proposal which I shall come to in a moment from a
[10] company GHA Associates. But, the electronics, save for
[11] the use of the Smart card, bore no relation

[12] MR JUSTICE LADDIE: Would you bear with me
[13] for a second?

[14] MR COX: Of course, my Lord. (Pause) The
[15] document evaluates the various advantages of having a
[16] Smart card and vouchers and magnetic stripes. It deals
[17] with the advantages of a Smart card which would produce
[18] data capture but the central idea is not here. The
[19] consortium exclusive of major retailers in the high
[20] street issuing and receiving a promotional currency and
[21] the various other secondary features that exist, were
[22] not addressed at all in project Onyx and it is also in a
[23] project

[24] MR JUSTICE LADDIE: You are saying that this
[25] project Onyx is not to use Smart cards or swipe cards,

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[1] it is what are the technological advantages of using
[2] swipe cards or Smart cards for whatever project you want
[3] to use them? Will this bit of hardware work on a wide
[4] range of projects?

[5] **MR COX:** Exactly. Our idea could in
[6] principle have functioned without Smart cards. In deed,
[7] your Lordship will see, because I am afraid it is going
[8] to be necessary ¶

[9] **MR JUSTICE LADDIE:** You could have had that
[10] sort of thing limited to a small select group of
[11] retailers?

[12] **MR COX:** And indeed and it was considered by
[13] Shell when they had problems with technology later on.
[14] My Lord, the position if I can move on ¶

[15] **MR HOBBS:** In view of what my learned friend
[16] has just said, would your Lordship please make a cross
[17] reference to page 467?

[18] **MR COX:** I am afraid there will be quite a
[19] bit of cross referencing. We will get to that in due
[20] course. Mr. Hobbs and I may have to discuss that
[21] document. We believe that is out of the chronology.

[22] This is a document relating to a much later period and
[23] comes later on in the September/October. Therefore, I
[24] have tried to take you chronologically to see how that
[25] develops. In March, 1992, Onyx is nothing more than

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[1] one first. That was to discuss longterm loyalty schemes
[2] launched by others in the market and signor King gives
[3] them an opportunity to present an electronic system run
[4] by Hughes Electronics, Smart card. That is at volume 2,
[5] page 768. I am conscious that I may be causing your
[6] Lordship fatigue to go through document after document
[7]

[8] **MR JUSTICE LADDIE:** It has to be done.
[9] Don't worry about it or get irritable on Day 3!

[10] **MR COX:** You are not going to find me on my
[11] feet on Day 3! The purpose of this is this: I am
[12] leading now to the point of the 12th May disclosure. By
[13] the 12th May disclosure, the claimant submits no views,
[14] clear or otherwise, had been formed as to promotional
[15] framework as to the longterm loyalty, but after 12th
[16] May, this you can see that lights have gone on in those
[17] responsible for the management of the project in Shell
[18] and we say that the lights have gone on because at least
[19] by then those responsible had heard and appreciated
[20] forcefully if they had not before, the idea of the
[21] claimant and we can give some suggestive indications,
[22] although it will be interesting to see them cross-
[23] examined, at least I hope your Lordship will be, but we
[24] may see them in these documents.

[25] **MR JUSTICE LADDIE:** Take your course.

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[1] what I outlined to your Lordship. This is a slight hole
[2] in the corner project. Mr. Hannagan only working on it.
[3] It is long- range, he knows his senior management is
[4] pretty set against going back to anything like 'Collect
[5] and Select', so he has given Mr. Hannagan this to go
[6] away and look into by himself and the report comes in
[7]

[8] **MR JUSTICE LADDIE:** I do not quite
[9] understand that ¶

[10] **MR COX:** You would only really use an
[11] electronic card being a stripe because of the costs
[12] involved or chip technology for something longterm. You
[13] would not use it for a short- term six or eight week.

[14] So, what he is doing here, perfectly reasonably, is go
[15] further up, he is considering more options. He is
[16] thinking of the future and he has given Mr. Hannagan his
[17] project. However, his mind clearly works and he himself
[18] says although the timing of his thinking we take issue
[19] with in his statement, his mind is thinking towards the
[20] longterm and in January, 1992, he has various meetings
[21] with two agencies: One Senior King who has been
[22] retained as an advisor to Shell ¶

[23] **MR JUSTICE LADDIE:** This is January?

[24] **MR COX:** 8th January, 1992, there was a
[25] meeting with Senior King. Perhaps I can deal with that

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[1] **MR COX:** By 12th May, what did Shell have?
[2] Well, they had Senior King at 768, reviewed for them the
[3] competition and at 769 there is an introduction.
[4] Loyalty schemes, or frequent shopper schemes, the Coop
[5] Dividend and Green Shield Stamps, probably the best
[6] known. Mag Stripe cards have increased the potential
[7] for encouraging and rewarding loyalty.

[8] "In its most sophisticated form it has a huge memory
[9] and can cope with multiple memory/function
[10] requirements."

[11] May I just help your Lordship a little. When you have a
[12] computer based chip you can go to the machines and at
[13] the garages every day out goes the computer signals that
[14] takes your Lordship,'s purchase every day and stores it
[15] on the central computer. With a Mag stripe you do not
[16] have that facility of doing that information to be
[17] stored. It sets out the competitive schemes. It is
[18] quite important because these competitive schemes are
[19] now relied upon by being similar and as destroying the
[20] quality of confidence of the claimant's information.
[21] But, they were reviewed at the time Shell, Argos, Mobil,
[22] which is Premier Points- 772- we will have to come back
[23] to these in due course. I am afraid your Lordship will
[24] become very familiar ¶

[25] **MR JUSTICE LADDIE:** Just a moment. 776,

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[1] palming, is that forecourt staff putting money in their
 [2] pockets?
 [3] **MR COX:** Almost certainly. They can take
 [4] the cards or sometimes if the customer does not ask for
 [5] his card to be striped ¶
 [6] **MR JUSTICE LADDIE:** Is it 50,000 or 50m
 [7] Green Shield stamps?
 [8] **MR COX:** Fraud is an issue for all of these
 [9] schemes at any time. My Lord, we will be coming back to
 [10] this, I am afraid. I have to tell your Lordship with a
 [11] heavy heart to ignore them, because the defendants'
 [12] experts say, 'Well, they are features', they say that is
 [13] irrelevant, but we shall have to look at them. What it
 [14] does indicate is that it perceives Shell as doing
 [15] something just the same as these schemes we say why is
 [16] it apparent for 2,3,4,5 years they consider themselves
 [17] to be doing something innovatively different, but they
 [18] are reviewed in 1992. What this company, Senior King,
 [19] put forward is the future ¶
 [20] **MR JUSTICE LADDIE:** Just a second.
 [21]
 [22] **MR COX:** I beg your Lordship's pardon.
 [23] **MR JUSTICE LADDIE:** Oh, I see. They have an
 [24] interest in saying if the battery goes flat, you lose
 [25] all your accumulated points?

[1] today through observation and market intelligence and
 [2] put such knowledge to practical use in the development
 [3] of second generation systems. It is our view that
 [4] schemes such as these will continue to be developed and
 [5] will become more and more sophisticated as time goes by.
 [6] All the retailers using magnetic systems have fewer
 [7] outlets in the hundreds and therefore their capital
 [8] investment is smaller. Shell with its 2500 must consider
 [9] a longer term investment with the benefit of upgrading
 [10] cost effectively to meet developing retail needs."
 [11] My Lord, the next page, The Way Ahead, can I
 [12] encapsulate what we say about that. This was Senior
 [13] King trying to sell its Hughes Electronics Smart card
 [14] system. It was a technology based submission. It
 [15] contained no real recommendations as your Lordship will
 [16] see through to the end of this concerning promotional
 [17] framework. It is all to do with technology, over the
 [18] schemes, it is all to do with technology, over the
 [19] pages, technology, 787, 788, storage of data and so on
 [20] and these apparently are tag based. It is some sort of
 [21] tag rather than a Smart card. Mr. Watson says as much,
 [22] he says what they were putting forward ¶
 [23] **MR JUSTICE LADDIE:** So, you do not have a
 [24] battery on this. When you go to the till there is an
 [25] electronic magnetic field whatever that may be, which

[1] **MR COX:** I don't think so anymore.
 [2] **MR JUSTICE LADDIE:** My wife uses mine, no
 [3] end!
 [4] **MR COX:** Well, I think you can get your
 [5] point back if you apply for another one. Over at 783:
 [6] "As the market matures in this area, the technology
 [7] currently in place will rapidly become obsolete, as
 [8] retailers look to get more control of the systems they
 [9] have in place. This will mean that many retailers will
 [10] be looking for new and more controllable systems. As a
 [11] result much of the current capital investment made in
 [12] magnetic stripe technology will be obsolete. In
 [13] addition current schemes offer no real upgrade path for
 [14] the future. New interactive and intelligent systems are
 [15] now being developed to provide a solution that will
 [16] enable retailers to communicate directly with the
 [17] consumer at the point of purchase.
 [18] "In addition there is the opportunity to develop
 [19] schemes that have a much longer life, due to the nature
 [20] of the capture medium and the ability to upgrade the
 [21] base system. These second generation systems also will
 [22] provide the opportunity to control, monitor and
 [23] manipulate tactical promotional activity in a way that
 [24] to date has not been possible.
 [25] "We can learn from what is happening in the market

[1] generates an electrical burst, enough power inside the
 [2] cards to operate ¶
 [3] **MR COX:** Essentially it is a tag not a card,
 [4] but the point from our point of view and I do not want
 [5] to take up too much time on it, is that Mr. King's
 [6] presentation is Mr. Watson really deals with the
 [7] electronic system, using the new technology and on 27th
 [8] January, 1992 Mr. Hughes and Mr. Sotherton went to
 [9] Scotland to look at the technology they were using and
 [10] Mr. Watson says: 'We were looking at electronic systems
 [11] quite seriously.' It is quite important to look at the
 [12] point the development had reached by early January,
 [13] 1992.
 [14] **MR JUSTICE LADDIE:** Sorry, you say their
 [15] evidence ¶
 [16] **MR COX:** Page 100, paragraph 15:
 [17] "A visit to Hughes Electronics wa made on 27 January
 [18] 1992... We were beginning to look at electronic loyalty
 [19] schemes quite seriously."
 [20] Yes, indeed they were looking at the technology. Mr.
 [21] Hannagan reported on March on technology. They had
 [22] reached no conclusions on the form and nature of the
 [23] scheme, we submit, or even were addressing very much if
 [24] at all, that issue. Mr. Watson says as much at
 [25] paragraph 16:

[1] "At this stage I felt Shell was falling behind its
[2] competitors. Senior King who were still giving us
[3] strategic advice suggested a medium term promotional
[4] strategy for 1992 whilst investing in the development of
[5] a long- term loyalty mechanic unique to Shell. Their
[6] view was that if we were to return to long- term
[7] promotions we could not carry on using paper tokens. An
[8] electronic system of points seemed to be the way of the
[9] forward."

[10] My Lord, over the page Mr. Watson records what his
[11] priorities were: "A long- term promotion rather than a
[12] series of short- term promotions; an electronic loyalty
[13] scheme rather than a paper loyalty scheme; a link with
[14] third parties."
[15] He says having third parties in the scheme was least
[16] important at this stage.
[17] "Although our competitors were keen on the involvement
[18] of third parties, I was keen to get a scheme that would
[19] meet the needs of Shell."

[20] So, my Lord, as at early 1992, that is the state of his
[21] thinking. On 12th March, 1992, I will not deal with this
[22] one, we submit there was another presentation. Smart
[23] card with a catalogue scheme. At volume 2, page 723, I
[24] am sorry to take you back, that is because it is out of
[25] sequence, it do not propose to take your Lordship

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[1] is constantly receiving unsolicited communications of
[2] this kind. Many are rejected or not followed up but on
[3] this occasion, as the proposal seemed very much in line
[4] with the research we were undertaking, I arranged a
[5] meeting. On 12 March 1992 Sheard Thompson did a
[6] presentation about loyalty schemes and the use of a
[7] tagcard."

[8] But, again, if your Lordship reads that paragraph, the
[9] focus is on the technology and were you to be able to
[10] guess, I do not propose to go to it now, to go through
[11] this, this is a rather interesting document, the nearest
[12] it comes to promoting a promotional documents, is at
[13] page 729, linked to a high street retailer. In other
[14] words, the general and wholly unspecific suggestion is
[15] made of a link with retailers. Page 729 of volume 2:

[16] "Their ultimate goal is to have 400 suites operating 1
[17] month before Christmas. I am not in a position at this
[18] stage to disclose the offer, but the urgency and
[19] emphasis being placed on being 'up and running' for the
[20] month of December, should in itself indicate that it is
[21] not a merchandise based collector scheme but something
[22] which could be linked with a high street
[23] retailer/retailers."

[24] May I just give your Lordship one more
[25] example of the stage they had reached. That was on 12th

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[1] through that.

[2] **MR JUSTICE LADDIE:** You say it is out of
[3] sequence.

[4] **MR COX:** It is at 723. This is a
[5] presentation. Some of these documents are quite
[6] difficult to pinpoint but this was a presentation that a
[7] tag scheme, a tag card it is called, my Lord, which Mr.
[8] Watson deals with at paragraph 19, at page 101. He had
[9] this from an agency called Sheard Thompson Harris
[10] promoting what they describe as a tagcard for loyalty
[11] schemes.

[12] **MR JUSTICE LADDIE:** Do you want me to go
[13] back? I do not kind.

[14] **MR COX:** I do apologise.

[15] **MR JUSTICE LADDIE:** No, it is not your
[16] fault.

[17] **MR COX:** Page 101, paragraph 19. He had
[18] received a letter on 14th February, 1992 from Sheard
[19] Thompson Harris concerning this tagcard.

[20] "I received a letter dated 14 February 1992 from an
[21] agency called Sheard Thomson Harris promoting what they
[22] described as a 'tagcard' for loyalty schemes. Tagcards
[23] were magnetic cards linked to the point of sale which
[24] could identify individual customers, they had a full
[25] data handling capacity. In the promotions business one

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[1] March. On 16th March they met GHA power points. This
[2] is quite important to indicate how far they had got.
[3] Mr. Watson tells you in his witness statement that at
[4] this stage his least priority was a link with third
[5] parties. How, what relationship. This is the question.
[6] The way in which they linked, the nature of it is all
[7] important. All of these schemes we are looking at.
[8] User electronics through Senior King, the tagcard. They
[9] were not going to be a consortium. These were companies
[10] trying to sell their scheme to Shell, just like
[11] Airmiles, the companies like Shell, the retailers would
[12] have to buy the bids, but your Lordship appreciates the
[13] distinction. This would not be like a single currency
[14] amongst the partners as in the EU, this would be buying
[15] the currency from the dollar to use, for example and it
[16] would be a fundamentally different scheme. The control
[17] of database and so forth. But, the GHA power points on
[18] 16th March, to deal with this, at volume 2, page 843,
[19] presented on 16th March, because again the GHA power
[20] points presented a third party scheme and it is quite
[21] nearly and helpfully set out in a pretty diagram at page
[22] 857. The documents begins at 843 but 857 helps with a
[23] graphic illustration of the scheme.

[24] "Power Points provides: Hardware, Software, Systems
[25] administration, Publicity, Catalogues, Gifts."

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[1] Issued to the customer who collects on the cards and
[2] returns the power points. That is a classic third party
[3] as we would call it. Multi-collection selling Ms.
[4] Rainer calls it, as cited by some of the experts. It is
[5] multi-collection partnership and it is not at all the
[6] sort of scheme that subsequently to May 12th at least
[7] Shell began to move forward upon, but ¶
[8] **MR JUSTICE LADDIE:** One moment. (Pause)
[9] You say there is an issue here. If we look at Green
[10] Shield stamps, the person who was selling the currency
[11] is an independent company. As a result of that, that
[12] company controls the brand image, whatever and in
[13] theory, the company in partnership could sell the
[14] currency to Mobil and Shell. But, it might not. It
[15] might have a system to grant leases of a retail type.
[16] They say, 'We will not grant more than one lease to one
[17] client say to a wine merchant' and so on. They could, of
[18] course, have made it exclusive.
[19] **MR COX:** They could.
[20] **MR JUSTICE LADDIE:** In that case, much of
[21] the same benefit of unified branding would not exist?
[22] **MR COX:** Possibly.
[23] **MR JUSTICE LADDIE:** As I understand it, one
[24] of the proposals is that although the multibrand
[25] customer loyalty system would be created by Shell, it

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[1] did not consider the GHA power point scheme to be
[2] anything new.
[3] **MR JUSTICE LADDIE:** It looked like Green
[4] Shield stamps?
[5] **MR COX:** Yes. They decided to do something
[6] different and indeed they headlined their intention to
[7] do something different. At first Mr. Watson was
[8] interested in power points. It was a ready-made scheme
[9] but by January, 1993 he had rejected it and the question
[10] for your Lordship and or one of the suggestions for your
[11] Lordship will be what changed between 16th March, 1992
[12] and January, 1993 so that Shell had decided to take what
[13] it perceived had a radically different path to those
[14] being proposed to it or existing in its competitors on
[15] 12th May, 1992 and in November, 1992 the new group in
[16] the Shell promotions department, a young man by the name
[17] of Andrew Lazenbury, in his late 20s had arrived and had
[18] received from the claimant, the attraction, power,
[19] appeal and impact, explained orally and in writing of
[20] the concept of this deep divide.
[21] **MR HOBBS:** Would your Lordship turn to page
[22] 828 so we can close the file together?
[23] **MR JUSTICE LADDIE:** You guarantee if I look
[24] at ¶
[25] **MR HOBBS:** There will be an hour's

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[1] would be floated off a very separate venture. Assume
[2] that had been a separate venture. What is the
[3] difference between a separate venture selling currency
[4] to Shell, to what is here?
[5] **MR COX:** First my Lord, the retailers have
[6] to pay power points for the currency so they are taking
[7] a cut. If instead of having your own currency, you are
[8] having to buy it point by point from the third party and
[9] therefore in the partnership idea you are not giving the
[10] middleman the cut; you are not giving them a cut.
[11] Secondly, even in the advanced stage that your Lordship
[12] is postulating, you still have the control because you
[13] will have, being the leading and organising partner, the
[14] right to veto and select partners. With any third party
[15] scheme, when you are on a contact buying a currency, you
[16] are in a different position.
[17] **MR JUSTICE LADDIE:** Even in the case of
[18] Green Shield stamps, they did not offer their tokens to
[19] Anne Summers, did they?
[20] **MR COX:** Well, one of the reasons certainly
[21]
[22] **MR JUSTICE LADDIE:** Too down market?
[23] **MR COX:** But, they expired. One of the
[24] reasons was because they did distribute too widely their
[25] stamps, but we will be addressing the issue. But, Shell

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[1] difference between now and when your Lordship looks at
[2] it at 2 o'clock.
[3] **MR JUSTICE LADDIE:** I have looked at it.
[4] **MR HOBBS:** Thank you.
[5] **MR JUSTICE LADDIE:** Shall we leave it like
[6] that?
[7] **MR COX:** Thank you.
[8] (After the luncheon adjournment)
[9] (2.00 pm)
[10] **MR COX:** My Lord, we had reached the point of the
[11] GHA Associates Powerpoints' presentation. The
[12] presentation document your Lordship had been looking
[13] at. My Lord, it may be necessary in due course to come
[14] back to this presentation, certainly in connection with
[15] the expert case. But at paragraph 4 at page 845, we had
[16] been dealing with the illustrative graphics. It sets
[17] out just a little bit more about the scheme as it was
[18] being proposed by GHA Powerpoints Limited. GHA
[19] Powerpoints have already presented ¶
[20] **MR JUSTICE LADDIE:** 845?
[21] **MR COX:** Yes, my Lord. Paragraph 4 under "Introduction":
[22] "Having presented the concept to a selected major
[23] retailer and other service provider groups,
[24] including ...(Reading to the words)... each has
[25] expressed positive interest in the concept and a

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[1] willingness to participate as a member of a Powerpoints
[2] network subject to the conditions of appropriate
[3] partners in noncompetitive market sectors and
[4] acceptability of the contract terms."
[5] My Lord, what we submit about this scheme is,
[6] first, that Shell rejected it as being inappropriate to
[7] its needs and wanted to do something different; second,
[8] your Lordship has the point that the fundamental
[9] differences between this scheme and the scheme being
[10] proposed is that it was a true partnership being
[11] proposed by Mr Donovan: a consortium of partners sharing
[12] costs, who were engaged in the direct relationships
[13] between each other that we shall see became the
[14] modus operandi of the Shell Smart Scheme and the way in
[15] which it was developed. When you have a direct
[16] relationship between major retailers and when you put
[17] major brands alongside each other, co-operating directly
[18] together, you have a different thing, we say ¶ for all
[19] the various reasons I explored with your Lordship this
[20] morning ¶ from a third party scheme effectively selling
[21] its surplus. It may be that the expert evidence will
[22] need to address that with your Lordship as to the
[23] reasons why the claimant's experts contend that, why
[24] published research suggests it and so on. There are
[25] multiply reasons why and Shell's conduct in seeking to

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[1] Smart Card technology as an option with some kind of
[2] link with third parties. They had only explored those
[3] things, apart from Project Onyx, through the
[4] presentations of those that your Lordship has seen,
[5] usually technology-based in the case of Senior King and
[6] the tagcard Sheard Thompson presentation. In the case
[7] of GHA your Lordship has seen a third party scheme,
[8] selling the points, managing the brand, no doubt
[9] consulting those who are going to be involved but not a
[10] partnership or a consortium directly between members of
[11] the consortium managing its own currency in effect, with
[12] all the intended advantages of that: the management of
[13] brand, of image, of perception and so on.
[14] My Lord, we come at that point then to an
[15] important period, a very important period. Because it
[16] is at this point, my Lord, that Mr Lazenby has already
[17] joined the Promotions Department. He joined on
[18] 1st February 1992. He reported to Mr Watson, who was
[19] his immediate superior, and Mr Watson reported to a
[20] Mr Sweeny, who was later replaced in September 1992 by
[21] Mr Frank Leggatt.
[22] My Lord, Mr Lazenby's role in this, we say, is
[23] central to the case. It is the case that your Lordship
[24] may have to decide precisely how the events in 1989 and
[25] 1990 relate to the use of the idea, as we say, or it may

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[1] do something different from it is suggestive, we say, of
[2] that.
[3] May I come on then, my Lord? That was
[4] 16th March. The 23rd March, your Lordship has already
[5] seen the Onyx Report. The Hannagan Onyx Report, which
[6] I showed your Lordship at page 623, postdates the GHA
[7] presentation. Mr Watson's conclusions are,
[8] I repeat ¶ asking forgiveness for the repetition ¶
[9] that he was content ¶ at paragraph 26 of page 103 of
[10] the bundle of statements, paragraph 26 of Mr Watson's,
[11] he says:
[12] "By this stage the grass roots opinion in the
[13] Shell Promotions Department was that Shell should move
[14] towards long-term promotions."
[15] Now, nothing is said in that evidence, beyond the
[16] statement of his priorities at paragraph 17, as to the
[17] shape, the nature, the form, the promotional framework
[18] in which these elements would be combined and it is the
[19] relationship in relationship marketing, which it is
[20] sometimes called, which is one of the crucial factors.
[21] So we submit that, as of 12th May 1992, it is quite
[22] wrong to suggest ¶ and to the extent that it is being
[23] suggested still ¶ that Shell had reached formed
[24] conclusions or indeed any conclusions or indeed had done
[25] more than explore long-term loyalty schemes using new

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[1] assist your Lordship in concluding whether the idea was
[2] used. But the claimant is in, we submit, the
[3] advantageous submission of being able to pinpoint the
[4] conduit through which at least without seeking to
[5] restrict our case, it is at least probable, we submit,
[6] the idea entered the blood stream or the thinking ¶ if
[7] I can put it that way ¶ of Shell. Because on
[8] 12th May Mr Lazenby met Mr Donovan and Mr Sotherton on
[9] behalf of Don Marketing.
[10] **MR JUSTICE LADDIE:** 12th May?
[11] **MR COX:** 12th May 1992. He had had a letter dated
[12] 27th April 1992 from Don Marketing introducing
[13] themselves to the new Promotions Manager. That letter,
[14] my Lord, is at 952 of the bundle your Lordship has
[15] open. It is introducing himself to Mr Lazenby.
[16] **MR JUSTICE LADDIE:** Mr Cox, your chronology is very useful.
[17] Would it be possible for somebody on your side to
[18] produce it with a third column which contains references
[19] to the documents? For example, 27/04/92, which is this
[20] one, is on page 3 of your chronology. It would make it
[21] a lot easier.
[22] **MR COX:** It will be done. In fact I have such a document
[23] and I will ensure it is with your Lordship on disk as
[24] well as in writing.
[25] My Lord, the position is that that is the

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[1] introductory letter. Our case is that Mr King had
[2] suggested that we write to Mr Lazenby. Mr King had told
[3] us Mr Lazenby had arrived. He had come to be the
[4] National Promotions Manager and this was the letter
[5] following up the suggestion that we write to Mr Lazenby
[6] who had arrived in the department.

[7] **MR JUSTICE LADDIE:** This actually does not talk about a
[8] long-term promotional or a partnership promotional
[9] project at all. It is all about games of course.

[10] **MR COX:** It is, my Lord. May I explain why that would be?

[11] **MR JUSTICE LADDIE:** Yes.

[12] **MR COX:** Mr Donovan did not know that the policy was
[13] changing or the thinking was changing in Shell. There
[14] had been, as your Lordship will recall, a decision to
[15] come out of long-term and into short-term. But the
[16] Hannagan Project Onyx was a confidential project and it
[17] was not known to Mr Donovan. Indeed, it was not
[18] throughout this year known to Mr Donovan that Shell
[19] was becoming orientated towards a return to the
[20] long-term loyalty-type scheme. Throughout 1992 and
[21] this will be an important feature of the case for
[22] your Lordship, the claimant's case. Mr Donovan in fact
[23] was being told the contrary: that there was at that
[24] stage no intention to go back into long-term or
[25] certainly not imminently. Throughout 1992 he was told,

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[1] seems to me to be along the lines of what is covered by
[2] your skeleton and is included expressly in some of the
[3] witness statements on your side.

[4] **MR COX:** It is at least one option.

[5] **MR JUSTICE LADDIE:** You have to make that clear so that
[6] Mr Hobbs can advise his clients that, if that serious
[7] allegation is made, his clients can know whether they
[8] need to send somebody into the witness box to refute it.

[9] **MR COX:** I hope at the conclusion of my opening Mr Hobbs and
[10] nobody else will be left in any doubt as to the nature
[11] of the case made by the claimant. But I do propose to
[12] advance it, if I may, logically and step-by-step.

[13] **MR JUSTICE LADDIE:** Fine, so long as you have that in mind.

[14] **MR COX:** I do, and I am most grateful.

[15] After the 27th April 1992, my Lord, Mr Lazenby
[16] tells us in his witness statement and I can give
[17] your Lordship the paragraph without inviting you ...
[18] unless your Lordship feels it is necessary.

[19] **MR JUSTICE LADDIE:** No.

[20] **MR COX:** Mr Lazenby tells us in his witness statement
[21] that he asked around the office and that I think is
[22] paragraph 9 of Mr Lazenby's witness statement. When he
[23] received the letter:

[24] "On 27th April I received a letter from
[25] John Donovan introducing himself ... never met or heard

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[1] amongst others by Andrew Lazenby, that it would be some
[2] time later, considerably later, that Shell would be
[3] looking to go into the long-term. Now, your Lordship,
[4] if your Lordship accepts that evidence, is going to have
[5] to ask, we submit, why Mr Lazenby was telling Mr Donovan
[6] and Mr Sotherton throughout 1992 when in fact the policy
[7] was changing. They were entertaining submissions from
[8] different agencies that it was only short-term and
[9] that.

[10] **MR JUSTICE LADDIE:** Shell were not under an obligation to
[11] your client to disclose what their future plans were.

[12] **MR COX:** I completely agree. But your Lordship, when we tie
[13] it together, as I hope to do so, may see that it forms
[14] part of a picture, which is premature for me at the
[15] moment to advance, as to why that might have been the
[16] case. Because it was coupled with requests not to
[17] approach anybody else with the loyalty concept.

[18] **MR JUSTICE LADDIE:** I see.

[19] **MR COX:** That is the point. May I come back to.

[20] **MR JUSTICE LADDIE:** I am sure that I have picked up the same
[21] message as Mr Hobbs has picked up. Before Mr Hobbs'
[22] clients have to make up their minds whether they are
[23] going to risk putting up any witnesses for
[24] cross-examination, if you are going to be saying that it
[25] was a deliberate exercise in deception, which certainly

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[1] of him ... The letter referred to previous promotions."

[2] His standard practice was to ask around the
[3] office. He did it and, as a result, he went on to
[4] arrange a meeting for 12th May 1992. He then says:
[5] "Mr Donovan and his colleague, Roger Sotherton,

[6] were present.

[7] **MR JUSTICE LADDIE:** I have read it.

[8] **MR COX:** Thank you. My Lord, the position is this: having
[9] asked about the office, the meeting is held. No doubt

[10] because Mr Donovan is considered to be worth seeing. It
[11] is at that meeting that the claimant contends there was
[12] a disclosure. Broadly speaking in that meeting, amongst
[13] other subjects, Mr Sotherton first raised with
[14] Mr Lazenby the Megamatch concept and then the loyalty
[15] concept that had been so closely related to it.
[16] (2.15 pm)

[17] My Lord, Mr Lazenby, it is our case, exhibited
[18] immediate interest. He asked details concerning it and
[19] he said that he would get in touch with Mr King and
[20] retrieve a copy of the Concept Four document that
[21] your Lordship has already seen. My Lord, it is the
[22] united case of both men who were present for the
[23] claimant that there is no doubt that on that day those
[24] discussions were held. My Lord, the relevant paragraphs
[25] of the claimant's evidence are in the witness

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[1] statements, paragraph 19 of Roger Sotherton and
[2] John Donovan, witness statement paragraph 53.
[3] My Lord, that is denied by the defendant: that
[4] there was any discussion of the multibrand loyalty
[5] concept. It is accepted that Megamatch was discussed,
[6] but not the multibrand loyalty concept. But, my Lord,
[7] that sits uneasily, we submit, and more than uneasily ¶
[8] **MR JUSTICE LADDIE:** Just tell me this: in the reading of
[9] this material, in particular yours and Mr Hobbs'
[10] skeletons, I remember Mr Hobbs referred to a number of
[11] occasions where he says his client's recollection of
[12] what happened at meetings was confirmed or was
[13] consistent with the contents of minutes.
[14] **MR COX:** Yes.
[15] **MR JUSTICE LADDIE:** Was the 12th May meeting one which was
[16] the subject of any minutes?
[17] **MR COX:** My Lord, what there were were handwritten notes,
[18] not so much minutes but notes, which Mr Lazenby kept.
[19] **MR JUSTICE LADDIE:** Where are they?
[20] **MR COX:** I think, my Lord, in volume 3 at page 973.
[21] **MR HOBBS:** It is E2, my Lord, page 980/A.
[22] **MR COX:** I am very grateful. Your Lordship may see the
[23] notes. Mr Lazenby points out that there is no explicit
[24] reference of course to the multibrand loyalty concept.
[25] But what we say, my Lord, apart from the evidence of

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[1] Mr Sotherton and Mr Donovan, is that the Megamatch
[2] concept was very closely related, historically and
[3] indeed in other ways, to the multibrand loyalty concept
[4] and that for the first time meeting the new National
[5] Promotions Manager it would have been perfectly natural,
[6] and was, that they should raise, albeit it may be by a
[7] side wind and not the focus of the conversation, the
[8] consequence and logical and natural development of
[9] Megamatch which had taken place: namely, the loyalty
[10] scheme. Because it after all was a scheme on which
[11] Shell still possessed an option. So, in passing, it may
[12] very well have been in the sense that it formed a topic
[13] of separate discussion but would not perhaps have been
[14] seen as the main reasons why Mr Donovan and Mr Sotherton
[15] were there.
[16] **MR JUSTICE LADDIE:** Can I ask two questions in relation to
[17] this: how long did this meeting go on for?
[18] **MR COX:** My Lord, that is a question that may not be
[19] addressed and may have to be addressed in oral evidence.
[20] **MR JUSTICE LADDIE:** No doubt your clients will know.
[21] **MR COX:** Yes. May I take instructions? Just over an hour,
[22] it is thought.
[23] **MR JUSTICE LADDIE:** Can you tell me one another thing? This
[24] document was produced on disclosure?
[25] **MR COX:** Yes.

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[1] **MR JUSTICE LADDIE:** Has any challenge been made as to the
[2] authenticity of it?
[3] **MR COX:** Of this note?
[4] **MR JUSTICE LADDIE:** Yes.
[5] **MR COX:** No. Not as a contemporaneous note or a note ¶ of
[6] course, we do not know when it was taken. I will need
[7] to ask questions. But, as a note that has been
[8] fabricated since, no.
[9] **MR JUSTICE LADDIE:** Thank you.
[10] **MR COX:** My Lord, there are a number of features of this.
[11] I do not want to go ¶
[12] **MR JUSTICE LADDIE:** I understand. There are bits you will
[13] want to put to Mr Lazenby if he turns up in the witness
[14] box?
[15] **MR COX:** Yes, quite a bit. I do not want to, if I may,
[16] foreshadow the whole reasons why we say Mr Lazenby's
[17] failure to recollect this is implausible. But the
[18] letter on 14th May is one of them and is plain at
[19] page 981. At page 981, just two days later, Mr Donovan
[20] wrote to Mr Lazenby thanking him for the meeting, a
[21] follow-up letter, at page 981. There he referred to
[22] their discussions:
[23] "Roger Sotherton and I would like to thank you for
[24] the time you gave to our presentation. With your
[25] authority I will now be contacting the various potential

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[1] partners we discussed in regard to the multibrand
[2] proposal. I will supply them with outline proposals,
[3] plus invitations to attend exploratory discussions at
[4] Shell-Mex House in June as per instructions."
[5] So there it is apparent that Megamatch was the
[6] focus of the discussion and Mr Lazenby, as his own note
[7] suggests, had given the go-ahead for the Megamatch
[8] scheme, which had appealed to and attracted, it seems,
[9] most of those at Shell who listened to it, to go ahead.
[10] **But Mr Donovan adds:**
[11] "We also noted your interest -
[12] **MR JUSTICE LADDIE:** I have read it.
[13] **MR COX:** My Lord, Concept Four was included and it is
[14] admitted by the defendant that Concept Four arrived. So
[15] it is accepted that the document was sent to Mr Lazenby,
[16] but Mr Lazenby says that he cannot recollect reading
[17] it.
[18] **MR JUSTICE LADDIE:** Whether he can recollect reading it, can
[19] you tell me this, and no doubt these are matters that
[20] you will want to put to Mr Lazenby if he is to be
[21] cross-examined: was there any letter back from Lazenby
[22] saying "I do not know what you are talking about"?
[23] **MR COX:** None. None whatsoever. Indeed, as we shall see,
[24] my Lord, quite the contrary. Not a word was suggested
[25] to demur or disagree with the summary put there and yet

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[1] there were further contacts during the year. My Lord,
[2] one thing is important of course: the defendant admits
[3] having received Concept Four. So with the letter of
[4] 14th May went Concept Four and your Lordship will see a
[5] fairly straightforward "Please read Concept Four"
[6] invitation in that paragraph. "Enclose a copy and
[7] please read Concept Four", and that he had agreed that
[8] sufficient merit was to be retained on file.

[9] **MR JUSTICE LADDIE:** Yes, I have read it.

[10] **MR COX:** My Lord, that is why we submit that in May a
[11] disclosure was made. We submit it was made in
[12] circumstances of confidence, certainly all habitually of
[13] the correspondence were entitled so, and the two men
[14] present, Mr Sotherton and Mr Donovan, say it was the
[15] explicit understanding and assertion of Mr Lazenby that
[16] what they disclosed would be kept and treated as in
[17] confidence.

[18] My Lord, it is a very interesting fact that, at
[19] the same time, something else was going on. We have
[20] another piece of evidence which we propose to put before
[21] your Lordship from a man by the name of
[22] Mr Armstrong-Holmes. Mr Armstrong-Holmes was a former
[23] leader of, I think, Berkshire or Bedfordshire
[24] County Council -

[25] **MR JUSTICE LADDIE:** I have read it, yes.

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[1] it was almost exactly contemporaneous. Because
[2] Mr Armstrong-Holmes puts the follow-up conversation on
[3] or about 13th May. So within days certainly of
[4] 12th May. If Mr Armstrong-Holmes's evidence is
[5] accepted, it is further evidence that there was such a
[6] discussion and further evidence that Mr Lazenby was
[7] interested in it and considered it to be of sufficient
[8] merit to be worthy of use.

[9] **MR JUSTICE LADDIE:** If Mr Armstrong-Holmes's evidence is
[10] accurate, Mr Lazenby also said that Shell had an option.

[11] **MR COX:** Indeed. Forgive me. I thought I had mentioned
[12] that. Shell had an option, yes.

[13] **MR JUSTICE LADDIE:** It was not just they were interested,
[14] but they had some sort of right.

[15] **MR COX:** Yes. Your Lordship then is already -

[16] **MR JUSTICE LADDIE:** On the other hand, Mr Armstrong-Holmes,

[17] if the rest of his witness statement is anything to go
[18] by, is not well disposed towards Shell.

[19] **MR COX:** No doubt that is what the defendant will say: he is
[20] just a liar. I do not know. But certainly to fabricate

[21] and invent an account which gives as its centerpiece the
[22] explanation that his gardening concept could be used as

[23] part of a long-term loyalty scheme upon which Shell held
[24] an option and then a mention of Don Marketing in that

[25] context, when it in fact became part of a gardening

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[1] **MR COX:** Nottinghamshire. My Lord, broadly speaking,
[2] Mr Armstrong-Holmes had contacted Mr Lazenby at almost
[3] exactly the same time, had met him and put forward an
[4] idea for a gardening concept. To cut a longish story
[5] short, my Lord, the upshot of it is this, as
[6] your Lordship read: the gardening concept was
[7] unenthusiastically treated, Mr Lazenby said to
[8] Mr Armstrong-Holmes it would be kept in confidence and
[9] he said -

[10] **MR HOBBS:** Your Lordship knows that this is the subject of
[11] objections on my side.

[12] **MR JUSTICE LADDIE:** Yes, I know.

[13] **MR COX:** For the moment, my Lord, I want to concentrate upon
[14] its direct and immediate relevance, which is -

[15] **MR JUSTICE LADDIE:** The direct relevance is he says that
[16] Don Marketing was mentioned to him at the time. I think
[17] he said in relation to a long-term project but I cannot
[18] remember the detail.

[19] **MR COX:** The reason I mention it is for this purpose,
[20] conscious of Mr Hobbs's objection: I did not understand
[21] that this could reasonably be taken issue with on this
[22] point. Which is that Mr Armstrong-Holmes was told "We
[23] can use this as part of a long-term loyalty concept on
[24] which we have an option", and the name Don Marketing was
[25] mentioned. So we have that piece of evidence and indeed

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[1] theme with incorporated subsequently, as we shall see,
[2] into the reward structure of the Smart Scheme, is
[3] something your Lordship will have to consider. But it
[4] is not just Mr Armstrong-Holmes. No doubt of course my
[5] learned friend will say these men are just men with a
[6] grudge against Shell. Your Lordship will have to make
[7] up your mind. But Mr McMahon of course, again at a very
[8] similar time, on 26th May, at around this time, Lazenby
[9] rings him. Mr McMahon was the Managing Director of
[10] Concept Systems Limited who had an arrangement with a
[11] technology supplier who was trying to sell smart cards.
[12] He had put up a document to Shell -

[13] **MR JUSTICE LADDIE:** I have read this.

[14] **MR COX:** Your Lordship has.

[15] **MR JUSTICE LADDIE:** I know at one stage your client was a
[16] moving force behind the body which was protesting at
[17] Shell's allegedly improper business practices.

[18] **MR COX:** Yes.

[19] **MR JUSTICE LADDIE:** I have forgotten what the name of that
[20] body was, but it was a play on words of some ethical
[21] statement which had been made on behalf of Shell.

[22] **MR COX:** Yes.

[23] **MR JUSTICE LADDIE:** Were Mr Armstrong-Holmes and Mr
[24] McMahon

[24] members of that group?

[25] **MR COX:** No, my Lord.

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[1] **MR JUSTICE LADDIE:** Neither of them?
[2] **MR COX:** Neither of them. Indeed, they were not discovered
[3] until discovery in this case. It was only when
[4] discovery was given that Mr Donovan came across
[5] references to them in the papers and traced them that
[6] they were ever known to Mr Donovan at all.
[7] **MR JUSTICE LADDIE:** I see.
[8] **MR COX:** Your Lordship will have to make up your mind. But
[9] Mr McMahon's evidence is very similar to that of
[10] Mr Armstrong-Holmes. Indeed, Mr McMahon's evidence is
[11] rather more significant because, if Mr McMahon were to
[12] be accepted as being right, then Mr Lazenby on
[13] 16th July gave him an oral brief at Shell-Mex House to
[14] approach potential buyers for a novel plan, as he was
[15] told it, for a multibrand loyalty scheme -
[16] **MR JUSTICE LADDIE:** Which paragraph is this?
[17] **MR COX:** Paragraphs 10 to 12 of Mr McMahon's statement.
[18] (2.30 pm)
[19] It starts about four lines down.
[20] **MR JUSTICE LADDIE:** Can you tell me this, Mr Cox: on
[21] paragraph 11, four lines down:
[22] "I wrote to Mr Lazenby the following day to
[23] confirm the basics of the brief he had given to me."
[24] Is that in discovery?
[25] **MR COX:** My Lord, at page 1168 in volume 3.

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[1] contributing to the cost of the scheme as part-owner ...
[2] acceptable partners being ...", and the partners there.
[3] Albeit in a short letter one cannot encapsulate it all,
[4] but one sees the thinking has gone several stages
[5] forward. In the handwritten note, at the top "David",
[6] it is addressed to Mr Watson one assumes:
[7] "For your information, I have my own hard
[8] copy - let's discuss."
[9] My Lord, if one takes Mr McMahon's evidence,
[10] because it is Mr McMahon's evidence that is specifically
[11] in relation to that, the name of Don Marketing was
[12] mentioned in connection with the concept, but Mr Lazenby
[13] said he preferred to work with agencies that he had
[14] chosen. It is important to remember it may be a feature
[15] of this - so often in these cases, one has to remember
[16] one is dealing with human beings. Of course Mr King had
[17] been, for many years, the National Promotions Manager -
[18] **MR JUSTICE LADDIE:** Yes, and you are going to suggest that
[19] maybe Mr Lazenby wanted to show clear water between him
[20] and Mr King and was going to do it his own way without
[21] Mr King's contacts. Yes.
[22] **MR COX:** New broom sweeps clean.
[23] **MR JUSTICE LADDIE:** I see the suggestion. Whether that is
[24] true or not will depend upon what happens when you
[25] cross-examine.

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[1] **MR JUSTICE LADDIE:** Do you mind if I have a look at that
[2] now?
[3] **MR COX:** No, by all means. It is a letter I was going to
[4] take your Lordship to immediately, so your Lordship has
[5] simply anticipated my actions.
[6] My Lord, I am suddenly made aware that
[7] your Lordship may not have witness statements
[8] cross-referenced. I do apologise. May I hand
[9] your Lordship a bundle? Would it help?
[10] **MR JUSTICE LADDIE:** Just a second. Yes, you can hand me a
[11] new one. (Handed).
[12] **MR COX:** My Lord, the experts' bundle is also here.
[13] **MR JUSTICE LADDIE:** Right. Experts' reports ...
[14] **MR COX:** They are at bundle D.
[15] **MR JUSTICE LADDIE:** Let me look at volume 3, 1168.
[16] **MR COX:** My Lord, Mr McMahon adds to his evidence by saying
[17] that it was put forward as a novel concept, different
[18] from other schemes, effectively as a partnership and he
[19] was being asked in effect to test interest with
[20] potential partners. He says it was only at this meeting
[21] that he became aware that there was this formed view,
[22] this idea. We submit that when one reads that, Shell
[23] owning the scheme, inviting other retailers to:
[24] "... participate on a transaction-charged basis
[25] or, alternatively, each member of the scheme in part

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[1] **MR COX:** Ultimately upon your Lordship's judgment of the
[2] witnesses.
[3] Moving on then, my Lord, from that position
[4] Mr McMahon and Mr Lazenby had a number of other
[5] meetings. On 30th July Mr McMahon had joined forces
[6] with Fortronic and at the same time he has conversations
[7] with Mr Armstrong-Holmes, telling him that his garden
[8] concept would be used in the long-term scheme.
[9] Mr Armstrong-Holmes would ring him up and ask him from
[10] time to time. My Lord, by 1st August it is plain,
[11] certainly between May/June/July - late May into the end
[12] of July - a pretty clear idea had been formed of what
[13] Shell would want. It may not have been fully formed and
[14] it may well have to be subjected to research and
[15] testing. But a light had gone on in the minds of
[16] Shell. My Lord, we submit that that can be partly seen,
[17] albeit it only partly - and it will be a matter for
[18] cross-examination - that in a document slightly earlier
[19] in-between 12th May and 16th July meeting, Mr Watson had
[20] minuted or noted -
[21] **MR JUSTICE LADDIE:** Reference?
[22] **MR COX:** Reference volume 3/1062. This is the first
[23] document, at 1062, which suggests that either Mr Watson
[24] or Mr Lazenby had formed any view, certainly that they
[25] were putting up to their seniors, about the promotional

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[1] framework of this long-term scheme. It comes a month
[2] after the disclosures made by the claimant and a month
[3] before the meeting with Mr McMahon. Albeit it is at the
[4] end of May that contact, according to the defendant's
[5] evidence, 26th May Mr Lazenby first makes contact with
[6] Mr McMahon. It is headed "Promotional Strategy" and it
[7] is really a note to Mr Sweeny, Mr Watson's superior,
[8] about what they had been doing:

[9] "We have been assessing feasibility and options of
[10] using magnetic strike cards ..."

[11] They then set out what they analysed in terms of
[12] technology. The next paragraph is of interest:

[13] "Before, however, we move forward on any
[14] technology we must now decide what type of promotion we
[15] actually wish to run. UORM/13 ...", which I think is
[16] Mr Watson's department, "... do not believe it is worth
[17] making any technological innovation if we intend to
[18] continue to run short-term promotions. The dissonance
[19] between a more modern promotional mechanic and what
[20] would remain a relatively simple offer would be clearly
[21] perceived by the client/consumer. In addition, we would
[22] be implementing a significant project for no obvious
[23] commercial gains. We would not be leapfrogging our
[24] competitors or perceived as catching up and there are no
[25] clear cost savings ... tagcards would be the same as

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[1] participants before we can judge how serious an option
[2] it is. Our proposed action plan has continued to keep
[3] up-to-date with technical improvements ... continue to
[4] investigate Powerpoints, actively pursue other agencies
[5] like GHA for other options and schemes, approach certain
[6] key third parties, most notably the grocers directly to
[7] gauge their true levels of interests and to ensure we
[8] are not messed about by agencies. Before pursuing this
[9] action plan I believe it is important these thoughts and
[10] plans should have the broad endorsement of yourself."

[11] My Lord (d) approaching directly third parties,
[12] Mr McMahon comes in on 16th July and is asked to
[13] approach them. It is important to remember about
[14] Mr McMahon that it was never Mr McMahon's suggestions to
[15] Shell that he would be a third party running a scheme in
[16] which Shell would be a client or a member. He was
[17] coming forward with a technological idea and what was
[18] being asked of him was to test the reaction of third
[19] parties.

[20] My Lord, this document is on 11th June. The
[21] discussion with the claimant was on 12th May. My Lord,
[22] it will be an issue as to what extent - and we submit
[23] clearly Mr Lazenby's thinking was being influenced by
[24] the disclosures that had been made to him by
[25] Mr Donovan. My Lord, Mr McMahon's and

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[1] vouchers. This leads us to the same decision point as
[2] we have reached by other means. During 1993 we should
[3] plan, either to get out of national promotions
[4] altogether or to plan to implement a longer term
[5] collections scheme. Such a scheme would be electronic
[6] and should involve other retailers, not only in the
[7] redeeming of points, but also in the issuing of points.
[8] A long-term electronic collection scheme with such third
[9] party link-ups would leapfrog our competitors. Our
[10] scheme would be the only one with multiple retailer
[11] issue of points and it would encompass all aspects of
[12] other existing schemes."

[13] Then a warning is entered, that, if they did not
[14] move fast, then third parties would be get snapped up in
[15] different types and different forms of schemes run by
[16] Mobil, Total, Burma and so on. They then say something
[17] about Powerpoints, my Lord, at the last paragraph:

[18] "We are of course currently pursuing the
[19] Powerpoints option ..."

[20] I think your Lordship has probably read it
[21] already:

[22] "We are of course currently pursuing the
[23] Powerpoints option. We require, however, a lot more
[24] information from Powerpoints as to the technical
[25] qualities of their system as well as about other likely

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[1] Mr Armstrong-Holmes's evidence, as well as the
[2] documents, we submit, assists and supports our case.

[3] My Lord, it then moves on from there and may
[4] I take us forward in time? By August what was happening
[5] was that Mr Lazenby and Mr Hannagan had been talking to
[6] a number of potential suppliers of technology for
[7] long-term loyalty schemes. Lazenby's witness statement
[8] at paragraph 19, my Lord, helps us with that. Page 9 of
[9] the bundle.

[10] (2.45 pm)

[11] The issuing and redeeming of points is an
[12] important feature of the scheme as put forward by
[13] Mr Donovan. Redemption - I should have made this plain
[14] and forgive me if I did not - if you think back to the
[15] Powerpoints diagram, your Lordship will see that
[16] redemption takes place by Powerpoints, the network
[17] organiser. But in the partnership of course you have
[18] this enormous advantage: you can go with your card,
[19] because it is a single currency, and redeem at any one
[20] of the partners, if they are full partners, redeemers
[21] and issuers. This was central to the scheme put forward
[22] by Mr Donovan: that the members of the consortium, the
[23] exclusive consortium, would be redeemers and issuers.
[24] You could have associate partners or less than full
[25] partners -

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[1] **MR JUSTICE LADDIE:** The effect would be, for the purpose of
[2] this card, you treated all the partners as a department
[3] store. You might buy on one floor, but you redeem your
[4] points on another floor.
[5] **MR COX:** Yes.
[6] **MR JUSTICE LADDIE:** You could buy on any floor and redeem on
[7] any floor. The only difference is that the floors
[8] happen to be different companies selling different
[9] things.
[10] **MR COX:** Yes. That would certainly be one way of putting
[11] it, my Lord. That was central to Mr Donovan's idea and
[12] begins to surface in documents after 12th May. Not, we
[13] submit, before. Powerpoints is fundamentally
[14] different. The redemption alone shows that, but also
[15] for the various reasons I have mentioned before. But
[16] after 12th May that is why I have said to your Lordship
[17] a light has gone on. The ideas are beginning to show
[18] through, the various evidence that we can approach
[19] this. A clear similarity to the idea put forward on
[20] 12th May and in 1989 and 1990. Let me be quite frank
[21] about it if I may: what we say is that Mr Lazenby, when
[22] he arrived on 1st February, began to see clearly the way
[23] his superior was thinking. He realised that the tide
[24] was turning back to long-term, he realised that
[25] investigations and explorations had been made and, when

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[1] Mr Donovan arrived on 12th May, he realised the apposite
[2] relevance of what Mr Donovan was saying. Hence he
[3] expresses the desire to see the document and gets it two
[4] days later and hence what subsequently transpires. We
[5] submit it comes on, one could possibly imagine, as a
[6] light. It is obviously relevant to the problems we
[7] accept that they are already beginning to grapple with.
[8] **MR JUSTICE LADDIE:** Your enthusiasm, Mr Cox, is commendable
[9] but it does have certainly consequences.
[10] **MR COX:** I put it forward, my Lord, as a possible
[11] construction -
[12] **MR JUSTICE LADDIE:** Yes, but you are enthusiastic about this
[13] possible construction and there are consequences of it.
[14] The consequence is, if you are going to be brutally
[15] frank about it, as you put it, if this is right, then it
[16] is going to be very difficult to say that Mr Lazenby's
[17] current version of events is truthful. Because I notice
[18] in your skeleton you say the confidential information -
[19] assuming it is confidential information - of your
[20] clients has been used, knowingly or unknowingly, but has
[21] been used by the defendants. You say, probably rightly,
[22] that, as a matter of law, it does not matter whether
[23] they knew that they were misusing confidential
[24] information. The only question is whether they were.
[25] If it slipped into their subconscious, just as in Scene

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[1] v Copytext (?) that is enough.
[2] **MR COX:** Exactly.
[3] **MR JUSTICE LADDIE:** But that is not the story you are
[4] putting to me now. The story you are putting to me now
[5] in the form you are doing it comes down to this: this
[6] was crucial, it was soon realised by Mr Lazenby to be an
[7] important possible way of advancing the business of
[8] Shell. "Gosh, he was interested. Let us see what the
[9] proposal is, get it in Donovan, see it, send people out
[10] all over the place, finding out whether it will work"
[11] and the story that he does not remember is unlikely to
[12] be a reflection of poor memory.
[13] **MR COX:** "Fundamentally implausible" is the way I put it in
[14] my skeleton. It is always -
[15] **MR JUSTICE LADDIE:** He is lying, is what you coming down
[16] to? It is not necessary to your case.
[17] **MR COX:** It is not necessary to my case, and may I say of
[18] course there are other individuals involved here - for
[19] example, Mr Leggatt - further removed, who no doubt
[20] could not for a moment have a trace of suggestion
[21] levelled at their door that they might have perceived
[22] knowingly that they were using somebody else's idea.
[23] **MR JUSTICE LADDIE:** You have no material upon which to make
[24] such an assertion.
[25] **MR COX:** No. But, in relation to Mr Lazenby, I have to say

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[1] to your Lordship, after long reflection, that I agree it
[2] will be hard for your Lordship in judging his evidence
[3] to shy away from having to make a decision as to whether
[4] you believe him or not.
[5] **MR JUSTICE LADDIE:** No, Mr Cox, that is the wrong way
[6] round. I do not decide that people are liars unless
[7] I am invited to do so by one party or the other. If you
[8] are going to say he is as clean as the driven snow and
[9] Mr Hobbs is going to say he is as clean as the driven
[10] snow I am not going to say you are both talking rubbish
[11] and that I think he is a liar. The whole point is, as I
[12] said to you earlier, you have to make it clear to
[13] Mr Hobbs and his clients what you are saying. It sounds
[14] to me - as it appeared to me in your skeleton - when
[15] push comes to shove, what you are saying is there is a
[16] very strong likelihood, the way you run this case, that
[17] Mr Lazenby lied to your clients and is lying in his
[18] witness statement.
[19] **MR COX:** Yes.
[20] **MR JUSTICE LADDIE:** I see.
[21] **MR HOBBS:** While we are on this, does this extend to any one
[22] of the other witnesses in Shell that we have been naming
[23] as we have been going through this material? Is the
[24] same said against David Watson?
[25] **MR COX:** My Lord, there is a difficulty when the claimant is

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[1] invited to do this. With Mr Lazenby it is frankly not
 [2] difficult. With Mr Watson, it is impossible to say.
 [3] **MR JUSTICE LADDIE:** At the moment your position in relation
 [4] to Mr Watson is you reserve the right to accuse him of
 [5] not being honest, but you do not know yet whether that
 [6] is a case that you are going to put. Is that right?
 [7] **MR COX:** Exactly. I think, with Mr Watson, one would like
 [8] to hear his answers in cross-examination. As
 [9] your Lordship knows, these issues can arise and it is
 [10] not necessary to my case to suggest that to Mr Watson.
 [11] It may be that your Lordship is right that necessarily
 [12] (inaudible) join issue on the facts of Mr Lazenby allows
 [13] little room for alternatives. I do have this proviso to
 [14] enter, if I may, concerning Mr Lazenby: it may be that
 [15] on an analysis of this case at the end of this evidence,
 [16] my Lord, your Lordship would come to the view that there
 [17] was a fairly serious misunderstanding by the employees
 [18] of the Shell Promotions Department as to just what
 [19] confidentiality required them to do. What it meant. It
 [20] may be that, at the time, Mr Lazenby perceived himself
 [21] as doing nothing wrong. That if somebody came to you
 [22] with an idea, it did not matter much what they said
 [23] about it or the circumstances, if you did not take it up
 [24] and ask them to do the work for example, their ideas
 [25] were otherwise unprotectable. They could not complain

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[1] Shell were going to have to do is, broadly speak, the
 [2] mechanics. They were going to be doing technology, they
 [3] were going certainly to be testing their idea for market
 [4] research. But you would expect any idea to be tested
 [5] for practicability against market research, reviewed and
 [6] so on. But the idea, certainly towards the end of 1992,
 [7] had already crystallised in their minds. I am going to
 [8] show, I hope, your Lordship how that, on the balance of
 [9] probabilities, given all the other evidence, is a
 [10] reasonable conclusion.

[11] May I take your Lordship to it? On 4th August at
 [12] volume 3, page 1200, an interesting letter is written by
 [13] Mr Lazenby. Mr Lazenby by now, as Mr Watson and he
 [14] comment, is fully onboard. He is the mainstream of his
 [15] department's activity; he is really at the centre of it
 [16] and becomes subsequently the Project Manager for
 [17] Hercules. This was perceived plainly as an important
 [18] project for Shell and it would be no doubt desirable to
 [19] be associated with it if it were going to be successful
 [20] and big. Mr Donovan was written to by Mr Lazenby about
 [21] the Megamatch. My Lord, it is quite important to
 [22] recollect what has happened. In May your Lordship will
 [23] recall the earlier letter, Mr Donovan had given the
 [24] go-ahead to try to reassemble this consortium. This is
 [25] about the third time that Shell, from its various

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[1] if you used them. It may be that some theme of that
 [2] kind emerges on an examination of these facts. There
 [3] certainly was no very clear policy. One can see later
 [4] on in discovery how that is addressed many years later.
 [5] But, my Lord, on the subject of recollection, on
 [6] the subject of whether the disclosures were made, it is
 [7] difficult to see how, we submit, it can be a loss of
 [8] memory.
 [9] (3.00 pm)
 [10] My Lord, moving forward in time. Because we have
 [11] come to August now and I have referred your Lordship to
 [12] paragraph 19 of Mr Lazenby's statement where he says:
 [13] "By the start of August 1992 Tim [Mr Hannagan] and
 [14] I had seen and spoken to a number of potential suppliers
 [15] of technology for a long-term loyalty scheme and on the
 [16] 4th Tim had produced a note putting forward 14 possible
 [17] suppliers for running Project Onyx."
 [18] He had met with these suppliers, he had added AT&T
 [19] and they had shortlisted six. My Lord, these were the
 [20] suppliers of technology, as he puts it, for long-term
 [21] loyalty schemes, who could supply the electronic
 [22] element. It will become fairly clear, in our
 [23] submission, to your Lordship from an analysis of the
 [24] evidence that, from then on really, what really mattered
 [25] and what persons who were to be recruited to assist

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[1] offices, had said -
 [2] **MR JUSTICE LADDIE:** Go and look at the consortium and,
 [3] according to Mr Donovan, at the same time put the
 [4] loyalty programme on the back burner. We will consider
 [5] that later.
 [6] **MR COX:** Yes. But, in reality, my Lord, in discovery there
 [7] is hardly a document about the Megamatch scheme. Shell
 [8] appear to be deafening in silence about Megamatch. So
 [9] if Mr Lazenby was asking Mr Donovan to go ahead with
 [10] Megamatch -
 [11] **MR JUSTICE LADDIE:** Is the bottom line of what you are
 [12] saying that, every time they wrote about Megamatch, it
 [13] was an exercise in drawing a false scent across the
 [14] trail? Is that the point you are making?
 [15] **MR COX:** My Lord, certainly it is odd that, if Megamatch was
 [16] seriously being entertained by Shell, there are simply
 [17] no documents.
 [18] **MR JUSTICE LADDIE:** There are all sorts of things that are
 [19] odd, Mr Cox. I want to know how does it relate to the
 [20] issues before me? Is it going to be your suggestion,
 [21] subject to anything you hear in evidence which convinces
 [22] you to the contrary, that, insofar as Shell were
 [23] continuing to discuss Megamatch with Don, it was an
 [24] exercise of putting Don off the trail?
 [25] **MR COX:** My Lord, certainly it is a possible conclusion on

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[1] the evidence. I would not wish to be drawn further on
[2] it, because it is not necessary for my case to do so.
[3] Can I come to this letter and your Lordship will see
[4] what I say here?
[5] **MR HOBBS:** I must intervene. There were 64 volumes of
[6] discovery on my side in this case. Not one person from
[7] the plaintiff's solicitors came and inspected. They
[8] left it to Mr John Donovan personally and it is nothing
[9] short of outrageous for my learned friend to say "there
[10] are no documents" in circumstances where he has no means
[11] of knowing what documents there are. This is quite
[12] wrong.

[13] **MR COX:** I defer from my learned friend, although I always
[14] defer to expressions of emotion. They are always
[15] admirable, but the reality is that I have instructions
[16] which I am entitled to assume are correct and, at the
[17] moment, that is my instruction.

[18] **MR JUSTICE LADDIE:** What worries me about this point,
[19] Mr Cox, is that, if you are not drawing it to my
[20] attention for the purpose of showing a red herring, what
[21] are you showing it to me for?

[22] **MR COX:** My Lord, because of this letter -

[23] **MR JUSTICE LADDIE:** Nudge nudge, wink wink?

[24] **MR COX:** My Lord, I am about to take your Lordship to a
[25] letter which shows that the two projects in Mr Lazenby's

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[1] **MR COX:** That is why I do not wish to suggest - because it
[2] is not necessary for me to suggest this, but it is a
[3] possibility -

[4] **MR JUSTICE LADDIE:** And it may become apparent in
[5] cross-examination that this was a deliberate attempt to
[6] put Don off the trial. I understand that. All I am
[7] saying is, if that is not the reason you are showing it
[8] to me, just tell me what the point is.

[9] **MR COX:** Let us come on to it, my Lord. It is a letter
[10] telling us that Megamatch is not going to be run:

[11] "We got our formal market research back on
[12] 22nd July and Megamatch performed pretty well, faring
[13] well over all groups and surprisingly not with any
[14] avoidance by high mileage drivers. In fact it was the
[15] third most successful concept in this research. I am,
[16] however, not going to develop Megamatch for use in
[17] quarter one 1993 for these three reasons: I do not
[18] believe that high mileage motorists will be happy with
[19] this concept despite the research. The crucial element
[20] of this promotion was the group of participating
[21] retailers, including a supermarket chain. I do not
[22] believe it would be possible to pull together such a
[23] group of participants and co-ordinate them all. The
[24] research does show a significant degree of scepticism
[25] among the customers. There is a significant degree of

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[1] mind seem to have been overlapping. I hope, if
[2] your Lordship will just bear with me, to examine this
[3] letter and it may become clear.

[4] **MR JUSTICE LADDIE:** Tell me now what the purpose of this is,
[5] if it is not to give support to the suggestion of a red
[6] herring. I am not objecting to you saying it was a red
[7] herring, Mr Cox. It may be you are right. If that is
[8] what you are saying, maybe it was a deliberate decoy.
[9] Maybe. If it is, no doubt it will reflect badly on
[10] Shell. If that is so, they should know it is coming.
[11] If that is not the purpose of showing me this letter,
[12] what is the purpose of showing me this letter? I do not
[13] care. I have an open mind.

[14] **MR COX:** Let me put it this way: certainly it is part of our
[15] case that Mr Lazenby put up red herrings to the
[16] claimant. Having said that, whether or not Megamatch
[17] was one of them is a matter on which I would like, if
[18] I may, on reflection, to reserve my position. But this
[19] letter I am taking your Lordship to for another reason.
[20] There are sometimes, my Lord, themes and matters
[21] that arise on the analysis of any case in any trial
[22] where the advocate must say to himself "That may be a
[23] runable matter. I will have to see how the evidence
[24] unfolds in cross-examination".

[25] **MR JUSTICE LADDIE:** Of course.

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[1] resistance within senior Shell management to running a
[2] competition. Despite all of these, in principle I still
[3] like the idea of Megamatch and I will actively keep it
[4] in mind for promotions later in 1993 and 1994. I am in
[5] fact speaking directly to a variety of suitable partners
[6] and, when it looks as though we will be able to get
[7] together, I will get back to you to develop Megamatch
[8] further."

[9] My Lord, what is interesting about that final
[10] paragraph is that Mr Lazenby has illuminated suddenly
[11] that he is talking directly to a variety of suitable
[12] partners. Now, that can only be for Megamatch or the
[13] multibrand loyalty concept. Since Megamatch was not
[14] going to be run, what we know is, when one looks at
[15] discovery, that he was talking directly to partners
[16] about a multibrand loyalty scheme. So that, not only
[17] does his witness statement, when he says "I was putting
[18] together possible suppliers for Onyx", what is clear is
[19] that, by 4th August, he was talking - and we remember
[20] the July meeting with Mr McMahon - directly to third
[21] party retailers. It could not be Megamatch, because he
[22] said he was ending it: it had to be some other project.
[23] We submit it was the multibrand loyalty concept.

[24] So, my Lord, that is interesting as a letter
[25] because it helps us show that direct approaches are in

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[1] his mind to these third parties. My Lord, it may be we
[2] have to come back to that letter. But, for now,
[3] my Lord, I will, if I may, leave it to one side. He has
[4] thanked Mr Donovan for his work.

[5] My Lord, by September Mr Lazenby was drafting a
[6] brief for the shortlisted candidates for the suppliers
[7] of technology. That is at 1272. This was a brief to
[8] form the basic requirements of the Project Onyx system.
[9] The first page of it is at 1268. My Lord, without going
[10] through every detail of it now, the relevant passage is
[11] at 1272 and the bottom of 1271 where the marketing
[12] requirement is set out:

[13] "What is it not? A copy of current Mobil, Total
[14] or Burma promotions ... a simple copy for paper
[15] vouchers. The next step is what it is: a long-term
[16] loyalty scheme, distinct and better. High degree of
[17] flexibility facilitating promotion of fuel sales. High
[18] degree of flexibility in third party link-up, points
[19] issue by third parties, points redemption by third
[20] parties, catalogue promotion, partnerships promotion.

[21] **Shell:** our promotion."

[22] It is a list only and it is a brief to be supplied
[23] to these six suppliers. My Lord, it may be, in due
[24] course, that one needs to look at various other - the
[25] promotional requirement sets out on page 1271 multiple

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[1] (3.15 pm)

[2] My Lord, that by itself needs to be looked at with
[3] other documents. That was sent to six companies. They
[4] narrowed them down to two, jettisoning on the way
[5] Concept Systems, Mr McMahon, and they selected GHA
[6] Associates and Senior King; those, in other words, that
[7] had made presentations at the beginning of the year.

[8] The other four, my Lord, they said, though they
[9] rejected them, they asked for further information and,
[10] as Mr Lazenby put it, kept their options open with them,
[11] and sent them scurrying around looking for information
[12] at their request.

[13] My Lord, all that did not avail the two chosen
[14] because by January 1993, even those two short-listed who
[15] had been part of the tender process, who had given
[16] presentations throughout October 1992, were then
[17] jettisoned and rejected. It was at that point that a
[18] new agency came in, called Option One, so that these six
[19] companies make their presentations in October; two of
[20] them are told that they are going to be selected on 27th
[21] October but by January, both of them are out and a new
[22] agency has come in called Option One.

[23] My Lord, may I make our case reasonably plain on
[24] that? We say that it is a reasonable inference from the
[25] evidence that the following is the reason: both GHA and

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[1] promotions and several different promotional activities,
[2] redemptions, and so on.

[3] My Lord, that was accompanied by a letter at 1266
[4] to each of the six shortlisted companies, agencies,
[5] requiring confidentiality:

[6] "It is a condition of providing this brief and
[7] related data regarding Shell's performance that you
[8] enter into a personal undertaking with regard to
[9] preservation of confidentiality concerning all the
[10] information, oral and written, with which you have been
[11] provided. Preservation of confidentiality also extends
[12] to any information you have received or will receive in
[13] the future in connection with this project."

[14] Then various other remarks are made "kept strictly
[15] confidential ... may not be used and may not be
[16] disclosed to third parties". So that went with the
[17] information contained in the documents that
[18] your Lordship has had a look at. It is, we submit, an
[19] indication, extending as it did to all of the
[20] information in the document, how Shell regarded
[21] the - of course, there was another information in the
[22] document, but how Shell regarded what it was doing. In
[23] particular the idea of a loyalty scheme
[24] consortium-based, partners in a partnership, Shell-led
[25] in the way that I have indicated.

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[1] Senior King, certainly GHA - your Lordship has seen
[2] their presentations briefly this morning - were running
[3] systems that they decided by certainly the end of 1992,
[4] they did not want. They were third party systems of the
[5] type that we have already examined and they brought in
[6] Option One, not to run any scheme, as GHA were hoping to
[7] do, but rather to do what Shell determined they should
[8] do, a limited role. The idea was already there; the
[9] scheme was already decided upon, the promotional
[10] framework. Option One was simply going to, in effect,
[11] review the idea and put forward together a strategy to
[12] implement it. GHA, on the other hand, had a different
[13] kind of approach, as your Lordship has seen.

[14] My Lord, this was already in the mind, we submit,
[15] it may be, in Mr Lazenby's mind in August when he was
[16] writing himself direct to partners, or at least says he
[17] was approaching direct partners, because that would not
[18] necessarily we submit have been compatible with a GHA
[19] scheme.

[20] If I can invite your Lordship to look, on 28th
[21] October, at volume 3, 1318, your Lordship will see that
[22] the agenda of Mr Lazenby, together with Mr Watson, as it
[23] would appear, is already really inconsistent with GHA
[24] and Senior King being retained because they are already
[25] writing directly to potential partners. 27th October

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[1] 1992, this is 1318. Mr Lazenby minuted Mr Watson on
[2] 28th October 1992 under promotional opportunities with
[3] Sainsbury.
[4] "Sainsbury's would be an ideal promotional
[5] partner", he says, "due to their size and number of
[6] stores and their brand image and market positioning.
[7] Problems working with them will be that they have no
[8] representation in Scotland and Northern Ireland. Also,
[9] they claim to have 4 per cent petrol market share ...
[10] "Still, they have 7 to 9 million customer visits
[11] per week which, whilst the profile of their customers
[12] oriented to women, and so away from high mileage
[13] motorists, is still attractive target audience.
[14] "Any partnership marketing activity we did with
[15] them might fall into the following areas:
[16] "Air Miles. If a major supermarket were brought
[17] into Air Miles on a broad national basis, this would
[18] cause a major UK relaunch of Air Miles. The grocer
[19] would enhance the Air Miles offer to extend its appeal
[20] to most of our customers, possibly 50 to 70 per cent,
[21] though there would still be a significant number to whom
[22] this offer will not be attractive, so we will still not
[23] be able to make this our only promotion without losing a
[24] significant number of our current customers."
[25] Of course, the point made there is the point about

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[1] At the bottom, he says:
[2] "The first two routes are the most attractive
[3] long-term and strategically useful."
[4] So in other words, tying up Sainsbury's in to Air
[5] Miles, of which Shell were a member, but also a true
[6] universal lifestyle promotion for customers collecting
[7] generic points, that is the Shell-led consortium, we
[8] say, and expressed in a few lines.
[9] My Lord, it is important to recollect that the
[10] claimant's idea was first ventilated in its fuller form
[11] in 1990 by means of an approach to Sainsbury's. It was
[12] known to Mr Lazenby, it is our case, as a consequence of
[13] 12th May discussions because it is the evidence of both
[14] men that they mentioned that they had made an approach
[15] to Sainsbury's and explained how, what had been done.
[16] Mr Watson wrote a letter at page 1323 to
[17] Sainsbury's on exactly the lines that Mr Lazenby had
[18] suggested two days before. He wrote that letter on 13th
[19] October 1992; 1323.
[20] My Lord, I am going to move to the bottom of the
[21] page. (3) deals with the Air Miles' suggestion:
[22] "Whilst it appeals only to a minority of our
[23] customers, to those people it clearly appeals
[24] strongly ... Sainsbury's could offer Air Miles."
[25] "(4) We could launch--"

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[1] Air Miles generally. It is not a mass market appeal
[2] promotion because it is only for those who are able to
[3] have the luxury or good fortune of travelling to far
[4] away clients.
[5] "The second impact that a grocer giving out Air
[6] Miles would have would be to enfranchise more of the
[7] public into promotional awareness."
[8] So, my Lord, it has dealt with Air Miles. Over
[9] the page, at paragraph 2, under the words "Project
[10] Onyx", which is the long-term loyalty scheme that Shell
[11] are considering, is an important paragraph:
[12] "A major grocer will be key to getting a truly
[13] universal 'lifestyle' promotion, where customers collect
[14] generic points, collected from different points, into a
[15] pool. The grocer would act as a major collecting
[16] source, beside ourselves, and neither of us will be a
[17] key location for supply of rewards."
[18] Then a point is made that if another grocer were
[19] to go with Air Miles, then they would be in an extremely
[20] strong position to tie up a second of the big three
[21] grocers in the national promotion, accessing 12 million
[22] customer visits a week.
[23] "This is not a short or medium-term option since
[24] Sainsbury simply is not set up to go fully integrated
[25] into this technology without major investment."

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[1] **MR JUSTICE LADDIE:** I cannot help but laugh at this. They
[2] say they would drive several miles out of their way to
[3] find a Shell station. Yes, I know all about that.
[4] **MR COX:** My Lord, quite. Number 4, though, is an
[5] interesting part of it:
[6] "We could launch a joint major 'points
[7] promotion'. Customers would collect points, either in
[8] paper form or electronically, from both Shell and
[9] Sainsbury's outlets (and from other retailers, banks,
[10] et cetera?) and redeem them for items from a mail order
[11] catalogue.
[12] "We are currently studying the feasibility of
[13] this option and believe that it would be a powerful
[14] marketing tool, 'leapfrogging' all of our and your
[15] competitors."
[16] **MR JUSTICE LADDIE:** That is not quite the same thing, is it,
[17] a mail order catalogue?
[18] **MR COX:** You could redeem from a mail order catalogue--the
[19] redemption techniques were matters that could be
[20] varied. One will see in the discovery in this, one
[21] could have simply a catalogue at Sainsbury's and at
[22] Shell, and the various retailers, and you could go and
[23] collect your points at Sainsbury's, go to Shell and get
[24] your gifts from the catalogue there, or you could use it
[25] as a currency to get discounts.

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[1] **MR JUSTICE LADDIE:** What I am saying, Mr Cox, is this is a
[2] description of a limited Greenshield stamps project.
[3] They both offer tokens, in this case electronically, and
[4] you go and redeem it in a catalogue, a mail order
[5] catalogue.

[6] **MR COX:** My Lord, it could be -

[7] **MR JUSTICE LADDIE:** It is so imprecise it could cover just
[8] about anything.

[9] **MR COX:** It could. What is being suggested is a direct
[10] link-up, no third party intervening, between Sainsbury's
[11] and Shell, issuing a common currency, issuing and
[12] redeeming a common currency. The mail order catalogue
[13] is merely one way it could be done. It could be done
[14] for their own commodities. It is a direct approach, my
[15] Lord, which is not compatible with a third party scheme
[16] being operated, like GHA; in other words, they are
[17] already exploring direct relationships with partners in
[18] a joint promotion, issuing and redeeming a common
[19] currency.

[20] It may be, my Lord, that it is not until the end
[21] of the year that this forms conclusively in the minds of
[22] Mr Lazenby and Mr Watson, because it is important to
[23] trace it step by step.

[24] My Lord, in November, this is a second important
[25] period, Mr Donovan telephoned Mr Lazenby with a view to

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[1] but just a few days before he and the claimant spoke on
[2] the phone, he asked to see a copy of that letter,
[3] knowing that it existed. He had minuted -

[4] **MR JUSTICE LADDIE:** Does he admit that he asked for the
[5] letter?

[6] **MR COX:** No. He says he can see no reason why he would have
[7] asked for it.

[8] **MR JUSTICE LADDIE:** I understand. He can see no reason why
[9] he should have asked for it, no reason why he should
[10] have looked at it, because he was already in discussions
[11] with Sainsbury's.

[12] **MR COX:** One wonders whether he has forgotten that. He says
[13] at paragraph 30 of his statement:

[14] "I understand that he alleges he left me a copy of
[15] a July 1990 letter he had written to Sainsbury's of this
[16] meeting. I have no recollection of ever requesting
[17] discussing or seeing that letter and there is simply no
[18] reason why he would have brought it along to the
[19] meeting, let alone handing it to me in the context of
[20] this meeting, and my note makes no reference to any
[21] discussions on this subject. The letter would have
[22] added nothing to our already existing thinking on
[23] loyalty schemes."

[24] Paragraph 30, my Lord.

[25] Although it is couched as having no recollection,

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[1] putting forward further proposals of a short-term
[2] nature, believing that Shell was interested in
[3] short-term promotions. During that telephone
[4] conversation it is our case that Mr Lazenby asked him
[5] some time in early November, "Could you bring with you,
[6] or send me a copy of the letter you wrote to Sainsbury's
[7] back in July 1990?" Mr Donovan and Mr Lazenby agreed to
[8] meet on 24th November 1992.

[9] **MR JUSTICE LADDIE:** Just a second.

[10] **MR COX:** My Lord, Mr Lazenby, they did -

[11] **MR JUSTICE LADDIE:** They met when?

[12] **MR COX:** 24th November, 1992.

[13] My Lord, Mr Lazenby admits that meeting but says
[14] that he cannot recall seeing, reading or receiving the
[15] letter of 24th July, 1990 that is, and cannot think, or
[16] indeed, more than that:

[17] "There is simply no reason why John Donovan
[18] should have brought that letter to the meeting" - I am
[19] quoting verbatim from his statement at paragraph 30 -

[20] "let alone hand it to me in the context of this
[21] meeting. My meeting note makes no reference to any
[22] discussions on this subject."

[23] **He says:**

[24] "It would have added nothing to our thinking."

[25] My Lord, one knows not whether he had forgotten,

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[1] it seems to us, with respect, to be a clear denial and
[2] it is denied in the pleadings -

[3] **MR JUSTICE LADDIE:** Sure.

[4] **MR COX:** The fact is that just a few weeks before, just of
[5] some days before, he asked to see that letter, he had
[6] written or rather he had strongly recommended to his
[7] immediate superior to write to Sainsbury's, approaching
[8] them for a direct common currency promotion, just as he
[9] knew the claimant had done -

[10] **MR JUSTICE LADDIE:** Maybe I am misunderstanding. Assume for
[11] the moment that Mr Lazenby knew of the letters that he
[12] wrote to the internal memorandum to senior management
[13] and the fact that he was going to write to Sainsbury's,
[14] and so on and so forth, why is that inconsistent with
[15] paragraph 30, having decided to do it all himself,
[16] having told management that he was going to do it, why
[17] did he need to see a letter from Don?

[18] **MR COX:** My Lord, I submit the reason is obvious. The
[19] reason is that when you are making an approach along
[20] exactly the same or very similar lines to one that you
[21] know has been made before by Shell, or at least with
[22] Shell's direct approval, Sainsbury's being a prize
[23] partner in the market for this kind of promotion, you
[24] would want to establish in your own mind what has gone
[25] before.

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[1] It would be the most ordinary activity of a
[2] professional man to say, if one knows you are entering a
[3] negotiation with a major partner, potential partner,
[4] like Sainsbury's, the first thing you do is ask to see
[5] what has happened before. "What have we discussed in
[6] the past with Sainsbury?" You know, because you have
[7] had disclosed to you in May, that an approach was made
[8] directly on behalf of Shell, with Shell's approval and
[9] Shell's textual input and it would be, I submit, not
[10] only natural but possibly negligent not to say, "We need
[11] to see what was said before, how was it put, and more
[12] importantly, how was it left with Sainsbury's, with what
[13] expressions of interest, with what understandings?" To
[14] have the letter then was the natural thing that any
[15] reasonably competent man would have done. My Lord, in
[16] our submission it was probably essential, so that you
[17] could see that you were not making incompatible
[18] statements.

[19] In this case, it is very significant, because if
[20] he asked for that letter from Mr Donovan and Mr Donovan
[21] gave it to him, as he and Sotherton say he did, then it
[22] means that Lazenby knew that the letter existed. That
[23] is why Mr Donovan and Mr Sotherton brought it on 24th
[24] November, because they had been asked to, and the reason
[25] why they had been asked to was because unbeknownst to

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[1] Mr Donovan until discovery, a strong recommendation had
[2] been made by Lazenby to approach Sainsbury's for a
[3] common currency partnership promotion and Mr Watson had
[4] done that.

[5] It does mean, if one thinks about it, and this
[6] will be a matter for the evidence and Mr Lazenby, if he
[7] comes, that if he knew about that letter, he could have
[8] only known about it via the meetings he had with my
[9] client, the claimant, on his own story, because he says
[10] he has not consulted Mr King, although they work in the
[11] same department. He asks for that letter. It does
[12] rather suggest that May and November hang together.

[13] **MR JUSTICE LADDIE:** Can you tell me this: is there any
[14] evidence other than the witness statements of
[15] Mr Sotherton and Mr Donovan that the letter was in fact
[16] handed over?

[17] **MR COX:** My Lord, there is the evidence of Mr Sotherton;
[18] there is a note Mr Sotherton made on his copy there was
[19] such a letter.

[20] **MR JUSTICE LADDIE:** Can you tell me where that is?

[21] **MR COX:** My Lord, I can. It is to be found at - if your
[22] Lordship will give me one moment. Would your Lordship
[23] bear with me for just a moment? It is E1, my Lord,
[24] 450/A.

[25] **MR JUSTICE LADDIE:** E1.

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[1] **MR HOBBS:** It is a second copy of a letter. 450/A is the
[2] one with the annotation on it. You need to contrast it
[3] with the one which precedes it at 449.

[4] **MR COX:** I am very grateful. It has been filed there
[5] because it would have borne a date in July.
[6] Page 450/A.

[7] **MR JUSTICE LADDIE:** Yes. That does not -

[8] **MR COX:** My Lord, no.

[9] **MR JUSTICE LADDIE:** It does not suggest that that was
[10] contemporaneously written on the document. This looks
[11] like it could just be a note to solicitors, or something
[12] like that.

[13] **MR COX:** One does not know. It is the only note -

[14] **MR JUSTICE LADDIE:** It is not suggested that that note was
[15] added contemporaneously.

[16] **MR HOBBS:** Yes, it is suggested.

[17] **MR COX:** Mr Sotherton does say that he made a note on the
[18] document at the time and if I can take your Lordship to
[19] that witness statement, it is in the claimant's bundle.

[20] **MR JUSTICE LADDIE:** For example, on 24th November, or 25th
[21] November, he wrote on it:

[22] "Relates to proposal presented to Paul King" -
[23] I have the wrong note, obviously.

[24] **MR COX:** 450/B I am told.

[25] **MR HOBBS:** The manuscript note is on 450/B.

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[1] **MR JUSTICE LADDIE:** Quite right. Just leave it for a
[2] moment. (Pause) I see.

[3] **MR COX:** My Lord, Mr Sotherton says he made a note on the
[4] letter -

[5] **MR JUSTICE LADDIE:** Yes, I see.

[6] **MR COX:** - at paragraph 22. That appears to be it.

[7] But, my Lord, the position is that that is a
[8] straightforward issue of fact. We submit, we say the
[9] letter was handed over; it was brought to that meeting
[10] as a result of a request. Unbeknownst to Mr Donovan,
[11] there is a very good reason why it would have been
[12] required and asked for by Mr Lazenby. That has emerged
[13] on discovery with those two documents on 28th and 30th
[14] October.

[15] Sainsbury's was a sensitive issue. It was
[16] perceived as the prize grocer supermarket. It was known
[17] to be very hard to get. Unquestionably arose issues of
[18] some sensitivity and, therefore, to determine what had
[19] happened in 1990 would have been important. We say
[20] Lazenby got that letter.

[21] My Lord, it is important to recollect something
[22] because of course it is said - there was no mention of
[23] giving that letter over by Mr Donovan and Mr Sotherton
[24] when they wrote subsequently to Mr Lazenby on 3rd
[25] December 1992. On 3rd December 1992, which was the next

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[1] piece of correspondence -
[2] **MR JUSTICE LADDIE:** 1345?
[3] **MR COX:** I think so, my Lord, yes. 1345. Mr Donovan writes
[4] about the recent presentation of Hollywood Collection
[5] and Make Merry concepts and deals exclusively with the
[6] Hollywood Collection and Make Merry concepts and
[7] proposals.

[8] The reason for that is we submit that Mr Lazenby
[9] told Mr Sotherton and Mr Donovan that there was no
[10] prospect of a long-term loyalty promotion for a long
[11] time yet to come. In other words, Mr Sotherton and
[12] Mr Donovan did not understand there to be more than a
[13] passing interest; Mr Lazenby asking to see it, a brief
[14] discussion with no immediate relevance, because
[15] Mr Lazenby -

[16] **MR JUSTICE LADDIE:** Wait a minute. Once again, to be
[17] perfectly clear, what this must mean, if that evidence
[18] is right, is that Mr Lazenby, who was deeply in
[19] negotiation with Sainsbury, asked to see a copy of the
[20] letter, which he did not have in his files.

[21] **MR COX:** Yes.

[22] **MR JUSTICE LADDIE:** Because he knew it existed, and
[23] deliberately and dishonestly said, "There is no
[24] long-term project going on", so that Mr Donovan and
[25] Mr Sotherton would not realise that this information was

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[1] recollection. This is an exercise in deliberate deceit,
[2] if you are right.

[3] **MR COX:** Yes.

[4] **MR JUSTICE LADDIE:** There is really no alternative to that
[5] suggestion.

[6] **MR COX:** There is not, I am afraid. The only reason -

[7] **MR JUSTICE LADDIE:** Fine.

[8] **MR COX:** The only reason I have been diffident about it is
[9] that one is reluctant to make such an allegation and one

[10] is reluctant, but the fact is that the facts, we will
[11] have to submit, drive one to the conclusion that this
[12] young man was on the make, wanted to make a name for
[13] himself, did not tell his superiors that he was

[14] receiving good ideas from Mr Donovan and drove the
[15] project along the lines suggested by Mr Donovan, no

[16] doubt not telling his superiors that the input, what he
[17] was being fed was from somebody else.

[18] **MR JUSTICE LADDIE:** It makes life so much easier when I know
[19] that no prisoners are being taken.

[20] **MR COX:** I am not famed for taking prisoners. May I also
[21] say that I suppose I would not be here if this were the
[22] nature and nub of the case for your Lordship to decide.

[23] **MR JUSTICE LADDIE:** It is obviously going to be a hard
[24] fought action.

[25] **MR COX:** The fact is that we submit Mr Donovan was being

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[1] being furnished to help them with precisely such a
[2] long-term loyalty.

[3] **MR COX:** Exactly.

[4] **MR JUSTICE LADDIE:** No if-ings and but-ings. That is, if
[5] your clients are right, unquestionably an action of
[6] deceit.

[7] **MR COX:** Unscrupulous and unethical conduct, we agree.

[8] **MR JUSTICE LADDIE:** Designed to hide from Mr Donovan and
[9] Mr Sotherton the fact that they were going ahead with
[10] just that thing which Shell said they were not going
[11] ahead with.

[12] **MR COX:** Yes, they were told it would be too ambitious to go
[13] for a multipartner scheme in the immediate future, all
[14] on the back burner, but no doubt it was helpful to have
[15] for future consideration.

[16] **MR JUSTICE LADDIE:** That does clear the air a bit.

[17] **MR COX:** Yes. I know you have been trying to draw me out.

[18] **MR JUSTICE LADDIE:** On this one I do not think you have much
[19] choice. Your case on this is that Lazenby is a liar.
[20] There is no other alternative; he is a liar. If I think
[21] he is a liar, I will say so. There is no two ways about
[22] it.

[23] **MR COX:** I do not think so.

[24] **MR JUSTICE LADDIE:** This is not an area of imperfect
[25] recollection. This is not an area of dimmed

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[1] made use of and if your Lordship has already opened the
[2] tempting pages in Pandora's box -

[3] **MR JUSTICE LADDIE:** It is an extraordinary - I mean,
[4] Mr Lazenby has to be a great poker player.

[5] **MR COX:** Not really.

[6] **MR JUSTICE LADDIE:** Yes. He could just find out from
[7] Sainsbury's what contact they had had in the past. Why
[8] get involved - these are all questions that will have
[9] to be canvassed at some stage. It is a high-risk
[10] strategy, is it not, to discuss this issue with Don just
[11] when he could find out all that he needed from Sainsbury
[12] direct?

[13] **MR COX:** No, not really. That might look a little bit - to
[14] ask Sainsbury what Shell had done in the past?

[15] **MR JUSTICE LADDIE:** It did not matter, they could just carry
[16] on with Sainsbury and say, "Let us work out how we can
[17] co-operate together". You know the expression "sleeping
[18] dogs", why wake up Don about the Sainsbury -

[19] **MR COX:** But you were not waking him up. You had been
[20] telling them in May and in November, "It is a long way
[21] ahead, we will keep it in the locker. It is all far,
[22] far off. We think it is too ambitious", you were not
[23] waking anybody up. Meantime, you were discussing
[24] actively short-term promotions and making them believe
[25] no doubt, as was no doubt the truth, they were being

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[1] actively considered for short-term promotions.
[2] It is not, in fact, as I will submit to your
[3] Lordship during the trial, a very difficult trick; it is
[4] just ordinary stuff of the criminal court, albeit in
[5] this case it does not have the elements that will bring
[6] it before those courts. It is not a criminal offence to
[7] steal somebody's idea.
[8] **MR JUSTICE LADDIE:** It is criminal to commit perjury.
[9] **MR COX:** That is another matter, as your Lordship knows.
[10] Either Mr Donovan is telling a lie and Mr Sotherton or
[11] it may very well be -
[12] **MR JUSTICE LADDIE:** As I said, no prisoners in this case.
[13] **MR COX:** Yes. My Lord, moving forward, not to take up your
[14] Lordship's time too much longer, on 24th December 1992,
[15] Mr Lazenby, and that, my Lord -
[16] **MR JUSTICE LADDIE:** 1356, this is a note to Mr Leggatt.
[17] **MR COX:** It is the note to Mr Leggatt, my Lord, yes. I seem
[18] to have the wrong bundle here.
[19] **MR JUSTICE LADDIE:** E3, 1356.
[20] **MR COX:** Yes, my Lord, I am grateful. Mr Lazenby urgently
[21] minuted Mr Leggatt, a senior man at Shell, to say with a
[22] launch date of October 1st 1993 for Project Onyx and, of
[23] course, this is one feature, that they were moving
[24] forward with a very ambitious date, they wanted to get
[25] this on by 1st October 1993.

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[1] **MR JUSTICE LADDIE:** Just one second. Was there a copy?
[2] **MR COX:** No.
[3] **MR JUSTICE LADDIE:** In discovery?
[4] **MR COX:** No.
[5] **MR JUSTICE LADDIE:** So we have not just that Mr Lazenby is
[6] lying but that he has destroyed the documents. That
[7] must be the case.
[8] **MR COX:** He may not have retained it at the time, beyond
[9] reading it.
[10] It is quite right, I should have reminded your
[11] Lordship, there was an office move in which Mr Lazenby
[12] says quite a lot of his documents went missing or were
[13] lost or destroyed.
[14] **MR JUSTICE LADDIE:** I see. Okay.
[15] **MR COX:** I will help your Lordship further with that but one
[16] of the questions I propose to ask Mr Lazenby is where -
[17] my Lord, there was no discovery of the files relating to
[18] Mr King, as far as we can see. There were no letters,
[19] and so on, relating to that. I will have to take
[20] instructions about it. It may be that Mr Lazenby is
[21] referring to that as to the reason why he could not find
[22] certain documents of Mr King's. I will have to check
[23] that.
[24] **MR JUSTICE LADDIE:** There is no copy of that.
[25] **MR COX:** No. Page 1356.

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[1] **MR JUSTICE LADDIE:** Just a moment. 1356.
[2] **MR COX:** My Lord, it is significant to note that that letter
[3] was not found at all, even though Mr King would have had
[4] one in 1990.
[5] **MR JUSTICE LADDIE:** I understand that. As I understand it,
[6] that letter was drafted with the assistance of Mr King,
[7] originally; that is what it says.
[8] **MR COX:** Yes.
[9] **MR JUSTICE LADDIE:** And there seems to be contemporaneous
[10] other documentation which confirms that. You have
[11] already told me that there has been no discovery, or
[12] very little discovery, relating to Mr King's files and
[13] that may be because of what happened in the move.
[14] **MR COX:** It is possible.
[15] **MR JUSTICE LADDIE:** To lose one letter ...
[16] **MR COX:** We do not know whether he kept it. He may, for
[17] example, have discarded it at the time.
[18] **MR JUSTICE LADDIE:** The importance of preserving doc-
[19] uments,
[20] to lose one letter is a misfortune, to lose two ...
[21] **MR COX:** I can see what your Lordship is -
[22] **MR JUSTICE LADDIE:** It was a great misfortune really to lose
[23] two.
[24] **MR COX:** Yes.
[25] **MR JUSTICE LADDIE:** On the assumption that there were two.
[26] **MR COX:** Yes. Mr Donovan is absolutely clear, as is

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[1] Mr Sotherton, that it was given to him.
[2] **MR JUSTICE LADDIE:** Absolutely. There is going to be a
[3] clear difference of evidence on this issue.
[4] **MR COX:** Yes. Your Lordship can see why it has excited
[5] strong feeling. If it is right what Mr Donovan says,
[6] your Lordship can see -
[7] **MR JUSTICE LADDIE:** Mr Cox, what I gathered when I was
[8] reading the papers is that Shell do not like being
[9] called liars and fraudsters and your clients do not like
[10] being cheated. One of them is justified in that
[11] feeling. Your clients may well have been cheated. That
[12] is your case.
[13] **MR COX:** Yes.
[14] **MR JUSTICE LADDIE:** If so, no wonder they are exceedingly
[15] upset. If, on the other hand, they have not been
[16] cheated, Shell have been accused of being liars and no
[17] doubt they are upset and that is why no doubt a lot of
[18] money is going to be spent on this litigation.
[19] **MR COX:** Yes, a great deal. When I say "Shell", one means
[20] at least a single employee.
[21] **MR JUSTICE LADDIE:** Mr Lazenby, but it is not as simple as
[22] that because your client has gone around saying - not
[23] just your client but some of the other witnesses -
[24] "What a disgraceful company Shell is, they continue to
[25] employ a crook like Lazenby." There is a lot of strong

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[1] language on either side.
[2] **MR COX:** What I would not want to do is lay against some of
[3] the individuals in this case any such allegation. I am
[4] conscious very much that this is being fought in open
[5] court and we are responsibly bound to be careful about
[6] what one says. I am not suggesting in the case of
[7] Mr Leggatt or Mr Pirret, or whatever it may be, that
[8] these things could possibly apply.

[9] **MR JUSTICE LADDIE:** 1356.

[10] **MR COX:** Mr Lazenby is minuting quite urgently because of
[11] the looming rapidly date option 5, "Various options and
[12] current status report on the project, summary of options
[13] open to us" and, my Lord, the relevant one is at option
[14] 5, what he calls "the ultimate".

[15] Your Lordship will remember that in the concept 4
[16] document -

[17] **MR JUSTICE LADDIE:** I remember it.

[18] **MR COX:** It is no more than a passing fancy of mine to refer
[19] it to you and probably with no relevance.

[20] "Option 4, but with partner promotors both
[21] redeeming and issuing electronic points. Each
[22] individual partner promotor will not necessarily both
[23] issue and redeem points."

[24] That is the claimant's idea. If I can take your
[25] Lordship back in recollection only to that idea, there

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[1] he calls it just a few months later, the Aladdin's lamp,
[2] is a scheme of a multipartner consortium with issuing
[3] and redeeming what he calls full partners. Despite the
[4] rather interesting questions we were asked during
[5] pleadings about what was a partner, discovery showed
[6] that Shell knew full well what a partner was because
[7] they used those very terms, "We will have a full partner
[8] and we will have an associate partner". The full
[9] partner was defined in the documents as issuers and
[10] redeemers, fully on board inside the consortium; the
[11] other kind was just redeemers.

[12] So this idea, by December, was entrenched within
[13] at least what became the project manager of Hercules,
[14] the implementation project to launch the Smart scheme,
[15] in his mind. Nowhere, we submit, does it show in these
[16] documents where that idea came from, neither in the
[17] evidence of the witness statements; it has simply
[18] evolved, but your Lordship knows what our case is.

[19] It is significant that when one comes - they also
[20] by now had decided that persons who were going to
[21] implement their Shell scheme were not going to be GHA
[22] and Senior King, they got rid of them and they brought
[23] in Option One. My Lord, the terms on which they brought
[24] in Option One are quite interesting. I need not take
[25] too much of your Lordship's time with this. Suffice it

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[1] will be some partners both issuing and redeemers; there
[2] will be others merely redeeming. They will be partners
[3] in a consortium and they will be with a common
[4] currency. He goes on to say:
[5] "Options 1, 2 and 3 can be implemented by 1st
[6] October ... Option 4 will be more difficult since it
[7] will require some investment and technological hardware
[8] input from partner promotor and hence it is unlikely
[9] that third parties' redemption of electronic points
[10] could be achieved before Q1 1994. Option 5 will take
[11] even longer with partner promotors issuing and redeeming
[12] points.

[13] "It is quite possible that we can launch options
[14] 4 and 5 on October 1st 1993 in a limited way on the
[15] basis that our partner promotors are brought on-line as
[16] soon as possible after the launch."

[17] He then reviews the competitor position at 1357.
[18] My Lord, that is how he leaves it at Christmas.

[19] My Lord, may I now begin to try to generate some
[20] of the reality that a close and rather lengthy
[21] examination of these documents we say gives rise to when
[22] one looks at it.

[23] What this document is making clear is Lazenby -
[24] at least Mr Lazenby we submit - has formed a clear idea
[25] of where he wants to go. The scheme, the ultimate, as

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[1] to say that Mr Lazenby himself, my Lord, says they were
[2] brought in to do no strategic work, no work of any kind
[3] of imaginative or character dreaming up the scheme. He
[4] says as follows:

[5] "We did not want them", this is Lazenby,
[6] paragraph 34, "15th January 1993, we considered
[7] Powerpoints and Senior King's proposals further and
[8] while we were still interested in pursuing those ideas
[9] we were not wholly convinced about either of them.
[10] Powerpoints' proposal was a ready-made package and could
[11] not be flexible about Shell's needs."

[12] There at once they are identifying the difference,
[13] a difference, although they do not spell out what the
[14] needs were which were not fulfilled:

[15] "Senior King were no longer working with Hughes
[16] Electronics and they were too small anyway, so we again
[17] thought of using Option One, a substantial marketing
[18] agency with a proven track record. We thought that
[19] Option One would be able to assist with promotional
[20] advice as well as PR and design but we did not want them
[21] to start acting as general strategic consultants.

[22] "They were not cheap. They had a far greater
[23] number of contacts than Senior King and would be a good
[24] intermediary to approach third parties as promotional
[25] partners. We decided to brief them to produce a

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[1] strategic plan, an implementation plan of the marketing
[2] offer and the means to present that offer. The idea was
[3] to have several third parties who at least expressed
[4] serious interest in principle in becoming promotional
[5] partners within the coming months."

[6] So before Option One were brought on, they were
[7] brought on, my Lord, not to review, Mr Watson agrees,
[8] not rather to do any strategic thinking. In fact, they
[9] already had what they described as a vision and, at
[10] paragraph 36, in terms that even through the dryish
[11] print of a no doubt carefully drafted witness statement,
[12] the enthusiasm and pride we submit peeps through the
[13] language used by this witness because he says, my Lord,
[14] at paragraph 38:

[15] "I also set out our vision for the next
[16] generation", this is to Option One, "of strategic
[17] loyalty promotions. We briefed Option One to act as our
[18] promotions agency, to review this vision, to participate
[19] in our market research exercise and to achieve contact
[20] with promotional partners with a view to the joint
[21] promotion and to select the correct mechanical and
[22] technical supplier using the experience which Shell had
[23] already."

[24] **He says:**

[25] "We did not have a deficient loop in from

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[1] you intend to refer me to?

[2] **MR COX:** I can give you one.

[3] **MR JUSTICE LADDIE:** Would it be easier if you give me that
[4] list and I promise you I will have read them all
[5] assiduously before we start again tomorrow morning? It
[6] might save a little bit of time.

[7] **MR COX:** I am more than happy to.

[8] **MR JUSTICE LADDIE:** You have been on your feet all day.

[9] **MR COX:** Yes, I have. I am very conscious of the length of
[10] time.

[11] **MR JUSTICE LADDIE:** They are serious allegations of
[12] impropriety.

[13] **MR COX:** My Lord, I will give you such a list.

[14] **MR JUSTICE LADDIE:** I will be in my room from about
[15] 8 o'clock tomorrow morning. As long as you fax it
[16] through to my clerk by 8.30 will do, that will be plenty
[17] of time.

[18] **MR COX:** I am very grateful. My Lord, that will shorten it
[19] considerably.

[20] **MR JUSTICE LADDIE:** I understand you will take me through
[21] them. It is just that you will not have to read it line
[22] by line.

[23] **MR COX:** There are also one or two authorities that at this
[24] stage I will take your Lordship to.

[25] **MR JUSTICE LADDIE:** If you give me those, I will have read

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[1] Hercules. Quite fundamental questions such as whether
[2] the project should be electronic or paper still remained
[3] unresolved."

[4] That is like saying, we submit, when you take this
[5] scheme as a whole and refer to quite fundamental
[6] questions such as whether it should be paper or
[7] electronic, really deciding whether or not - well, it
[8] is an exaggeration, I was going to say whether the
[9] paintwork was green or red. Your Lordship understands
[10] the point from the discussion we had before.

[11] **MR JUSTICE LADDIE:** Yes.

[12] **MR COX:** The whole point is that he gives himself away, we
[13] say, in that paragraph and the discovery will
[14] demonstrate that even more clearly as I take your
[15] Lordship through it, that they had already got the
[16] idea.

[17] **MR JUSTICE LADDIE:** Mr Cox, can you tell me how much longer
[18] you intend to be? This is a most unusual opening for
[19] the Chancery Division.

[20] **MR COX:** My Lord, I am sorry.

[21] **MR JUSTICE LADDIE:** No, if you think it has to be done, but
[22] we normally expect to see witnesses by the afternoon of
[23] the first day.

[24] **MR COX:** I apologise. I think 45 minutes, at maximum.

[25] **MR JUSTICE LADDIE:** Do you have a list of the documents that

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[1] those as well. Would that be a convenient point to
[2] leave it?

[3] **MR COX:** Yes.

[4] **MR JUSTICE LADDIE:** Thank you very much.

[5] (4.00 pm)

[6] (The court adjourned until 10.30 am the following day)

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Lawyer's Notes

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1998 D No. 2149.

Court No. 58
The Royal Courts of Justice
The Strand
LONDON EC4

16th June 1999

Before:

MR JUSTICE LADDIE

JOHN ALFRED DONOVAN
(Plaintiff)

-v-

SHELL UK LTD
(Defendant)
(by Original Action)

AND BETWEEN

SHELL UK LTD
(Plaintiff by Counterclaim)

-and-

(1) JOHN ALFRED DONOVAN
(2) DON MARKETING UK LIMITED
(3) ALFRED ERNEST DONOVAN
(Defendants to Counterclaim)
(by Counterclaim)

MR G COX, assisted by MS L LANE, instructed by Royds
Treadwell, appeared on behalf of the Plaintiffs.

MR G HOBBS, assisted by MR P ROBERTS, instructed by DJ
Freeman, appeared on behalf of the Defendant.



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[1] Wednesday, 16th June 1999

[2] (10.30 am)

[3] OPENING SUBMISSIONS by MR COX (continued)

[4] **MR COX:** My Lord, at a necessarily rapid pace and with the
[5] advantage, I hope, to your Lordship of being able to see
[6] some of the documents – I am afraid rather numerous –
[7] that I copied, I propose to complete within a relatively
[8] short time, I hope.

[9] **MR JUSTICE LADDIE:** I should tell you I have not,
[10] unfortunately, had the chance to read the authorities
[11] because I had a telephone conference which went on and
[12] on.

[13] **MR COX:** My Lord, not to worry, because I hope I shall be
[14] able to complete the facts relatively shortly.

[15] My Lord, we had reached 24th December by which
[16] time it is the claimant's case that what became and what
[17] is referred to in the witness statements as the "Shell
[18] vision" had already essentially been determined.

[19] Your Lordship will recall the letters to Sainsbury's,
[20] the paragraph with the minutes, the note dealing with
[21] the ultimate scheme, the lifestyle promotion. All of

[22] these documents existed prior to 24th December and
[23] reflected, in our submission, a clear understanding of a

[24] consortium approach with an issuing and a redeeming in
[25] an exclusive consortium of partners.

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[1] My Lord, if one then goes into January one begins
[2] to see just how powerful that idea is perceived to be
[3] and also how new. Because, if your Lordship has had an
[4] opportunity of seeing some of those documents, can
[5] I take you to a selection of them?

[6] **MR JUSTICE LADDIE:** Tell me the point you want to make,
[7] because it may not be necessary to go to the selection.
[8] I have read it for the purpose of reading them, so ...

[9] **MR COX:** Option One were brought in. They were not brought
[10] in to do what was described in some of the notes as

[11] "blue sky meandering". They were brought in to
[12] implement a predetermined and established vision. The
[13] vision was one that is set out in the Option One
[14] response document, dated 2nd March 1993. My Lord,
[15] without taking you to it, may I cite a few lines from
[16] it. Option One entitled this document "The Shell Vision
[17] Outline Response", and they wrote in a prefatory
[18] paragraph that they were now at the stage where
[19] Project Hercules, as it had then become, with Mr Lazenby
[20] as its head, was starting to take shape in their minds.

[21] What we submit is it is clear from what has gone before
[22] that what they meant was they were beginning to
[23] understand what Shell was driving at, what it was
[24] getting at. They described it as opening the door, the
[25] Smart Card technology that was being proposed, to a new

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[1] kind of involvement with partners, never previously
[2] achieved in the UK. A genuine partnership, they said,
[3] with retailers or –

[4] **MR JUSTICE LADDIE:** What page is this?

[5] **MR COX:** My Lord, this is at volume 4, 1643.

[6] **MR JUSTICE LADDIE:** Yes.

[7] **MR COX:** I am quoting from it:

[8] "A genuine partnership with retailers or
[9] manufacturers in a loyalty promotion. The kind of
[10] scheme that Air Miles dreamed of becoming but never
[11] attained, with a common reward currency."

[12] My Lord, without now exposing these documents, as
[13] I am afraid at some stage it may be necessary to do
[14] either by me providing your Lordship – and I suspect
[15] this might be helpful – with a schedule under headings
[16] of each document that we say is relevant to that
[17] specific point. That may be helpful to your Lordship.

[18] I do not know. But these documents do require – and of
[19] course they have not received analysis in any of the
[20] witness statements, for obvious reasons – some careful
[21] examination.

[22] **MR JUSTICE LADDIE:** At the end of the all, Mr Cox, this is a
[23] breach of confidence action.

[24] **MR COX:** Yes.

[25] **MR JUSTICE LADDIE:** I suspect – but nothing is

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[1] guaranteed – that Mr Hobbs is going to accept and
[2] rejoice at the fact that the Shell Smart Card promotion
[3] is wonderful. Whether unique or not is secondary. It
[4] is wonderful. No doubt they will say, as you would
[5] expect them to say, it is wonderful. They have put a
[6] lot of effort into it and it is hopefully, from their
[7] point of view, delivering the goods. What counts, as
[8] far as I am concerned, is what was it that was proposed
[9] by your client and whether that was adopted. Whatever
[10] your client proposed was not the finalised version that
[11] Shell put on the market. If you did not have the Smart
[12] Cards, the actual hardware had not been worked out, the
[13] partners had not been gone into, put your client's case
[14] as favourably as possible, but the finished package that
[15] Shell had, even on your case, was developed from your
[16] client's idea. But you are not surely suggesting that,
[17] the minute after Mr Donovan had made his proposal, they
[18] could have gone out the next day and said, "Right, that
[19] is the project we are going to adopt. We have
[20] everything in place". It is ridiculous. Of course they
[21] did not. They had to develop it. Assuming it came from
[22] your clients, it had to be refined. What they are
[23] proclaiming as wonderful is the finalised –

[24] **MR COX:** No, with respect not, my Lord. Because we are here
[25] at a stage where we are a long way away from the

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[1] finalised scheme. In January 1993 what is being greeted
 [2] is a new concept of a relationship between major
 [3] High Street retailers which had never been achieved or
 [4] even really thought of, we say, before.
 [5] **MR JUSTICE LADDIE:** Fine. I understand that. Even that,
 [6] Mr Cox, I understand. It may come as a surprise, but
 [7] I understand that. But I do not need thousands of
 [8] documents to see that point.
 [9] **MR COX:** Of course not.
 [10] **MR JUSTICE LADDIE:** I have also seen the reference in one of
 [11] the Shell documents saying the only thing in any way
 [12] like this was with Air Miles. Which is one of the
 [13] documents you drew to my attention, and I can see the
 [14] differences. Then there will be questions as to what
 [15] was it that your client handed over to Mr King and again
 [16] to Mr Lazenby, if he did, and whether that was the
 [17] origin of what it is that has gone into the defendant's
 [18] long-term promotion. I am a bit concerned that we are
 [19] going to end up rather like an advertising campaign in
 [20] this court, which I can tell you I will set my face
 [21] against. I do not believe the court's time or the
 [22] parties' money should be spent on that sort of thing.
 [23] We have to get down to the nitty-gritty.
 [24] **MR COX:** My Lord, we agree. The documents throughout 1993
 [25] we say show - first, it goes to the issue of the

[1] anyone else. But I am afraid in real time I have to
 [2] unfold these things. I have taken the decision this
 [3] morning not to trouble your Lordship with it, but to do
 [4] it by short order.
 [5] **MR JUSTICE LADDIE:** Fine.
 [6] **MR COX:** And that is by scheduling the documents under
 [7] headings during the course of the trial. But may
 [8] I simply, plucking at random - for example, there is at
 [9] volume 4/1796 qualitative consultancy market research
 [10] results. When I seized these examples, frankly I am
 [11] embarrassed by the number of plums that I could pluck
 [12] from the tree. So I do not mean this to be exhibiting
 [13] the strongest case that I could manage. But, my Lord,
 [14] qualitative consultative market research greeted the
 [15] idea that they had been brought in to test by focus
 [16] group of consumer reaction as this new idea from Shell.
 [17] **MR JUSTICE LADDIE:** Mr Cox, for goodness sake. We are grown
 [18] men. What do you expect them to say? They have just
 [19] been brought in by Shell. "We have been asked to test
 [20] this trite thing". What do you expect them to say?
 [21] They are in the advertising field.
 [22] **MR COX:** Yes, I know, and that may well be the answer: the
 [23] whole thing was just a lot of puff. But, insofar as one
 [24] can base anything on the documents that were
 [25] contemporary, they point one way. I am going to be

[1] quality of confidence because everybody -
 [2] **MR JUSTICE LADDIE:** That is not in dispute, Mr Cox. It is
 [3] not in dispute. Mr Hobbs accepts that, if it was
 [4] suitable for treating as confidential: that is, of
 [5] sufficient merit - whatever it was was handed over
 [6] under obligations of confidence. There is no doubt
 [7] about that.
 [8] **MR COX:** No, my Lord, forgive me. I am not making myself
 [9] clear. As I understand it, what is disputed or not
 [10] admitted - not so much denied but not admitted - is
 [11] that this information possessed the necessary quality of
 [12] confidence. It was not new: it was trite. It was so
 [13] ordinary, so much in the public domain that it was
 [14] completely incapable of protection by an obligation of
 [15] confidence. Now, to that issue, to some extent, in our
 [16] submission - I will not trouble your Lordship with it
 [17] now - the clear contemporary evidence of the response
 [18] of the trade is both foreshadowed in the authorities as
 [19] a relevant factor and is shown in the documents as being
 [20] all one way, as being a profoundly new concept. For
 [21] example, and I quoted at random from such a plethora of
 [22] examples that I am embarrassed by them. Indeed, I am
 [23] embarrassed in presenting them to your Lordship.
 [24] Because of course I know your Lordship can seize the
 [25] essence of a document faster than I can and faster than

[1] exposed -
 [2] **MR JUSTICE LADDIE:** It may be that this is not the strongest
 [3] point that Mr Hobbs has. Whatever the input of your
 [4] clients, at the end of the day the project that Shell
 [5] had was considered by them to be commercially worthwhile
 [6] and, at the least, commercially sufficiently valuable to
 [7] need to keep it from the eyes of competitors. Although
 [8] they accepted sooner or later their competitors would
 [9] either find out about it or would get there themselves.
 [10] But they needed to be there first, and it was
 [11] commercially important for them to have this new project
 [12] kept confidential. To the extent that, whatever they
 [13] wanted kept confidential was the same as what Mr Donovan
 [14] handed to them, it is going to be difficult for them to
 [15] say what Mr Donovan had was not of a sufficient quality
 [16] to warrant being kept confidential.
 [17] **MR COX:** Sometimes one finds oneself profoundly wishing one
 [18] had put it like that oneself.
 [19] **MR JUSTICE LADDIE:** One of the things that I suspect
 [20] Mr Hobbs is going to say is, well, whatever the result
 [21] may have been inside Shell, what was proposed was at
 [22] such a high level of generality and low level of detail
 [23] as to be like wisps in the wind. That is what he is
 [24] going to say. He may not succeed, Mr Cox, but that is
 [25] what he is going to say. If it is his best point, he

[1] will put a lot of effort into it. Maybe there are other
 [2] points he will put effort into as well, but that is one
 [3] of the things he is going to say.
 [4] **MR COX:** My Lord, I can see the way your Lordship is moving,
 [5] or at least indicating for me this morning. May I say,
 [6] therefore, that is the first point your Lordship has so
 [7] - if I may say so - eloquently summarised. The
 [8] second point to which these documents would go is the
 [9] fact that there are profound similarities between the
 [10] way - even the formula which the claimant adopted in
 [11] his documents and disclosures - but the way in which
 [12] subsequently one can see in 1993 Shell approaching it.
 [13] **MR JUSTICE LADDIE:** Once again I am trying to look ahead.
 [14] As I understand it, one of the things you are going to
 [15] say - and this is just a reflection of how I understand
 [16] the issues arising - is look at the distilled high
 [17] points selected by Shell as making this such a wonderful
 [18] scheme. You say those distilled high points are in
 [19] substance what Mr Donovan handed over. That may be
 [20] right and, if that is right, it will go some way - it
 [21] may go a long way - towards supporting your client's
 [22] submission that there is sufficient identity to give
 [23] rise to an inference of copying or derivation and that
 [24] there is sufficient in it to undermine Mr Hobbs'
 [25] submission that this is too generalised to be

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[1] was Mr Donovan's proposals up their sleeve and were
 [2] referring to them?
 [3] **MR COX:** The basic premises of Mr Donovan's proposals can be
 [4] seen to be the very issues with which -
 [5] **MR JUSTICE LADDIE:** Sorry, Mr Cox, we are talking about
 [6] terminology. You are paying emphasis on terminology.
 [7] I want to know are you saying this means they actually
 [8] had the document in front them?
 [9] **MR COX:** No.
 [10] **MR JUSTICE LADDIE:** Terminology just happens to be because
 [11] they are both writing in English?
 [12] **MR COX:** Yes, if your Lordship will have it so. I am going
 [13] to retreat as gracefully as I can from taking
 [14] your Lordship through these documents. I am then going
 [15] simply, having the comfort of knowing your Lordship has
 [16] read these, to take your Lordship -
 [17] **MR JUSTICE LADDIE:** I have read all the ones you identified
 [18] and I cast my eyes over some of the following pages as
 [19] well. They were such a gripping read.
 [20] **MR COX:** I do not have to be bludgeoned or cudgelled too
 [21] hard to see the way your Lordship's mind is working.
 [22] My Lord, may I take you to the authorities, the
 [23] claimant's bundle? Simply to assist, I hope, by way of
 [24] introduction to your Lordship some of the matters which
 [25] we place reliance upon. The claimant's bundle, a black

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[1] protectable. But once again, at the end of the day,
 [2] I have to bear in mind that all of these
 [3] documents - your client's documents and Shell's
 [4] documents - are not written by lawyers specialised in
 [5] the law of intellectual property or lawyers at all.
 [6] They are written in advertising language all the way
 [7] through. In fact, one of the things that struck me
 [8] about Mr Lazenby's documents, when talking to his own
 [9] staff, it sounded like General Patton addressing the
 [10] troops. "Let's go forward, strongly arm in arm. I am
 [11] not going to impose my machiavellian views on people".
 [12] Terrific, terrific stuff.
 [13] **MR COX:** Yes.
 [14] **MR JUSTICE LADDIE:** But, at the end of the day, I am going
 [15] to have to make up my mind what was handed over, whether
 [16] it was used and whether it is confidential.
 [17] **MR COX:** I would simply conclude this part by saying, my
 [18] Lord, that those documents in 1993 might assist, as they
 [19] show them grappling with precisely the same problems in
 [20] exactly the same terminology often as used by Mr Donovan
 [21] in his disclosures to Shell.
 [22] **MR JUSTICE LADDIE:** Let me make sure I understand the
 [23] "exactly the same terminology" point. Is the "exactly
 [24] the same terminology" just a happy coincidence, or is
 [25] this a subliminal suggestion to me that what they had

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[1] bundle.
 [2] (10.45 am)
 [3] My Lord, to the extent that I need to for these
 [4] purposes, may I begin to introduce your Lordship to an
 [5] area with which I know you are already more than
 [6] familiar. My Lord, the latest case is a case called
 [7] De Maudsley v Palumbo. But, my Lord, if I may,
 [8] I propose to deal first with the two television
 [9] programme cases, one in Australia and one of course in
 [10] this country. My Lord, first at tab 7, Talbot v The
 [11] General Television Corporation, 1981 RPC, page 1.
 [12] **MR JUSTICE LADDIE:** Yes.
 [13] **MR COX:** My Lord, this was a case of a proposal for a
 [14] television programme. The plaintiff was a film producer
 [15] who had developed a concept or idea for a series of half
 [16] hour television programmes. Your Lordship may be
 [17] familiar with the facts.
 [18] **MR JUSTICE LADDIE:** I do not remember it. I have read it
 [19] once.
 [20] **MR COX:** May I briefly deal with them for your Lordship? He
 [21] devised an idea of interviewing and making programmes
 [22] about Australian millionaires and, although that had
 [23] been done before in general terms in the sense that
 [24] programmes about rich men had been made in which they
 [25] had given their life stories, what was new about this

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[1] particular idea for a programme was that it had the
 [2] slant that the millionaires would spend a few minutes in
 [3] an allocated slot telling us all how we too might make
 [4] a million. My Lord, the plaintiff in this case produced
 [5] that idea and sent it to the Channel 9 network in
 [6] Australia. Reading from the headnote, he prepared:
 [7] "... a written submission for use in negotiation
 [8] for the sale of the programme to television networks.
 [9] In the course of negotiations with Channel 9 network
 [10] television stations in December 1996 T disclosed the
 [11] concept and presented the submission."
 [12] He then, at a later stage, subsequently forwarded
 [13] to the network a pilot script for the programme, but
 [14] thereafter there was no further communication, no
 [15] response. In 1977, a few months later in April 1977, he
 [16] became aware of promotional material being broadcast by
 [17] the defendant, the operator of the Channel 9 network
 [18] station in Melbourne advertising a forthcoming series of
 [19] segments on a current affairs programme in which persons
 [20] who became millionaires through their own efforts would
 [21] spell out their recipes for success and posing to the
 [22] viewers the question: could you be a millionaire too?
 There were then discussions and correspondence between
 solicitors and an injunction was obtained. My Lord,
 [25] however, I understand, at least the first segment was

[1] been commenting on already this morning:
 [2] "Then follow some quotations and some seven sample
 [3] stories. Each story dealt with an Australian who
 [4] started with nothing or very little and became very
 [5] wealthy. Programme philosophy is stated in these terms:
 [6] the previous shortlist of subjects demonstrates the
 [7] scope for the development of this programme."
 [8] My Lord, I pause to interpolate: this is an idea
 [9] plainly not yet developed:
 [10] "Its commercial aspects centre on two points:
 [11] people are fascinated by money, particularly when it is
 [12] counted in millions, and they enjoy prying into the
 [13] private lives of others. By looking at a series of real
 [14] life millionaires and examining how they have made it,
 [15] as well as their life styles, will satisfy the needs and
 [16] desires in the minds of the audience."
 [17] This, I suppose, is addressing the appeal of the
 [18] programme. Much, as we say, Mr Donovan addressed the
 [19] appeal of his concept in the documents that
 [20] your Lordship has before him:
 [21] "Each case study will provide viewers with
 [22] in-depth background about how the million dollars was
 [23] made and how it is being spent. It is a show for
 [24] financial voyeurs and there is a little of that in all
 [25] of us."

[1] broadcast and this matter came before the court in the
 [2] Supreme Court of Victoria.
 [3] My Lord, the relevant passages of the judgment,
 [4] may I take your Lordship to page 5 first of the
 [5] judgment? At line 10 on page 5 the learned judge sets
 [6] out that:
 [7] "The plaintiff had developed a concept for a
 [8] television programme. The theme of the concept: the
 [9] programme should depict the story of the success of
 [10] selected millionaires with the specific theme that the
 [11] success of those persons could provide an example and
 [12] inspiration for viewers to make a million for
 [13] themselves."
 [14] Then he describes the nature of the submission in
 [15] the judgment:
 [16] "The submission began with an introduction which
 [17] included these passages:
 [18] "Everyone has the desire to become a
 [19] millionaire. Few of us make it. This programme is
 [20] about those who have, how they did it, how it affected
 [21] them. How does it affect a man when he goes from
 [22] selling oranges door-to-door to millionaire six times
 [23] over all in the space of seven years?"
 [24] The language of course is not dissimilar in tone
 [25] and style sometimes to the language your Lordship has

[1] Then under "Format" it is posed as a suggestion:
 [2] "... can be constructed in one of two ways.
 [3] Ideally a 30-minute show. However, if it is desirable
 [4] from a programming standpoint, it could be produced as
 [5] a one-hour with three participants in each show.
 [6] Initially the subject will be introduced by way of
 [7] location interview. We will then retrace his or her
 [8] path to fortune, perhaps including key figures."
 [9] May I pause there just for a moment to say the way
 [10] this idea is adumbrated in these documents with its
 [11] "possibilities" and its "perhapses" and its suggestions
 [12] of alternatives is not dissimilar in feature and
 [13] character from the way in which Mr Donovan put forward
 [14] his ideas.
 [15] **MR JUSTICE LADDIE:** It does not stop being suitable for
 [16] being confidential information because you have a number
 [17] of options and some things are not finalised.
 [18] **MR COX:** Exactly. It is posed in the condition. My Lord,
 [19] the possibility of specials was adverted to and there
 [20] was a section on costing. Finally there is a summary:
 [21] "Because of its content, to make a million is a
 [22] natural big rater because it has a common denominator
 [23] that everyone is interested in: money."
 [24] Then a paragraph about the class of millionaires
 [25] who are growing. Again designed, no doubt, to give a

[1] feel of the attraction of such a programme.
 [2] My Lord, there were meetings on 7th October 1976
 [3] in the studios to disclose this idea and, at the
 [4] meeting, from line 22:
 [5] "... copies of the plaintiff's submission were
 [6] given to a Mr Chisholm, Mr French and Mr Schildberger
 [7] and these were left with them. After the meeting the
 [8] concept was discussed. The meeting ended on the basis
 [9] that the plaintiff would make further enquiries and
 [10] contact the other persons further."
 [11] He did make other enquiries and then he
 [12] endeavoured to get in touch with Mr French. He was
 [13] unable to do so for a considerable time. During this
 [14] period a pilot script for one episode of the proposed
 [15] programme was written, entitled "How To Make A Million"
 [16] and dealt with the story of one successful man and how
 [17] he succeeded. On 6th January, following a telephone
 [18] conversation on that day, the plaintiff wrote to
 [19] Mr French enclosing the pilot script:
 [20] "Following our telephone conversation, I would
 [21] like to submit to you this pilot script. I point out it
 [22] is based on actual interviews and is a true reflection.
 [23] Since we last talked about this series we have
 [24] approached certain individuals on our list of sixty.
 [25] All of them have agreed to appear."

[1] how a millionaire achieved his success and how viewers
 [2] could learn from his example is something he kept
 [3] private. He communicated to Television Corporation
 [4] Limited in confidence in the course of negotiations for
 [5] the sale of a programme embodying the concept ..."
 [6] And setting out the relief that is asked for:
 [7] "It is clear [says the learned judge] that an
 [8] obligation of confidence may exist where there is no
 [9] contractual relationships between the parties."
 [10] My Lord, we have reflected upon this. There is
 [11] degree in the pleadings in which contract is mentioned.
 [12] We submit your Lordship need not be concerned with
 [13] contract in this case and that, for these purposes in
 [14] this case - maybe your Lordship will disagree - no
 [15] wider duty owed under the contract and what this case is
 [16] about, your Lordship has to decide, is the equitable
 [17] obligation.
 [18] My Lord, may I return to that? "The information
 [19] where a plaintiff sues", says the learned judge -
 [20] **MR JUSTICE LADDIE:** I am not sure about that. There are
 [21] consequences, Mr Cox. As far as I am aware, this is an
 [22] undecided area of law. What happens if you have a
 [23] contractual obligation of confidence, whether you can
 [24] have simultaneously an equitable duty of confidence.
 [25] Mere sensible people, non-lawyers, might say: what

[1] He names the various famous people he says would
 [2] have agreed:
 [3] "I think you would agree it is a pretty imposing
 [4] line up. In case you have mislaid the original
 [5] submission [page 7] we presented to you in
 [6] October, I have taken the liberty of enclosing a copy."
 [7] So, my Lord, there we have the broad outline of
 [8] the idea and the concept. Thereafter the plaintiff
 [9] heard nothing and then he becomes aware, as the learned
 [10] judge explains, of the proposal to run a similar
 [11] programme.
 [12] My Lord, at the bottom, line 40 indicates the
 [13] nature of the similarity:
 [14] "Tonight we begin a series of reports on a subject
 [15] very dear to all of us: money. Every generation
 [16] produces its share of self-made millionaires, those
 [17] people who by talent, ruthlessness, sheer hard work [the
 [18] announcer says over the airwaves] or luck, drag
 [19] themselves up by the boot straps, head and shoulders
 [20] above the rest of us. How do they do it? Can they tell
 [21] us how to do it? Those are the questions which will be
 [22] asked in the next four programmes."
 [23] Over the page at line 8:
 [24] "The plaintiff claims it is the concept which he
 [25] developed for the television programme, having its theme

[1] difference does it make? It does make a difference.
 [2] Because, for example, the financial compensation and the
 [3] relief that you can get for breach of an equitable duty
 [4] may be very different to the remedies you could get for
 [5] breach of contract.
 [6] (11.00 am)
 [7] **MR COX:** My Lord, yes.
 [8] **MR JUSTICE LADDIE:** It may well be, for example, that,
 [9] whereas under an equitable duty one would assume that
 [10] the duty would terminate under circumstances of the
 [11] judge's choosing basically, where the duty is
 [12] contractual, the parties will have determined, as a
 [13] matter of contract when the duty arises, when it
 [14] terminates and what its value is. So there may be an
 [15] enormous difference between a contractual right and an
 [16] equitable right. At least as far as relief is
 [17] concerned, and maybe duration as well.
 [18] **MR COX:** My Lord, I can quite see that. May I return to it,
 [19] because it may be a subject your Lordship has to deal
 [20] with later.
 [21] But to continue with this case, if I may, for the
 [22] moment. The learned judge, having set out what the
 [23] plaintiff has to establish: it was of a confidential
 [24] nature, it was communicated in circumstances importing
 [25] an obligation and that there had been unauthorised use,

[1] referring to the additional authorities to support that
[2] point, particularly Coco v Clark, he then recites the
[3] submissions made by counsel for the parties. He sets
[4] out the chief contention of the defendant, which was
[5] that the information which the plaintiff alleged had
[6] been misused by the defendant did not have the necessary
[7] quality of confidence. Indeed Mr Gillard put it that:

[8] "The plaintiff was seeking to protect an idea for
[9] programme about millionaires, how they succeeded and
[10] what viewers could learn from them and that was not
[11] original. He pointed to evidence that there had been
[12] programmes before on the careers of successful men and
[13] that it was a usual practice for interviewers to ask
[14] such people the secret of their success. He also put it
[15] that there was authority for the proposition there was
[16] no property in an idea."

[17] Now I move to line 14:

[18] "Where it had been developed to the point of
[19] setting out the real problem, as counsel for the
[20] plaintiff said, was to decide whether the idea or
[21] concept had been sufficiently developed. Where it had
[22] been developed to the point of setting out a format in
[23] which it could be presented so that it was apparent that
[24] the concept could be carried into effect, then, said
[25] Mr Archibold, it was something that is capable of being

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[1] That of course would be an aspiration. Perhaps not the
[2] moon these days, but "let us fly to Mars". One would
[3] simply not be able to say that that was commercially
[4] appealing, achievable. The idea must go beyond simply
[5] the expression of "would it not be great if ...", as the
[6] learned judge in Fraser v Thames Television Limited
[7] said.

[8] **MR JUSTICE LADDIE:** I am not sure why you have to limit it
[9] to something which is workable. Something which is not
[10] workable might be perfectly good subject matter for
[11] confidential information. Take the field of chemistry.
[12] Let us suggest you have a series of proposals for a set
[13] of experiments to prove X, Y and Z set out in detail.
[14] In fact they will not prove it, but they will put you an
[15] awful long way down the road to realising where the
[16] error is and, by going down this route, you will find
[17] out enough information to go on to develop the idea
[18] further. It will not work as such -

[19] **MR COX:** But it could be confidential.

[20] **MR JUSTICE LADDIE:** - but it could be confidential. All of
[21] these things seem to me to skirt round the issue.

[22] **MR COX:** My Lord, all I am saying is that the idea has to
[23] have sufficient body to it to be seen to be appealing,
[24] to be seen to have some application or potential
[25] application to the recipient's problem or trade or

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[1] the subject of a confidence. Without deciding that it
[2] is always necessary for a plaintiff to go that far, I am
[3] satisfied that, where a concept or idea has been
[4] developed to the stage where the plaintiff has developed
[5] his concept, it is capable of being the subject of a
[6] confidential communication -

[7] **MR JUSTICE LADDIE:** Just a second.

[8] **MR COX:** The plaintiff had developed his concept so that it
[9] would be seen to be a concept which had at least some
[10] attractiveness as a television programme and to be
[11] something which was capable of being realised as an
[12] actuality. In other words, in our respectful
[13] submission, may I simply preface our case by saying,
[14] my Lord, what the idea has to be shown to have is to go
[15] beyond what other cases that I will show your Lordship
[16] at some later stage if I may - a mere aspiration. It
[17] has to be shown to have commercial attractiveness, to be
[18] something which could work. It does not have to be, as
[19] your Lordship said, developed in its detail or its
[20] mechanics. It simply has to be seen to be something new
[21] and a saleable proposition, as the courts have referred
[22] to it in other cases.

[23] **MR JUSTICE LADDIE:** New and saleable proposition.

[24] **MR COX:** Workable, my Lord. If one were to say for example
[25] a mere aspiration might be "let us fly to the moon".

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[1] commerce. It does not have to be refined. It simply
[2] has to be seeable. That is what these cases are getting
[3] at. An aspiration is not seeable; it is simply a
[4] tissue, a bubble. You cannot see it working. That does
[5] not mean there might not have to be years of labour to
[6] achieve the idea, but it has to be seeable. What the
[7] learned judge in this case - as in others - is really
[8] sketching out is a sort of minimum level. Your Lordship
[9] may disagree, but I want to advance, if I may, that all
[10] that is being set out here is that the idea has to
[11] have -

[12] **MR JUSTICE LADDIE:** He is certainly not setting out a
[13] minimum level, Mr Cox. He said expressly "without
[14] deciding it is always necessary for a plaintiff to go
[15] that far". What he is saying is "Whatever the lower
[16] limit may be, these plaintiffs were beyond it". So he
[17] is certainly not addressing the low level.

[18] **MR COX:** I did not mean it that way. I meant there is a
[19] certain critical stage at which an idea becomes visibly
[20] sufficiently defined, potentially applicable. May I go
[21] on, my Lord, because the features in this case for the
[22] first time are something that the text books then adopt
[23] quite popularly. Your Lordship may be familiar with
[24] it. It is the phrase of "commercial twist" or
[25] "particular slant". Mr Archibold conceded that, if the

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[1] idea or concept was public knowledge, was in the public
 [2] domain, it could not be the subject of a duty of
 [3] confidence. But he submitted it was sufficient for the
 [4] plaintiff to show that the idea had not been the subject
 [5] of general awareness or adoption, so as to make it
 [6] within the public domain, whether or not the idea was
 [7] unique:
 [8] "I am satisfied that what was called the
 [9] 'commercial twist' or the 'particular slant' of the
 [10] plaintiff's concept or idea does give it a quality which
 [11] takes it out of the realm of public knowledge. Clear
 [12] enough that programmes about successful persons in which
 [13] such persons are asked questions about their success
 [14] have been known on television for some considerable
 [15] time, but, in my opinion, there is a distinct difference
 [16] between such programmes and a programme which has as its
 [17] theme the stories of the careers of some self-made
 [18] millionaires in which, as an integral part of the
 [19] programme, the successful men give their recipes for
 [20] success to the viewers."
 [21] My Lord, that was the slant: there had been
 [22] programmes before that asked people about the means by
 [23] which they had reached where they were, but there had
 [24] not been a programme - at least of which there was
 [25] sufficient general awareness. There was some vague

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[1] unique. So it is unique and is protectable. That does
 [2] not deal with the question of what happens if it is not
 [3] unique. Is it protectable?
 [4] **MR COX:** I agree.
 [5] **MR JUSTICE LADDIE:** There is authority, which I am sure you
 [6] are aware of. For example Franchie v Franchie, which
 [7] says that the issue of public domain is not precise.
 [8] There is a thing called relative secrecy. It may be,
 [9] for example, something which is known in Pristina and
 [10] something which is known in John O'Groats and something
 [11] which is known in Birmingham but not generally
 [12] disseminated. In other words, the same idea had by
 [13] other people in other places and which they are willing
 [14] to flog could still be confidential if somebody else
 [15] comes along and offers it in confidence to a potential
 [16] recipient.
 [17] **MR COX:** My Lord, yes.
 [18] **MR JUSTICE LADDIE:** It may have a lesser value, because
 [19] somebody else might be able to commercialise their own,
 [20] as it happens, identical propositions.
 [21] **MR COX:** My Lord, of course what is unique is sometimes
 [22] almost a metaphysical question. Some people have it:
 [23] there is nothing new under the sun.
 [24] **MR JUSTICE LADDIE:** I am not worried about that. The
 [25] trouble is, if you are not careful, you end up with the

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[1] evidence which is referred to. The evidence was to the
 [2] effect that this had not been done before in Australia,
 [3] with one possible exception about which the evidence was
 [4] vague - but that that slant took the idea into a realm
 [5] that made it confidential. Because it was a new slant:
 [6] "Further, the clear implication from the evidence
 [7] is that the plaintiff had not communicated his concept
 [8] to anyone outside his own organisation, except
 [9] Mr Schildberger. Mr Gillard conceded that the
 [10] submission and oral formulation of the plaintiff's
 [11] concept and later the pilot script were given in
 [12] circumstances which imported confidence. What he
 [13] contented was that this still left the network free to
 [14] make use of what he called the 'pure idea' of the person
 [15] giving the interview giving advice.
 [16] "In my opinion the concession was rightly made,
 [17] but I am not able to see the network was still left free
 [18] to make use of some of the information -
 [19] **MR JUSTICE LADDIE:** The judge does not appear to have
 [20] thought it necessary to consider line 28.
 [21] **MR COX:** "The subject of general awareness or adoption ...
 [22] **MR JUSTICE LADDIE:** Whether or not the idea was unique.
 [23] **MR COX:** No, he does not. My Lord is right.
 [24] **MR JUSTICE LADDIE:** He simply says in the case it was
 [25] unique. He comes to a conclusion of fact that it was

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[1] law of confidence ending up looking like the law of
 [2] patents, which it certainly is not, and a single
 [3] disclosure somewhere else is enough to deprive the
 [4] subject matter of the quality of confidence. My
 [5] inclination is to say that cannot be what the law is and
 [6] relative secrecy has some part to play.
 [7] **MR COX:** We submit so.
 [8] **MR JUSTICE LADDIE:** It almost got there, but then the judge
 [9] decided it was unique. So it did not matter.
 [10] **MR COX:** He decided in some of its element it was not, but
 [11] there was a new slant. Yes.
 [12] **MR JUSTICE LADDIE:** Whatever the others were, he says this
 [13] is entirely different. I take it, since he has
 [14] dismissed the only evidence that somebody else had done
 [15] it as being "vague", what he is really saying is this is
 [16] unique, so I do not need to consider what would have
 [17] been my conclusion had it not been unique.
 [18] **MR COX:** This particular slant, yes.
 [19] My Lord, may I go on because it is the learned
 [20] judge at the bottom of the page who refers, in my
 [21] opinion, to the saleable proposition phrase:
 [22] "In my opinion, the situation was that the
 [23] plaintiff had a saleable proposition which had as its
 [24] kernel the valuable concept of a programme which had the
 [25] intent of exposing the lives of successful people with

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[1] the built-in tantalising attraction of the somewhat less
[2] successful viewers being told how they, too, could make
[3] a million. The submission was, in my opinion,
[4] skillfully drafted to bring out the desirability of a
[5] television channel televising such a programme and, in
[6] my opinion, not only was the text of the submission made
[7] available in confidence, but the kernel of the concept,
[8] whether it was conveyed in writing or orally, was also
[9] made available in confidence."

[10] Therefore the learned judge found that it had the
[11] necessary quality of confidence.

[12] (11.15 am)

[13] The information included what I have called the
[14] "kernel of the concept".

[15] My Lord, thereafter the learned judge embarked
[16] upon an analysis -

[17] **MR JUSTICE LADDIE:** It is very odd actually. It is always
[18] easy to over-analyse judgments. But he has slipped from
[19] considering whether it is a suitable subject matter to
[20] whether or not it was supplied in confidence. The
[21] concepts appear to be - they are moulded together. He
[22] is talking about one and he ends up answering the other,
[23] it seems to me.

[24] **MR COX:** There had been a concession of course of the
[25] circumstances giving rise to confidence. That may be

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[1] My Lord, what that sufficient currency would be is
[2] a matter of judgment, in our submission, on the facts of
[3] each case. But we submit, as a matter of fact, this
[4] idea had a sufficient twist or slant to it which did
[5] distinguish it from other schemes pre-existing at the
[6] time of the disclosures and was not in sufficient
[7] currency, as the trade or exchange of ideas within the
[8] trade, to have meant that it was not confidential.

[9] Now, upon that issue, my Lord, and with that
[10] preface, I propose, with your Lordship's leave, now to
[11] curtail what has been an overlengthy introduction. What
[12] I propose to do with your Lordship's leave now would be
[13] to call Professor Worthington. My learned friend
[14] Mr Hobbs is aware of the course I intend to adopt and,
[15] indeed, it is to an extent - although, I submit, it may
[16] in fact have some convenience in it - enforced upon me
[17] by Professor Worthington's very busy academic schedule
[18] at this time of the year. I am anxious to call him
[19] today.

[20] **MR JUSTICE LADDIE:** Professor Worthington is not available
[21] after today?

[22] **MR COX:** I am afraid not, my Lord, until the 25th.

[23] **MR JUSTICE LADDIE:** Just to make sure I have it right, one
[24] of the issues that needs to be established by a claimant
[25] is that his or its information has been used by the

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[1] some of the reason.

[2] My Lord, I do not propose to take your Lordship
[3] through the rest of the judgment at this stage, because
[4] it really is an analyse of how the learned judge reaches
[5] his conclusion that the idea had been used.

[6] **MR JUSTICE LADDIE:** So what is the proposition of law that
[7] you get out of this?

[8] **MR COX:** My Lord, really this: when one is dealing with the
[9] realm of a concept or an idea, what one needs to show
[10] for a claimant is that the idea has - or may need to
[11] show, subject to your Lordship's remarks a moment or two
[12] earlier - the idea has a slant or a twist to it that
[13] distinguishes it from, in this particular case, other
[14] schemes that existed at the time of the disclosure. By
[15] that, I do not mean that there may have been a scheme
[16] buried in the wilds of the Nebraska or a Pacific island
[17] Vanuatu. This is your Lordship's relative secrecy
[18] clumsily put. It would have had to have been an idea
[19] that had gained some sufficient currency within the
[20] trade. I accept it would not have to be the ordinary
[21] lay public, because there is authority to suggest that
[22] sufficient awareness within the particular trade or
[23] community is sufficient. But it would have had to have
[24] gained sufficient currency in the trade to have taken it
[25] out of the realm of confidential information.

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[1] defendant. The number of cases where you actually have
[2] a witness to the misuse and the derivation are very
[3] small and normally what happens is the defendant ends up
[4] with something that has significant common fingerprints:
[5] significant common features which suggest derivation.
[6] The court is then asked to infer it. The more
[7] distinctive the claimant's information is, the less
[8] trite it is, the greater the likelihood that the
[9] similarities between what the claimant handed over and
[10] the defendant used are there because of derivation. So,
[11] in other words, the more unusual, then the harder it is
[12] to believe that the same unusual features in the
[13] defendant's package came from an independent source.

[14] **MR COX:** That, as a matter of judgment on the evidence, is
[15] an irresistible proposition, in my submission.

[16] **MR JUSTICE LADDIE:** And the corollary.

[17] **MR COX:** And the corollary must be true. No doubt of course
[18] in this case the defendant will say this was an idea
[19] where, if there are similarities - and they accept
[20] some - they were reached independently and the reason
[21] for that is because the idea was not distinct, even if
[22] it was confidential.

[23] **MR JUSTICE LADDIE:** Fine. The question of whether one has
[24] been taken from the other is an issue of fact.

[25] **MR COX:** Yes.

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[1] **MR JUSTICE LADDIE:** To be decided upon by the fact finding
[2] tribunal.
[3] **MR COX:** Yes.
[4] **MR JUSTICE LADDIE:** In this case, the High Court. That is
[5] not an issue which can be determined by experts on
[6] either side.
[7] **MR COX:** I agree completely.
[8] **MR JUSTICE LADDIE:** Okay.
[9] **MR COX:** My Lord, for the purpose of calling
[10] Professor Worthington, if I can take your Lordship to
[11] the expert report bundle. I do not know whether
[12] your Lordship has a copy of the witness statement from
[13] Mr Woodman of those instructing me, dated
[14] 10th June 1999. It should have been with
[15] your Lordship. I do not know whether it was.
[16] **MR JUSTICE LADDIE:** Who put it in?
[17] **MR COX:** The claimant has put it in.
[18] **MR JUSTICE LADDIE:** I have never seen that.
[19] **MR COX:** It is in the file, I am told, my Lord. It gives
[20] some of the background to the preparation of the expert
[21] case which may be of relevance to your Lordship.
[22] **MR JUSTICE LADDIE:** Where am I to find that?
[23] **MR COX:** It is in the court file, I am told, my Lord. It
[24] may be your Lordship does not have it personally.
[25] My Lord, we have a copy.

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[1] **MR JUSTICE LADDIE:** What does it go to?
[2] **MR COX:** My Lord, the situation is simply this, and
[3] I propose to make it plain to your Lordship: I had
[4] intended to raise the subject in relation to the
[5] opposition to Mr Christian's report. The claimant has
[6] been preparing his expert case under a significant and
[7] heavy disadvantage of absence of funds. Therefore
[8] Professor Worthington's report is not in that full and
[9] footnoted fashion that the defendant's experts have
[10] presented their --
[11] **MR JUSTICE LADDIE:** Your clients can only afford a Mini and
[12] not a Rolls Royce and they have a Mini, not a
[13] Rolls Royce. Fine. I have Professor Worthington here,
[14] so I have the Rolls Royce, revved up and ready to go.
[15] **MR COX:** We hope so. May I take your Lordship to that
[16] bundle of the expert evidence where he appears. It is
[17] at tab 1.
[18] **MR JUSTICE LADDIE:** I do not need, Mr Woodman's do I?
[19] **MR COX:** Not if your Lordship has that point onboard.
[20] Tab 1, my Lord, of the bundle of expert reports.
[21] With your Lordship's leave, unless it would assist
[22] your Lordship to read it first, I will call
[23] Professor Worthington.
[24] **MR JUSTICE LADDIE:** I have read it. Can I just ask this:
[25] I see we are lucky enough to have a shorthand writer in

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[1] front of us. Who is getting a shorthand note?
[2] **MR HOBBS:** The position on that, my Lord, is as follows: it
[3] is an official record, which your Lordship get as of
[4] right. We get a copy because we are paying for it, but
[5] Smith Bernal will not release a copy unless the other
[6] side pay for their copy.
[7] **MR JUSTICE LADDIE:** Am I getting a copy?
[8] **MR HOBBS:** Your Lordship is getting a copy.
[9] **MR JUSTICE LADDIE:** Is it an overnight?
[10] **MR HOBBS:** Yes.
[11] **MR JUSTICE LADDIE:** The last one did not arrive overnight.
[12] **MR HOBBS:** Last night's?
[13] **MR JUSTICE LADDIE:** No.
[14] **MR HOBBS:** That is going down on the transcript now.
[15] **MR JUSTICE LADDIE:** Can I ask for a copy to be made
[16] available to me on disk in Word 6 or Word Perfect 5.1 or
[17] ASCII?
[18] **MR HOBBS:** The transcript will show the shorthand writer
[19] nodding.
[20] **MR COX:** My Lord, may I understand the position?
[21] Your Lordship will get that, but neither my learned
[22] friend nor I will?
[23] **MR JUSTICE LADDIE:** No, I think Mr Hobbs is going to pay for
[24] it. I suspect your legal aid fund does not extend to
[25] that.

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[1] **MR COX:** We do not have legal aid.
[2] **MR JUSTICE LADDIE:** I cannot force Smith Bernal to waive its
[3] charges, nor can I force the defendant to pay the
[4] charges on your behalf.
[5] **MR COX:** No, your Lordship cannot.
[6] **MR JUSTICE LADDIE:** Miss Lane will have to right furiously.
[7] **MR COX:** She will. My Lord, there is of course a concern on
[8] behalf of the claimant that this means there is a lack
[9] of equality of arms.
[10] **MR JUSTICE LADDIE:** I cannot force Smith Bernal to waive
[11] their charges and I cannot force Mr Hobbs --
[12] **MR HOBBS:** There is no need for coercion, my Lord.
[13] **MR JUSTICE LADDIE:** I was not trying to.
[14] **MR HOBBS:** I have just spoken to Mr Wiseman, who is the
[15] in-house legal advisor to Shell. We will pay for them
[16] to have a transcript.
[17] **MR JUSTICE LADDIE:** There we are.
[18] **MR COX:** Thank you, Professor Worthington, please.
[19] (11.30 am)
[20] PROFESSOR WORTHINGTON (sworn)
[21] Examination-in-chief by MR COX
[22] **MR JUSTICE LADDIE:** Please take a seat. Just let me clear
[23] the line of fire so that I can actually see you. I want
[24] to see the tears rolling down your face when you are
[25] cross-examined!

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[1] **MR COX:** There should be a bundle next door to you of expert
[2] reports, bundle D. Do you see that?
[3] **A:** Bundle D?
[4] **Q:** If you wheel it round, you should find a bundle D.
[5] **A:** Yes.
[6] **Q:** If you take that bundle in your hand and turn to the
[7] first tab in it, you will find some documents which
[8] I hope are yours. The first is a letter entitled
[9] "Report", dated 14th May 1999, but really simply
[10] confirming what is at appendix 1 to that; is that right?
[11] **A:** That is correct.
[12] **Q:** Which can be found in the remaining pages?
[13] **A:** Mmm.
[14] **Q:** Now, you, Professor Worthington, set out your
[15] qualifications rather modestly in that letter and in
[16] that report and, if needs be, you can go into them but,
[17] indeed, the faxing of your academic record would
[18] probably tax the paper in my chamber's fax machine.
[19] I do not propose to go through it but broadly
[20] speaking, are you Professor of Marketing and Financial
[21] Services at Stafford University Business School,
[22] specialising in the issues surrounding the distribution
[23] of financial services, particularly via plastic cards,
[24] organisation and control of payment systems and also in
[25] the field of loyalty marketing?

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[1] the purpose of making that comparison at that time?
[2] **A:** In a sense, to establish whether the Shell Smart Scheme
[3] was significantly different, unique, from those other
[4] two.
[5] **Q:** What you were doing was an internal comparison between
[6] the three of those schemes to see whether each of them
[7] could be regarded as different from the other in terms
[8] of their execution; would that be fair?
[9] **A:** In terms of their execution, or their origins, or their
[10] aspirations, et cetera, et cetera, yes.
[11] **Q:** Your conclusion was that they are different schemes?
[12] **A:** Mmm.
[13] **Q:** In your report, I think you use the expression "loyalty
[14] village"?
[15] **A:** Mmm.
[16] **Q:** I can see you do. Could you please elaborate on that
[17] concept of what you mean by "loyalty village"?
[18] **A:** The meaning that I have there is in an sense, as in a
[19] village situation, where there is - assume in a village
[20] there is one butcher, one grocer, one Post Office, one
[21] newsagent and these people come together to co-operate,
[22] but also in a sense to slightly compete, but
[23] nevertheless to operate together to run a particular
[24] loyalty scheme. So the analogy really would be with the
[25] array of retailers in a village.

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[1] **A:** That is correct.
[2] **Q:** Yes. Can you confirm that the report that you have
[3] made, the conclusions there, are true and accurate?
[4] **A:** Yes, indeed. I stand by them.
[5] **Q:** Have you also read Mr Perkins' report and Mr Reynolds'
[6] report?
[7] **A:** Yes, I have.
[8] **Q:** Have you carefully considered them?
[9] **A:** Indeed, I have.
[10] **Q:** Have you in any way changed your opinion on the issues?
[11] **A:** No, I have not.
[12] **Q:** Professor, would you remain there, please, because there
[13] may be further questions for you?
[14] Cross-examination by MR HOBBS
[15] **Q:** Professor Worthington, your report, as we can see from
[16] the document you have open, was essentially prepared
[17] I think in 1997, the back end of 1997?
[18] **A:** That is correct.
[19] **Q:** At that time, if I understand the position correctly,
[20] you were asked to do a comparison between three schemes
[21] which you mention in your report, those being Argos
[22] Premier Points, British Airways Air Miles and the Shell
[23] Smart Consortium?
[24] **A:** Mmm.
[25] **Q:** Could you tell my Lord what it was you understood to be

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[1] **Q:** Right. To use a metaphor which came up yesterday, a
[2] sort of department store where the people are not in the
[3] department store together?
[4] **MR JUSTICE LADDIE:** I think you have slaughtered it,
[5] Mr Hobbs. The suggestion was that you could consider it
[6] like a department store with different people operating
[7] on different floors, selling different goods, but all
[8] sharing a common interest in the same customers.
[9] **A:** I do understand you, obviously, in the same way that the
[10] people working in a village environment were sharing
[11] those customers who shopped in the village in the same
[12] way. That is what I meant by the co-operation as well
[13] as competition. You are co-operating to keep those
[14] people in your department store or in your village.
[15] **MR HOBBS:** So the department store metaphor is not
[16] materially different from your loyalty village metaphor
[17] then, as we have just discussed it; is that correct?
[18] **A:** Okay.
[19] **Q:** One of the features, as you know, of the Shell Smart
[20] Scheme is that it uses a Smartcard?
[21] **A:** Mmm.
[22] **Q:** Can we agree on this, that the use of cards as an
[23] electronic purse for points is a very well-discussed and
[24] well-known concept in and of itself, is it not?
[25] **A:** It is, yes.

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[1] Q: That would date back at least to the mid-1980s, if not
 [2] before, would it not?
 [3] A: Certainly the use of a plastic card to accumulate -
 [4] there are two ways we can look at this. One is the use
 [5] of a plastic card as a payment's mechanism; the other is
 [6] the use of a plastic card as a loyalty token gatherer or
 [7] icon of a relationship between a customer and a
 [8] supplier.
 [9] Q: Let us get a timeframe on this. The use of a card as an
 [10] electronic purse for scoring points on is a proposal
 [11] which goes back shall I say to 1987, 1986, 1985? It is
 [12] a proposal in the loyalty industry that was well-known
 [13] at that time, is it not?
 [14] A: I think so. There were experiments with various pilots
 [15] of those kinds of schemes across the world.
 [16] Q: You would not yourself, would you, distinguish between
 [17] the use of a mag stripe card, a magnetic stripe card,
 [18] and a Smartcard for these purposes, would you?
 [19] A: In that you could have the same information,
 [20] essentially, on a mag stripe card as you could on a
 [21] Smartcard.
 [22] Q: But in the sense that as technology marches on, the
 [23] Smartcard becomes more reliable, you would naturally
 [24] expect a progression, a migration from the mag stripe
 [25] card into the Smartcard field, would you not? It would

[1] to about 1990. Would that tally with your recollection?
 [2] A: Late 1980s, early 1990s, yes.
 [3] Q: I am now going to revert to the question of the loyalty
 [4] village or department store. In your mental model of
 [5] the loyalty village, are you excluding the possibility
 [6] that there is a scheme operator who is not a shopkeeper
 [7] in the village, as it were?
 [8] A: Not in essence, no. It would be possible, I suppose,
 [9] for a scheme operator to run that village metaphor, or
 [10] department store metaphor, in the same way it would be
 [11] possible for one of the shops in the village to be the
 [12] originator of the scheme.
 [13] Q: You would not see any difference in principle, would
 [14] you, between those two modes of operation of the loyalty
 [15] village?
 [16] A: I think I would really because the way that I am
 [17] approaching this in my own mind is that we are looking
 [18] here at establishing relationships between the members
 [19] of the village and their customer base and my
 [20] understanding, my interpretation, my knowledge is that
 [21] if it was a third party, an outsider, that relationship
 [22] would be held by that third party as the runner of the
 [23] scheme whereas, in a sense, if it is operated by
 [24] somebody who is a shop in the village, then that
 [25] relationship can be held by them.

[1] be a natural thing to do.
 [2] A: That, indeed, is what is happening to both payment and
 [3] non-payment cards.
 [4] Q: That was happening, in fact, was it not, in the late
 [5] 1980s, 1990?
 [6] A: I would not like to say that migration was underway.
 [7] There were a number of pilot schemes of both payment
 [8] and, if you like, loyalty cards. I do not think you
 [9] could necessarily point, in a sense, or talk about the
 [10] migration being underway by that time. Really we are
 [11] only just now starting to migrate from mag stripe to a
 [12] Smartcard.
 [13] Q: But there were Smartcards in use for loyalty scheme
 [14] purposes in 1990, were there not, according to your
 [15] recollection of it?
 [16] A: There were some experiments certainly in Japan at that
 [17] time, which I am aware of.
 [18] MR JUSTICE LADDIE: I missed that.
 [19] A: There were some pilot schemes in Japan which I was aware
 [20] of.
 [21] MR HOBBS: What about the Vision Value network? Are you
 [22] aware of that?
 [23] A: I have some knowledge of that, not a complete knowledge
 [24] but some knowledge.
 [25] Q: That dates back, according to the documents I have seen,

[1] Q: In terms of practicalities, one of the shopkeepers in
 [2] the village may not have the financial resources or the
 [3] technical expertise at his disposal to operate this
 [4] scheme. Surely it is the same scheme, albeit it is
 [5] being operated by somebody who has those resources to
 [6] make it possible?
 [7] A: It may well look the same scheme in terms of its
 [8] functionality, the way the cards are done, and so on,
 [9] but I would myself contend that one of the key issues is
 [10] really who has the ownership of the relationship with
 [11] the cardholders.
 [12] Q: Why is that a key issue?
 [13] A: In my own mind because I think we are moving into an era
 [14] where it is very important that people who wish to have
 [15] a long-term supplier relationship with their customers
 [16] feel that they have some relationship with them.
 [17] Q: So if you have a situation where the villagers in the
 [18] loyalty village operate their own scheme and then one of
 [19] them decides - or they all decide actually that they
 [20] will use an outside operator, you would say it is a
 [21] different scheme, would you?
 [22] A: I would say that the logic of that is that they have
 [23] agreed or decided that they can pass whatever
 [24] relationships they had with their customers to a third
 [25] party, who then operates that scheme.

[1] Q: I do not understand why you are staying that because to
[2] all outward appearances to the customers, the scheme
[3] will operate in the same way as before?

[4] A: Indeed it might do, but the benefits that one could make
[5] of the information that you held on those customers
[6] would fall to the third party supplier.

[7] Q: But the third party supplier, assume for the sake of
[8] argument, will share it with the loyalty village
[9] shopkeepers, so what is the problem there?

[10] A: In a sense, when you are saying to share it, it is a
[11] question of what aspirations does that third party
[12] supplier have for themselves to build relationships with
[13] those customers or whether the people in the village,
[14] the shopkeepers, as it were, wanted to keep and maintain
[15] those relationships.

[16] Q: Suppose the third party operator is simply providing a
[17] service to the village shopkeepers and he shares the
[18] data and the information he collects with the
[19] shopkeepers. Surely there is no distinction there
[20] between a shopkeeper-operated scheme and a third
[21] party-operated scheme, is there?

[22] A: If the third party was prepared to completely share the
[23] information that they had gathered from all the
[24] participants in the scheme, then I think that would be
[25] the same, if that was the case.

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[1] somewhere in the witness-box? In that volume, I would
[2] like you to turn, please, to page 843. If you have the
[3] same as I have, Professor, that is a document which has,
[4] on its front page at the top: "Prepared for John
[5] Golding, Paul King, Richard Lazenby, David Watson.
[6] Prepared by GHA Powerpoints". Is that what you have?

[7] A: That is correct.

[8] Q: The system is working fine so far. This is 16th March,
[9] 1992, as you see from that date in the middle. First of
[10] all, can I ask you this: are you at all familiar with a
[11] scheme called Powerpoints?

[12] A: No.

[13] Q: Has it been mentioned to you in connection with your
[14] preparation of your report or, indeed, your preparation
[15] to come to give evidence here today?

[16] A: It has been mentioned to me in my preparation to come
[17] and give evidence today but I have not had an
[18] opportunity to study it in detail.

[19] Q: Or at all. You have not read it, have you?

[20] A: No.

[21] Q: Did you not ask for a copy when it was mentioned to you,
[22] whenever it was?

[23] A: Unfortunately, as we mentioned before, I have been up
[24] again some very tight time deadlines, so even if I had
[25] asked for a copy I would have had no opportunity to read

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[1] Q: That is right, is it not? Thank you for that. To what
[2] extent are you aware of loyalty schemes being operated
[3] on the loyalty village model? Can you give us some
[4] other examples that are not mentioned in your report,
[5] for example? Are there any you know of?

[6] A: There are examples where a number of retailers come
[7] together to allow, in a sense, collection of points,
[8] under particular schemes so one can say yes, there is
[9] some spread there. I do not have any knowledge myself
[10] of a particularly similar scheme to the Shell Smart
[11] loyalty village.

[12] Q: Have you in fact done any research into that question
[13] before coming here to give evidence?

[14] A: Indeed, I have read the expert witness statements of
[15] Mr Perkins, Jonathan Reynolds, et cetera.

[16] Q: Have you read any of the other documents in the case;
[17] the witness statements, for example?

[18] A: Not the witness statements, no.

[19] Q: Have you read any of what we call the discovery
[20] documents? Have you seen any of those; Shell's internal
[21] documents?

[22] A: No, I have not.

[23] Q: I would like to show you some of those internal
[24] documents that have been produced in these proceedings.
[25] Could you please take volume E2, which is alongside you

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[1] it, I am afraid.

[2] Q: I understand. I would like to show you one or two pages
[3] from this document. So that you should know what it is,
[4] this is a proposal, as you can see from the front page,
[5] which was made to Shell UK by GHA Powerpoints on 16th
[6] March, 1992. It is on the subject of increasing
[7] customer loyalty and store turnover. It is an outline
[8] proposal for Shell UK Oil.

[9] If you turn on to the page which has the stamp
[10] number 845 on it, knowing you have not seen this
[11] document before, I am going to show you portions which
[12] I would like you to read and digest as we go through?

[13] A: Yes.

[14] Q: The paragraph 4 on that page - I had better start at 3
[15] actually:

[16] "GHA Powerpoints Ltd was founded in the autumn of
[17] 1991 specifically to develop one particular concept - an
[18] integrated customer recruitment and customer retention
[19] service to be offered to retailers, other service
[20] providers and manufacturers.

[21] "GHA Powerpoints have already presented the
[22] concept to selected major retailers and other service
[23] provider groups, including petrol, grocery, travel and
[24] clothing. Each has expressed enormous positive interest
[25] in the concept and a willingness to participate as a

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[1] member of a Powerpoint network subject to the conditions
[2] of appropriate partners in non-competitive market
[3] sectors and acceptability of the contract terms."
[4] You see those sectors there, petrol, grocery,
[5] travel and clothing. You see the reference to a network
[6] where you have conditions as to appropriate partners in
[7] non-competitive market sectors?
[8] **A:** Mmm.
[9] **Q:** Do you think that sounds a bit like your loyalty
[10] village?
[11] **A:** Yes, it does.
[12] **Q:** Turning into the document, it is a longish document and
[13] I need just to take you to one or two pages. Would you
[14] go to page 853? Do you have that, Professor?
[15] **A:** Yes.
[16] **Q:** Thank you. You will see that they have gone ahead in
[17] their current UK market customer loyalty schemes and
[18] they have divided it up into three categories:
[19] proprietary schemes, joint schemes and self-administered
[20] schemes. Do you recognise any or all of those schemes
[21] mentioned there?
[22] **A:** I recognise a great many of them, not necessarily all of
[23] them.
[24] **Q:** Take the joint schemes at the top right, are you
[25] familiar with all of those; Mobil, Argos, Total, M&S,

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[1] **Q:** I think it is a magnetic stripe card scheme, would that
[2] be your recollection?
[3] **A:** That is correct.
[4] **Q:** What about the Total M&S/Boots scheme, is that a loyalty
[5] village as well?
[6] **A:** I think the scheme is slightly different here in that is
[7] not the Total scheme one whereby having collected points
[8] on a magnetic stripe card that is then redeemed for
[9] vouchers from Marks and Spencers and Boots? So it does
[10] not involve those two retailers as collection points for
[11] that scheme.
[12] **Q:** Is it part of your model for the loyalty village that
[13] the members of the scheme, the High Street shops, as it
[14] were, the metaphorical High Street shops are issuing and
[15] redeeming? Is that part of your model?
[16] **A:** It is. Yes, and if you mention that issuing and
[17] redemption, that would be my intention, that the village
[18] is one where the shopkeepers both issue and redeem a
[19] common currency.
[20] So looking back to Mobil and Argos, there is a
[21] slight difference here in that, although Mobil, BP now,
[22] Somerfield, et cetera, issue these points, they are only
[23] redeemable in Argos.
[24] **Q:** Okay. Turn the page in this document you have open,
[25] please, to page 854. You will see a heading which is

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[1] Boots, Elf, Intersport? Are you familiar with the
[2] operation of those?
[3] **A:** Perhaps with the exception of Elf Intersport. Certainly
[4] the other two, yes.
[5] **Q:** Are the other two loyalty village concepts?
[6] **A:** I would say - in the sense that you are asking me the
[7] question in that they involve non-competing retailers in
[8] different sectors, you could argue one could say yes,
[9] but I think my sense is that in the case of let us take
[10] the Mobil/Argos scheme, the information about the scheme
[11] and its operation lies entirely with Argos as a third
[12] party supplier.
[13] **Q:** So it is not a sufficiently integrated scheme, that one,
[14] to be regarded by you as within your loyalty village
[15] concept; would that be a fair comment?
[16] **A:** My loyalty village concept really refers to the idea of
[17] non-competing retailers in different market sectors,
[18] your department store analogy, and so on. In the sense
[19] that Mobil - if we can take the scheme forward to
[20] contemporalise it, there are a number of other retailers
[21] in that particular scheme who are in non-competing
[22] sectors. In that sense, yes, that would be a loyalty
[23] village.
[24] **Q:** It is a card scheme, is it not?
[25] **A:** It is.

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[1] "The networking advantage".
[2] **A:** Mmm.
[3] **Q:** You see that the author has some star points:
[4] "Networking delivers customer reward
[5] achievability via faster accumulation of points from
[6] many sources and from economies of scale which provide
[7] lower points cost per reward."
[8] You see there that what he was saying is that the
[9] more participants you have in the scheme the faster you
[10] can accumulate the points to get the rewards?
[11] **A:** Mmm.
[12] **Q:** Would you have said that in 1992 that was an
[13] earth-shattering revelation?
[14] **A:** I would say that was eminently common sense.
[15] **Q:** Absolutely. It is obvious, is it not?
[16] **MR JUSTICE LADDIE:** Because we have a transcript, when you
[17] agree with something, say you agree with it. If you
[18] disagree, as you may well do with questions asked of
[19] Mr Hobbs, say that you disagree, so it is on the
[20] transcript.
[21] **MR HOBBS:** When I just said, "It is obvious, is it not?" you
[22] nodded, I believe?
[23] **A:** I did.
[24] **Q:** Thank you. You see the next bullet point there:
[25] "There is only one networked customer loyalty

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[1] programme of any note in the UK - Air Miles.
[2] "Air Miles are offered by a range of retailers
[3] and service provider users.
[4] "To date Air Miles has failed in its attempt to
[5] recruit a grocery retailer.
[6] "Air Miles has been well branded and marketed but
[7] it is failing for four key reasons:
[8] (1) the reward offered does not have mass market
[9] appeal."
[10] Would you agree with that?
[11] A: Are you asking me whether I agree with that at that
[12] time?
[13] Q: Yes.
[14] A: Which was when, 1992?
[15] Q: Yes.
[16] A: I may disagree with that, quite frankly. I would be
[17] saying that perhaps Air Miles, even by then, was
[18] something of a common currency.
[19] Q: Anyway, let me ask you this: would you regard the Air
[20] Miles scheme, as it was operating in 1992, as a loyalty
[21] village or would you not regard it as a loyalty village?
[22] A: Again, I would concede that it was one in which there
[23] are a number of non-competing retailers who are offering
[24] collection opportunities for Air Miles. Because the
[25] redemption opportunities are offered by a different set

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[1] A: That is right.
[2] Q: So although it is common token within the village, it is
[3] only redeemable by paying it into the one place that
[4] redeems those tokens, Air Miles?
[5] A: That may well be outside the village, in that sort of
[6] village shop analogy we were talking about.
[7] Q: That is the second point, made down here on the bottom
[8] of this page, that effectively it is part of what takes
[9] away the ownership of the benefit, or the reputation or
[10] whatever it is, from the individual shopowners, because
[11] now it is not their goods that you are redeeming, it is
[12] somebody else's. So it looks like they are all
[13] co-operating with Air Miles rather than co-operating
[14] with each other?
[15] A: That has some credence to it. My other point of course
[16] was that the relationship that I have essentially is
[17] with Air Miles as my only way of redeeming those
[18] particular points. I am a member of the Air Miles
[19] scheme, even though I collect the Air Miles from a
[20] number of different suppliers.
[21] MR HOBBS: You still have open 854, do you not?
[22] A: I do.
[23] Q: What the writer of the report is doing, he is pointing
[24] to the networking advantage and he uses Air Miles as his
[25] example. He says that with bad example there are four,

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[1] of suppliers, then it does not fit with my
[2] interpretation of loyalty village.
[3] Q: Could we call it a sort of semi-loyalty village, is it
[4] halfway there?
[5] A: A sort of loyalty suburb.
[6] Q: Yes. Not quite the full kibbutz, but it is something
[7] off that?
[8] A: It certainly has some features, as I have said already,
[9] particularly in its choice of non-competing retailers,
[10] by and large who then offer opportunities for people to
[11] collect those points.
[12] Q: What you would say it lacks is this business of more
[13] than one source of reward?
[14] A: No, it is a case of what it lacks in my definition of
[15] loyalty village is the ability for one to redeem those
[16] points, in this case Air Miles, with the very people you
[17] collected them from. Much of the redemption on this
[18] scheme is either through Air Miles itself, as a third
[19] party provider of that scheme. In fact, that is the way
[20] everything is done through Air Miles.
[21] Q: Would you turn the page, please, to -
[22] MR JUSTICE LADDIE: Just one second. If you redeem in Air
[23] Miles, effectively what you are saying is you are going
[24] back to Air Miles, you get all your goodies out of Air
[25] Miles rather than from retailers?

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[1] if you like, drawbacks, which he identifies at the
[2] bottom?
[3] A: Mmm.
[4] Q: Turn the page now to the next page, 855, "What retailers
[5] really need"?
[6] A: Mmm.
[7] Q: He has a loyalty programme with offers retailers their
[8] own scheme, fully branded, and a proposition to invest
[9] in. He has taken the step, has he not, that we have
[10] just been discussing from being a pure Air Miles scheme,
[11] as it were, someone outside the village. He is talking
[12] about the need for retailers to have their own loyalty
[13] scheme, fully branded, and a proposition they can invest
[14] in, yes?
[15] A: It would appear so from those statements. At least he
[16] is going in that direction, of offering them something
[17] that they brand for themselves and that they maybe can
[18] invest in.
[19] Q: If you turn the page, he finally unveils the concept,
[20] 856?
[21] A: Yes.
[22] Q: "Powerpoints":
[23] "A national customer loyalty network.
[24] "A provider of issuing/redemption facilities for
[25] electronic points."

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[1] Then under "Electronic points":
 [2] "Collected on retailer brand Powerpoint collector
 [3] cards.
 [4] "Issued by retailer as reward for value.
 [5] "Redeemed for goods and services featured in each
 [6] retailer's own incentive catalogue.
 [7] "Network members:
 [8] "Pay only for Powerpoints loaded into till-linked
 [9] dispenser.
 [10] "Receive all other facilities free.
 [11] "Customers:
 [12] "Collect Powerpoints from all network members on
 [13] any members' card.
 [14] "Redeem points for goods/services from any
 [15] network member catalogue."
 [16] Do you see that?
 [17] A: Mmm.
 [18] Q: That is the loyalty village, is it not?
 [19] A: It begins to appear so, yes. It has some of those
 [20] attributes. What I am not sure of is the relationship
 [21] of Powerpoints in the sense of whether they are
 [22] providing this particular service or whether they will
 [23] have any input into the distribution of cards, or if
 [24] they will own the relationship with the customer, or
 [25] whether that would be owned by different retailers who

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[1] are members of that scheme.
 [2] Q: What is you would be anxious to know about the position
 [3] of Powerpoints in this concept?
 [4] A: I think primarily the one about the relationship,
 [5] whether or not the information - my premise really is
 [6] that we have moved into an era where information is
 [7] very, very useful, very powerful, and many of these
 [8] so-called loyalty schemes I believe are a misnomer.
 [9] They are really about collection of information about
 [10] customers. My query is with whom would that information
 [11] reside? Would it reside with, let us say, in this
 [12] instance, Powerpoints as a supplier, or would that
 [13] information reside with the participating members of the
 [14] loyalty village?
 [15] Q: If Powerpoints shared the information, made it
 [16] accessible to the network members, that would satisfy
 [17] your query, would it not?
 [18] A: I guess I would have to split hairs with you and say
 [19] what information is this? What are they sharing? Are
 [20] they sharing details of average spend or average
 [21] redemption values or are they sharing information about
 [22] people's name and address, their shopping patterns,
 [23] et cetera?
 [24] Q: If they share the information, the totality of the
 [25] information on their database by making their database

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[1] accessible, they are sharing everything there is to
 [2] share. Would that satisfy your requirement for a
 [3] loyalty village?
 [4] A: If they were sharing everything there is to share of
 [5] information about individuals who are members of a
 [6] personalised scheme in this way and how they accumulated
 [7] their points and how they redeemed them, then I think
 [8] that moves towards that.
 [9] Q: You say "moves towards" -
 [10] A: That would appear then to be a loyalty village in that
 [11] sense.
 [12] Q: Turn the page to 857. There is the issuing redemption
 [13] cycle shown diagrammatically?
 [14] A: Mmm.
 [15] Q: You have Powerpoints - it goes round in a circle.
 [16] Starting at 12 o'clock, you have:
 [17] "Powerpoints provides hardware, software, systems
 [18] administration, publicity, catalogues, gifts. Sells
 [19] points to retailer, who issues points to customer, who
 [20] collects."
 [21] It goes on to cards, and when the cards are full
 [22] they are returned to Powerpoints for redemption.
 [23] That is the cycle. That is showing a scheme which
 [24] is, if you like, under the control of an outside
 [25] administrator; correct?

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[1] A: Mmm.
 [2] Q: Turn the page to page 858. This is showing the scheme
 [3] operating from the customer's perspective, do you see?
 [4] A: Mmm.
 [5] Q: You can see as quickly as I can point it out to you, you
 [6] have the left-hand column for the retailers, that is the
 [7] shopkeepers in the village, you have the collector
 [8] cards, then you have the gifts and services catalogue
 [9] and you can see by all of those arrows, criss-crossing
 [10] from left to right, that your collector cards are
 [11] getting you rewards by virtue of points accumulated
 [12] anywhere, and you get your rewards anywhere; do you see
 [13] that?
 [14] A: I do.
 [15] Q: So to all outward appearances that is a loyalty village,
 [16] is it not, from the customer's point of view?
 [17] A: Yes, it has that feature of being able to both collect
 [18] and redeem points in the same locations, but I am still
 [19] unclear as to where the relationship would be held.
 [20] Would it be held by those participating retailers or
 [21] would it be held by Powerpoints?
 [22] Q: I will try and get to that. Turn to page 859,
 [23] "Rewards":
 [24] "Wide range of catalogue merchandise
 [25] - selected from any catalogue of participating

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[1] retailers
[2] - range of point values."
[3] That is one of the virtues of a loyalty village,
[4] is it not; you have a wide range of catalogue
[5] merchandise for your rewards?
[6] **A:** Again, it does not have to be a catalogue, of course.
[7] It is a question of whether or not in the village you
[8] can redeem at the same places you collect.
[9] **Q:** Whether it is a catalogue or a gift over the counter or
[10] money off, that is mere mechanics, is it not?
[11] **A:** Mmm.
[12] **Q:** Can you say "yes"?
[13] **A:** Yes.
[14] **Q:** That is mere mechanics. Once you have the concept, the
[15] way you execute it is a matter for your own preferences?
[16] **A:** Yes.
[17] **Q:** Turn the page to 860. "Network market sectors potential
[18] members"; all right?
[19] **A:** Mmm.
[20] **Q:** You can see that they have identified sectors down the
[21] left-hand column and named possible candidates in the
[22] right-hand column; do you see that?
A: I do.
Q: Down the left-hand side, they are envisaging that there
[25] will be within this scheme groceries, supermarket

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[1] "User friendly collection method - no lick and
[2] stick - no bits of paper.
[3] "Convenient - credit card, fits in wallet or
[4] purse.
[5] "- suits modern lifestyles."
[6] You would agree with all of that, would you not?
[7] **A:** Yes, I would.
[8] **Q:** "Network member benefits":
[9] "Tested concept (data available to potential
[10] customers)", do you see that?
[11] **A:** I do.
[12] **Q:** "Free support material: hardware, software, branded
[13] collector cards, branded tailor-made incentive
[14] catalogue, point of sale material,
[15] maintenance/repair/replenishment.
[16] "Fully branded loyalty programme.
[17] "Incremental customer traffic - crossover from
[18] other network members.
[19] "High awareness - economies of scale, benefits of
[20] network.
[21] "Low cost of participation - no set-up cost.
[22] "Access to the Powerpoint database (at low
[23] cost)."
[24] Do you see that?
[25] **A:** I do.

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[1] chains, chemists, DIYs - you can read them quicker than
[2] I can read them out.
[3] **A:** Mmm.
[4] **Q:** They have some names on the right-hand side. They are
[5] all pretty obvious names to put forward as candidates
[6] for membership in that sector, would you not think so?
[7] **A:** Yes, they are.
[8] **Q:** If you were trying to set up a scheme like this, those
[9] names, I think, would almost select themselves?
[10] **A:** I think that would be the case. Certainly they are all
[11] well-known High Street brands.
[12] **Q:** Turn, if you will, to page 863. Just so you get the
[13] context, have a finger in 863 and in 864. You will see
[14] that he is discussing, on 863, customer benefits and, on
[15] 864, network member benefits?
[16] **A:** Mmm.
[17] **Q:** All right? Customer benefits are the ones you would
[18] expect:
[19] "Wide choice of attractive, valuable and relevant
[20] rewards.
[21] "Achievable rewards - points are collected quickly
[22] from a range of network participants.
[23] "- economies of scale deliver lower points value
[24] requirement per reward.
[25] "Automatically dispensed without having to ask.

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[1] **Q:** That is enough, is it not, to tell you that we are
[2] looking here at almost the paradigm of your loyalty
[3] village, are we not?
[4] **A:** Yes. I am still unsure, of course, as to the last
[5] point, about the access to Powerpoint database, what
[6] exactly would that be and to what extent would that
[7] access be open and what would it reveal? But the idea,
[8] certainly, of the participating retailers being able to
[9] offer collection and redemption is part of the loyalty
[10] village but my definition or stance on that is that this
[11] is a loyalty village which is run by the village itself,
[12] in the sense that it enables them to have that
[13] relationship with the cardholders.
[14] **Q:** We are back to the point I was putting to you a little
[15] while ago. How can it matter in practical terms whether
[16] you use the resources of an external administrator or
[17] whether one of you is big enough to provide the
[18] administration services yourself; how can it matter?
[19] **A:** I think it matters not in an operational sense but in
[20] almost a philosophical sense, of who owns the
[21] relationship with the people who wish to be members, as
[22] cardholders, of that loyalty village. It matters in a
[23] sense of where does that information reside; to what use
[24] is it put? If it is put for the benefit of the village,
[25] in a sense of encouraging people to come more and more

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[1] to the village, by members of the village, that is
[2] I think well and good. If the benefit, however, is used
[3] by another party to them cross-sell other goods or
[4] services, that may not be an appropriate use of that
[5] information.
[6] **MR JUSTICE LADDIE:** I am not sure that you have actually got
[7] Mr Hobbs' point. He is suggesting that, assume that you
[8] have what you call a loyalty village and you decide that
[9] the administration - as far as the public is concerned,
[10] they see only the brands of the participants?
[11] **A:** Mmm.
[12] **Q:** That is all they see. They think it is run by the
[13] participants?
[14] **A:** Mmm.
[15] **Q:** That gives them the attraction. That is attractive for
[16] the participants that the customers see that. Mr Hobbs
[17] says assume that in what you call a loyalty village, it
[18] is decided that the administration is run by a separate
[19] and distinct organisation?
[20] **A:** Mmm.
[21] **Q:** He says that does not stop it being your type of loyalty
[22] village. I thought you said you agreed with him on
[23] that. But you did not agree with him.
[24] **A:** No, no, sorry. If we are taking your point about
[25] whether or not the customers have no interest in whether

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[1] benefits, at 864, is that not really a perfect
[2] description of the network member benefits of a loyalty
[3] village?
[4] **A:** It is certainly a good description of a loyalty village,
[5] yes.
[6] **Q:** You do not like my word "perfect". Why not?
[7] **A:** I am afraid, as you know, I have not read these
[8] documents before, I have not full comprehension of what
[9] this scheme was meant to be or if it came to fruition.
[10] **Q:** You had been alerted, I think, by people on Mr Donovan's
[11] side of this case to at least the existence of this
[12] concept. Are you really resisting me on the proposition
[13] that this is an electronic loyalty village?
[14] **A:** No, I am not. We were debating the word "perfect",
[15] I think.
[16] **Q:** Perhaps I will not press you on the word "perfect", in
[17] view of what you have now said. Look at page 873, if
[18] you would.
[19] **MR JUSTICE LADDIE:** Page what?
[20] **MR HOBBS:** 873. Could you just read that to yourself,
[21] Professor?
[22] **A:** Mmm.
[23] **Q:** Why should Shell UK oil participate? I just draw your
[24] attention to the bottom three points. "Strong network
[25] membership", you will see that they have this

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[1] or not this is run by somebody in the village or some
[2] third party, if that is the way you are putting it to
[3] me, this tallies then with our definition of loyalty
[4] village.
[5] **MR HOBBS:** You said "our definition".
[6] **A:** Sorry, with my definition of a loyalty village. If we
[7] make the assumption that the cardholders are oblivious
[8] and also unconcerned with who has the relationship with
[9] them.
[10] **MR JUSTICE LADDIE:** Sorry, Mr Hobbs, you carry on.
[11] **MR HOBBS:** Let me try another way. I am asking you
[12] questions about structure and operation and you are
[13] giving me answers in terms of proprietorship. Try and
[14] put proprietorship out of your mind, if you will.
[15] **A:** Fine.
[16] **Q:** The main facet of proprietorship is control. If in fact
[17] the members control their scheme in a way that gives
[18] them equal concurrent rights of access to the same
[19] database, it does not matter whether they own it or not,
[20] does it? They have all the benefits of being owners
[21] without necessarily being owners, would you not agree?
[22] **A:** Yes, if that access to the database is open and
[23] complete.
[24] **Q:** From what you have seen here so far, leave aside
[25] questions of ownership, looking at the network member

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[1] distribution of trading activities there under the sub
[2] bullet point.
[3] "Exclusive membership, denies your main
[4] competitors access to the network", so there is a little
[5] pigeonhole into which you can slot yourself and you can
[6] take your place in an orderly but nonetheless joint
[7] operation. Do you see that?
[8] **A:** Mmm.
[9] **Q:** Then "Access to database at low cost"?
[10] **A:** Mmm.
[11] **Q:** Okay, that I think means that we can agree, completely,
[12] that the proposal that was put forward to Shell in this
[13] document is a proposal for an electronic loyalty village
[14] as described in your report, correct?
[15] **A:** Yes.
[16] **Q:** Can I ask you this: do you see any difference in
[17] principle or any difference of substance between what
[18] I have shown you in this document and what the Shell
[19] Smart Scheme actually is?
[20] **A:** The only difference that I can see, from my cursory
[21] reading of the documentation here, is in that very
[22] ownership and originality of the scheme and the
[23] ownership of the information about those people who wish
[24] to be participants in the scheme by virtue of being
[25] cardholders.

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[1] If I may, I will expand on that. I would see that
[2] the Shell Smart Scheme was originally intended to be a
[3] group of retailers, working together in co-operation in
[4] this sense and that they would hold the information
[5] about cardholders within their consortium, within their
[6] loyalty village, and they would then be able to use that
[7] information, if they so deemed to, to learn more about
[8] their cardholders, about their customers, so therefore
[9] to be able to better serve them.

[10] Q: Are we not back to the question of ownership?

[11] A: Ownership of the data?

[12] Q: Yes. Is that not what you are really putting to me in
[13] your answer again?

[14] A: It is. You asked me what difference is there between
[15] this scheme and how I see the Shell scheme. That is my
[16] approach there.

[17] Q: Is that a difference of any real substance, in your
[18] opinion?

[19] A: In my opinion, I think it is, because it is, as I said,
[20] increasingly important that we, as consumers, are happy
[21] with who holds our information and to what use they put
[22] it.

Q: Is that a philosophical viewpoint of yours rather than a
commercial viewpoint of yours?

[25] A: It is a philosophical viewpoint but I believe it also

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[1] enlist the services of Powerpoint to administer the
[2] scheme and therefore it contracts out to Powerpoints the
[3] administration. There would not be any difference in
[4] principle or substance between that arrangement
[5] afterwards compared with what went before, would there?

[6] A: I may want to think that one through. You are
[7] suggesting that having started the scheme, Shell then
[8] sold the information that cardholders offered to them,
[9] to a third party, whoever it was, and there may not be
[10] any difference in the operation or mechanisms of the
[11] scheme, which may remain as before, but I personally
[12] believe that would be a different kettle of fish in the
[13] sense that the ownership of the relationships would be
[14] with another party.

[15] Q: You would be worrying about security of data, would you
[16] not?

[17] A: Not just security but the way in which that data was to
[18] be used, to what purposes.

[19] Q: Is it your understanding that Mr Donovan's proposal to
[20] Shell did, in fact, contemplate the possibility of Shell
[21] organising this loyalty village through an independent
[22] stand-alone company?

[23] A: I have no knowledge of that, I am afraid.

[24] Q: Subject to the point that you have just made, that
[25] I have just explored with you, there is not, is there,

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[1] has commercial credence in that we are increasingly
[2] looking to people who we feel we can trust as
[3] suppliers. I think those suppliers who misuse our
[4] information will be commercially disadvantaged. That is
[5] an opinion.

[6] Q: I understand. Let me put two hypotheticals to you:
[7] imagine that Shell had gone ahead with that Powerpoints
[8] proposal that I have just taken you through and so
[9] Powerpoints is out there acting as administrators and
[10] there is a full consortium joined together.

[11] A: Mmm.

[12] Q: They decide that after one year, Shell decided that they
[13] liked it so much that they would buy the Powerpoints
[14] operation. They would buy Powerpoints?

[15] A: Mmm.

[16] Q: There would not be any difference in principle, would
[17] there, between the way in which the scheme then operated
[18] as compared with the way in which it operated before?

[19] A: The only difference in principle is that now Shell would
[20] be the owner of the data of Powerpoints.

[21] Q: You think that is a point of principle, do you?

[22] A: No, I am mulling it over. I am agreeing with you.

[23] Q: The same would be true, this is the second hypothesis,
[24] that Shell in fact starts off running the scheme as it
[25] is done at the moment and then decides that it will

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[1] any difference of substance or principle between what we
[2] have looked at in GHA Powerpoints and the Shell Smart
[3] Scheme as you know it to be operating?

[4] A: Not in the sense that we have a mixture of collection,
[5] redemption or that, as you were saying, data is
[6] available to the retailer members of that scheme. It is
[7] a loyalty village in that sense of the word, yes.

[8] MR JUSTICE LADDIE: Professor, just to help me, what
[9] Mr Hobbs was saying was that except for the one caveat,
[10] he was saying this is the same. To answer "It is the
[11] same to the following extent" is not an answer.

[12] What are the differences between this and the
[13] Shell Smart Scheme, other than the point that you have
[14] made about ownership of the data? That is what Mr Hobbs
[15] was asking and what I want to have your answer to. What
[16] are the differences other than that one point?

[17] A: There appear to be no differences, in my opinion.

[18] MR HOBBS: Do you have enough knowledge to know whether
[19] that

[19] Powerpoints proposal could be regarded as novel in
[20] 1992?

[21] A: I believe I have considerable knowledge of this area.
[22] The novelty of a proposal of this kind lies within the
[23] idea of the simultaneous - not simultaneous, the
[24] collection and redemption to the same retailer members
[25] and I would suggest also the novelty also lies in the

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[1] fact that a proposal that involves one where the
[2] ownership of the data lies with the participant members
[3] of that grouping of that loyalty village, that would be
[4] a novelty.

[5] Q: Let me take the first of those two points. Do you
[6] consider that in fact communal issuing and redemption,
[7] do you think that that was novel in 1992?

[8] A: It is obviously - my knowledge is particularly of the
[9] UK market. There may have been schemes in America and
[10] Japan which have some elements of common issue and
[11] redemption but I think in the sense of a wide - when we
[12] looked back at the people who tended to be involved
[13] here, as retailers and market sectors, we are looking
[14] really at a proposition that would cover a wide
[15] percentage of most people's weekly spend. It was not
[16] something that was a combination of, say, hotels or car
[17] hire, it was everyday shopping experiences. To that
[18] extent, within my knowledge base, I think that is fairly
[19] novel.

[20] Q: Can you help us with an indication of how knowledgeable
[21] you feel yourself to be? I mean, is this mainstream,
[22] these topics I am discussing with you; are they main
stream so far as your research interests are concerned,
or are they peripheral?

[25] A: My mainstream interest is in the use of plastic cards,

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[1] Q: At the bottom of the left-hand side, "Retail Automation,
[2] September/October 1992"?

[3] A: Mmm.

[4] Q: Do you recognise Retail Automation as one of the
[5] publications of interest to people in this area in the
[6] UK?

[7] A: Yes, I do.

[8] Q: Does it have a wide readership, so far as you are aware?

[9] A: Particularly amongst people interested in technology in
[10] retail settings, yes.

[11] Q: That is the kind of area we are in here, with these
[12] electronic loyalty schemes?

[13] A: Yes.

[14] Q: Has anybody mentioned this to you, or have you had a
[15] chance to see this document before?

[16] A: Yes, I have.

[17] Q: When did you see it?

[18] A: Monday afternoon.

[19] Q: Right. Therefore, you have considered the contents of
[20] it?

[21] A: I have.

[22] Q: And you will be aware, I expect, that I am going to ask
[23] you about the middle column?

[24] A: I was not aware of that, but I am now.

[25] Q: Do you see there is a passage which says, "On the

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[1] payment and non-payment.

[2] Q: Right, but your knowledge, I think you said, was
[3] primarily concentrated on what was going on in the UK.
[4] Did you say you had much knowledge of what was going on
[5] in North America?

[6] A: I have some knowledge, and indeed of Japan.

[7] Q: Would you agree with the proposition that is being put
[8] forward on my side, that what goes on in North America
[9] is almost ipso facto of interest here because they are
[10] frequently one step ahead of us?

[11] A: I would certainly agree with the proposition that it is
[12] of great interest to us here. I may take issue with the
[13] fact that they are one step ahead of us. There are a
[14] large number of loyalty schemes in the United States but
[15] not many of them, in my opinion, are concerned with
[16] developing ongoing relationships with their customers.
[17] They are very much sales/promotion orientated.

[18] Q: Now, could you close up E2, please, and go to E3? If
[19] you would turn in that volume, if you have it, to a page
[20] which is marked 1286/A.

[21] A: Mmm.

[22] Q: Professor, if it is working correctly, you have a
[23] document there which has in the top left-hand corner,
[24] "AT&T expands the options"?

[25] A: That is correct.

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[1] customer loyalty front", middle column?

[2] A: Yes.

[3] Q: Could you read that to yourself to refresh your memory
[4] and go down to the penultimate paragraph there, "Bates
[5] envisages"? If you read that to yourself.

[6] A: Mmm. (Pause) Mmm.

[7] Q: All right. Now, I will take it by stages with you. He
[8] is discussing an AT&T proposal in 1992. He says, in the
[9] second paragraph:

[10] "We would envisage some sort of central points
[11] "bank", he says, 'with a mixture of participating
[12] retailers, where shoppers can accumulate points and then
[13] exchange them for goods in the outlets taking part in
[14] the scheme'."

[15] Do you see that?

[16] A: I do.

[17] Q: Here we have in principle a village of village
[18] shopkeepers, have we not?

[19] A: Yes, we have.

[20] Q: "AT&T Istel would act as central points banker trading
[21] the points and their financial values between stores and
[22] shoppers and at the same time accumulating shopper
[23] marketing data which could then be passed on to the
[24] retailers in the scheme to be used in customer loyalty
[25] programmes."

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[1] Do you see that the data is available to the
 [2] shopkeepers in the village?
 [3] **A:** Yes, I do.
 [4] **Q:** He says:
 [5] "It would all be rather like Air Miles only with
 [6] goods and services as the rewards instead of foreign
 [7] travel."
 [8] Do you see that?
 [9] **A:** I do.
 [10] **Q:** In view of our exchanges a little while ago, you would
 [11] see it as an improvement over Air Miles, would you not?
 [12] **A:** In the sense that yes, it is offering things which are
 [13] everyday purchases, rather than a special occasion, Air
 [14] Miles, yes.
 [15] **Q:** You do not get the one type of reward, you get a range
 [16] of rewards; yes?
 [17] **A:** That is correct.
 [18] **Q:** "Bates is already discussing the idea with likely
 [19] retailers and expects to have some sort of programme at
 [20] the pilot stage within six months.
 [21] 'We already have the network and links into the
 [22] High Street. Without these, this sort of scheme is a
 non-starter'.
 Would you agree with that?
 [25] **A:** I certainly would agree that, having in this case, I am

[1] that technology.
 [2] **Q:** How much do you think they invested in it; any idea?
 [3] **A:** I have no idea.
 [4] **Q:** You would expect it to be more than 10 million, would
 [5] you not?
 [6] **A:** I have no idea.
 [7] **Q:** The penultimate paragraph:
 [8] "Bates envisages such a loyalty scheme as having
 [9] around 3 million members and embracing a number of
 [10] non-competing retail operations."
 [11] Do you see that?
 [12] **A:** I do.
 [13] **Q:** Can we agree that this is a description of an electronic
 [14] loyalty village according to the model we have been
 [15] discussing?
 [16] **A:** Yes, we can.
 [17] **Q:** Can I ask you this again: do you see any difference in
 [18] principle or substance between what is described here
 [19] and the Shell Smart Scheme?
 [20] **A:** The only difference in principle is the one again of
 [21] where, in the central paragraph, "AT&T Istel would act
 [22] as a central points banker."
 [23] Admittedly here the claim is that they would have
 [24] traded the points and the information between
 [25] participating retailers, but nevertheless it would have

[1] presuming, terminals recording electronic funds
 [2] transferred at point of sale, that that would be an
 [3] advantage, yes.
 [4] **Q:** In fact, it is the main reason why, if you are going to
 [5] operate an electronic loyalty village, you are highly
 [6] likely, unless you are very wealthy indeed, to need an
 [7] outside administrator for the scheme; correct?
 [8] **A:** Not necessarily so, I do not think I mean, in this
 [9] instance here we are talking about the polling of data
 [10] from terminals, which is what AT&T were doing at that
 [11] time. Many retailers in the UK, many multiple retailers
 [12] own their own terminals and therefore have heavily
 [13] invested in that technology.
 [14] **Q:** Surely you need a central nerve centre of operation in
 [15] order to make the scheme operate fully functionally on a
 [16] common basis?
 [17] **A:** You would need a large databank to accumulate the
 [18] collection and the redemption of points.
 [19] **Q:** That is right. That is quite likely, in the ordinary
 [20] scheme of things, to be outside the reach of even quite
 [21] wealthy retailers, is it not?
 [22] **A:** I have no knowledge, unfortunately, of the cost of such
 [23] databases or such technology. My knowledge tells me
 [24] that, if we are looking at the Shell Smart Scheme,
 [25] I presume that in the case of Shell, Shell invested in

[1] been somebody outside of the loyalty village itself who
 [2] held the information.
 [3] **Q:** If I say that that is mere admin so far as the operation
 [4] of the scheme is concerned, would you quarrel with me?
 [5] **A:** I am afraid I would, because I do not think it is mere
 [6] admin. I personally feel that that is quite an
 [7] important feature, of who owns that data.
 [8] **Q:** We are back to the philosophical point.
 [9] **A:** I think we are.
 [10] **Q:** I think you and I must agree to differ on that. If you
 [11] could -
 [12] **MR JUSTICE LADDIE:** Can I just clarify something? From the
 [13] point of view of the consumer, who carries out the
 [14] administration can be made invisible?
 [15] **A:** Indeed.
 [16] **Q:** So the benefits to the members of the scheme of loyalty
 [17] generated by this scheme can be achieved whether or not
 [18] you have an administrator or not, because the consumer
 [19] behaviour is dependent upon the consumer observations of
 [20] what he is getting?
 [21] **A:** That would be correct if one can argue that consumers'
 [22] behaviour, in terms of their loyalty or their purchase
 [23] behaviour, can be affected, whether or not the scheme is
 [24] in-house or third party.
 [25] **Q:** What you are talking about is who has the control of the

[1] data inside the scheme?
 [2] **A:** Yes. My philosophical stance, which differs somewhat,
 [3] is that we are being asked to give quite a lot of
 [4] information to these schemes, particularly personalised
 [5] ones, not just name and address, date of birth, and our
 [6] ongoing shopping behaviour is monitored through them.
 [7] That is very valuable information and I think who
 [8] controls that is of importance, certainly from my
 [9] perspective.
 [10] **MR JUSTICE LADDIE:** If members of the public knew this was
 [11] going on they would all chop up their cards immediately.
 [12] **MR HOBBS:** We switch from the objective to the subjective.
 [13] I understand what you are saying and I have agreed
 [14] to differ with you and I hope you have agreed to differ
 [15] with me on this. It does not matter who owns the data,
 [16] it is the quality of the person who owns it. It is his
 [17] integrity as a data holder that matters, not who he is
 [18] in the scheme of things; is that not right?
 [19] **A:** That is true in a sense of looking at it from a security
 [20] point of view, but I am also looking at it from a point
 [21] of view of what is done with that data. What
 [22] possibilities exist with that information; what can be
 [23] done with it?
 [24] **Q:** Can you close up that file and take out volume E1?
 [25] **A:** Section E, file 1.

[1] have perhaps the wider spread of retailers, such as the
 [2] ones we have been talking about previously. That would
 [3] be one point. You are asking me about a loyalty village
 [4] there?
 [5] **Q:** Yes, I am. I am just intrigued by what you said about a
 [6] wide spread. What do you think is missing there?
 [7] **MR JUSTICE LADDIE:** This is a hamlet with two members; is
 [8] that what you are saying? Dahl Superstores and Super
 [9] Valu stores, those are the only two members of the
 [10] village so it is only a hamlet?
 [11] **A:** Both, it would appear, are grocery supermarkets, so in
 [12] that sense it is a very -
 [13] **MR HOBBS:** If it was not so small, if it was not a loyalty
 [14] hamlet, if it was bigger, it would be a loyalty village,
 [15] would it not?
 [16] **A:** If it was bigger, but on my first reading of this it is
 [17] not, it is just a loyalty scheme being run through one,
 [18] or in this case two supermarkets, presumably in
 [19] different locations.
 [20] **Q:** Is your only caveat over size?
 [21] **A:** No, it is really over the breadth of coverage of
 [22] different market sectors.
 [23] **Q:** Okay. Bear in mind what you have read here. Keep it
 [24] open, as a matter of fact. I must ask you then in view
 [25] of what you have just said to take out at the same time

[1] **Q:** That is it. In there, if you would not mind, could you
 [2] locate a page which carries the number 377/A?
 [3] (12.30 pm)
 [4] Do you have that?
 [5] **A:** Yes, I have.
 [6] **Q:** Is this a document you have seen before?
 [7] **A:** Yes, it is.
 [8] **Q:** Is this one of those that was shown to you the other
 [9] day, Monday?
 [10] **A:** It was.
 [11] **Q:** It was shown to you at the same time as the one we were
 [12] just looking at?
 [13] **A:** That is correct.
 [14] **Q:** Do you want to read it to yourself again, or can you
 [15] remember it?
 [16] **A:** I would not mind a quick perusal. Which part are we
 [17] looking at?
 [18] **Q:** It is "Supermarkets get smart", and follow it through
 [19] into the third column. (Pause)
 [20] **A:** Fine.
 [21] **Q:** Now, is this an electronic loyalty village?
 [22] **A:** I do not think in that sense that it is, no.
 [23] **Q:** What is it lacking?
 [24] **A:** Pardon? It is being provided through a number of
 [25] supermarkets as a one distribution source. It does not

[1] volume E2. In volume E2 turn to page 703/A.
 [2] **A:** Mmm.
 [3] **Q:** It should be Retail Automation May/June, 1991?
 [4] **A:** It is.
 [5] **Q:** Is this one you looked at the other day?
 [6] **A:** I think it is. I looked at a lot but I think so.
 [7] **Q:** It has not scorched itself into your recollection. Have
 [8] a look at the bit which says "Vision Grows", which takes
 [9] you across the page. Have a look at the figures there.
 [10] **A:** Yes.
 [11] **Q:** No longer a loyalty hamlet?
 [12] **A:** We may have to agree to differ again. To me, the people
 [13] mentioned here as the opportunities to collect points
 [14] are all grocery supermarkets, perhaps with different
 [15] names, but they are essentially supermarkets in
 [16] different locations in America.
 [17] **Q:** I see.
 [18] **MR JUSTICE LADDIE:** Just so I understand, when you talk
 [19] about a loyalty village, you say loyalty village because
 [20] all the different suppliers of different types of
 [21] products within the village which may be in substance
 [22] non-competing are contributing to the scheme. What you
 [23] are saying here is this is monochrome?
 [24] **A:** Yes.
 [25] **Q:** This is all the same type - instead of having whatever

[1] it is, Dahl Supermarket just running it amongst its own
[2] supermarkets, it is said, "Let us include somebody
[3] else's supermarkets" because it is just extending the
[4] loyalty scheme to other supermarkets, running the same
[5] sort of business, not cross-fertilisation between
[6] different businesses?

[7] **A:** That is the way I am reading it, that is correct, yes.
[8] Underpinning that point is the origin of this particular
[9] scheme, which is one that is generated by the
[10] manufacturers of products, branded products.

[11] **MR HOBBS:** You are talking about Procter and Gamble, are you
[12] not?

[13] **A:** Yes, that is one of the people involved, who therefore
[14] are looking to use a number of supermarket groups to
[15] monitor the distribution of their products.

[16] **Q:** It lacks the diversity you would wish to see in a
[17] loyalty village?

[18] **A:** It does not have any diversity. These are all grocery
[19] supermarkets.

[20] **Q:** I hear what you say. The position though is that we
[21] have a situation in which people are issuing and
[22] redeeming points, are they not?

[23] **A:** Through the same stores, yes.

[24] **Q:** But the members are issuing and redeeming, are they not,
[25] and they are using a Smartcard as an electronic purse

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[1] for these purposes, are they not?

[2] **A:** From the reading of the documentation it would appear,
[3] yes, that in these particular stores, one can collect
[4] and redeem them in that particular outlet. Whether one
[5] could also redeem them in a Safeway or Big Bear store,
[6] I am not sure. I suspect not but I am not sure. They
[7] can collect and redeem in the same grocery outlet.

[8] **Q:** My understanding of this is that in fact you can redeem
[9] from the Vision Value Club catalogue and that you can
[10] redeem in any of the stores. Had you any knowledge of
[11] this scheme before you read this material?

[12] **A:** Indeed, I had. I had heard of Vision Value because of
[13] its very use of a Smartcard. As you mentioned before,
[14] I do not have intimate knowledge of it in that sense.

[15] Again, there may be a catalogue, and indeed that is
[16] stated in one of the articles here. Still on the
[17] village idea, the collection and redemption, it seems to
[18] me this is merely between a number of different grocery
[19] supermarkets in different geographical locations.

[20] **Q:** If somebody said that the idea of members of a scheme
[21] issuing and redeeming, in other words, everybody is an
[22] issuer and a redeemer, was novel in 1992, would you
[23] agree with me that it would not be novel having regard,
[24] amongst other things, to Vision Value?

[25] **A:** I think Vision Value is a very different loyalty scheme

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[1] in that, number one, it was originated by the
[2] manufacturers of branded products and not by the
[3] retailers of those products. Number two, it appears to
[4] me that it is useful only in the sense that it is put
[5] out through one merchant sector, that is grocery
[6] retailing. To my mind, it does not qualify as a loyalty
[7] village, either in its origin of being devised by
[8] members of the village or in its implementation as being
[9] available for collection and redemption between all the
[10] different market sectors or retailers in a village.

[11] **Q:** You can close up those two files and put them away and
[12] I will take you to another file. File D, which is the
[13] one that has your statement in. It is the one you
[14] looked at first. You have read, I understood you to
[15] say, the report of Jonathan Reynolds?

[16] **A:** That is correct.

[17] **Q:** Do you know him, by any chance?

[18] **A:** I do.

[19] **Q:** Do you each know one another rather well?

[20] **A:** Not rather well, but we know each other.

[21] **Q:** Through your writings, and so on?

[22] **A:** We have met personally as well.

[23] **Q:** His report is behind tab 4 in this bundle. He mentions
[24] a number of schemes, and one of them I would like to
[25] look at. Look for page number 96 at the bottom, on the

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[1] stamped numeration. There is a heading on that
[2] page "Virgin Freeway". Do you see that?

[3] **A:** I do.

[4] **Q:** Is Virgin Freeway known to you?

[5] **A:** It is.

[6] **Q:** Is that a loyalty village?

[7] **A:** I would say in the terms of my definition and our
[8] understanding that it is not, the reason being that the
[9] collection of points on the Virgin Freeway are from
[10] separate sources down the redemption of points, apart
[11] from the scheme's originator, that is Virgin itself.

[12] **Q:** The rewards are available through the participating
[13] members, are they not?

[14] **A:** That is not my understanding. I believe that you can
[15] accumulate points through, for example, flying on Virgin
[16] Airways or using Virgin holidays. Yes, you can also
[17] redeem points through those, because they are the
[18] originators of the scheme. There are other ways of
[19] accumulating points, for example, through hotel chains,
[20] rentcars and so on, which, with my understanding, you
[21] cannot redeem the points there, you redeem the points in
[22] other activities. Jonathan mentions, in 9.2, the
[23] rewards include a wide choice of activities, gliding,
[24] golfing, et cetera, et cetera.

[25] **Q:** All right. Subject to that, a problem on which I may

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[1] have to get clarification myself, we are looking here,
 [2] are we not, at a loyalty scheme where you have
 [3] co-operating participants working together to promote
 [4] loyalty for their common benefit; yes?
 [5] **A:** We certainly have a scheme where participants are
 [6] joining together to offer points which hopefully will
 [7] attract people to use their services. But in that
 [8] sense, it is very much, if I can suggest this, more a
 [9] sales promotion activity than a loyalty scheme, whereby
 [10] one is trying to build relationships with customers.
 [11] **Q:** Surely it is a loyalty scheme, is it not?
 [12] **A:** In the common usage of the word "loyalty", it would be,
 [13] yes, but I am trying to give my opinion that it would
 [14] be - for example, if we take some of the people issuing
 [15] points here, as Chase Manhattan bank, or Holiday Inn,
 [16] I think that companies such as Holiday Inn, for example,
 [17] are involved in a wide range of schemes we could call
 [18] loyalty schemes.
 [19] **Q:** It is an example, you will agree, I think, of retailers
 [20] from different spheres co-operating with one another in
 [21] what is, I think you have agreed, a loyalty scheme?
 [22] **A:** Indeed, yes.
 [23] **Q:** Right. It is by no means an exception, is it? There
 [24] are plenty of examples, dating back to the late 1980s
 [25] and early 1990s, of retailers coming together for common

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[1] **Q:** Just one thing you are familiar with, I think you wrote
 [2] an article a long, long time ago. Perhaps it was not so
 [3] long ago. 1987 this was on style cards in Glasgow, do
 [4] you remember?
 [5] **A:** I do.
 [6] **Q:** That was an example which you found quite striking of
 [7] the time, of one store in Glasgow issuing a card which
 [8] was usable without discrimination in a whole variety of
 [9] stores in Glasgow, was it not?
 [10] **A:** Indeed it was.
 [11] **Q:** That was an early example in this country of retailers
 [12] coming together, working together for the common
 [13] interest, around and about a consumer benefit in the
 [14] form of a credit card?
 [15] **A:** Yes, it was, in fact, a payment card, a credit card that
 [16] one could use in a variety of retailers, not just within
 [17] Glasgow but eventually within the whole of the north of
 [18] England and Scotland. In many ways that is not very
 [19] different than retailers coming together to accept Visa
 [20] or Mastercard. It was an acceptance mark.
 [21] **Q:** I suppose I had better put it to you quite starkly:
 [22] there is nothing strange or unusual in suggesting, is
 [23] there, that retailers should come together and work for
 [24] their common benefit?
 [25] **A:** Not at all.

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[1] benefit under a loyalty scheme?
 [2] **A:** That is correct also, yes. There are many schemes of
 [3] this nature in the sense of frequent flyer schemes as
 [4] well.
 [5] **Q:** There are frequent flyer schemes, there are frequent
 [6] buyer schemes, there are frequent hirer schemes. If
 [7] anything is done with frequency there seems to be a
 [8] scheme for it. Does that rather cynical way of putting
 [9] it tally with your perspective?
 [10] **A:** I am smiling because ...
 [11] **MR JUSTICE LADDIE:** I think you have to distinguish,
 [12] Mr Hobbs, between frequent buyer schemes, so if you go
 [13] to one shop you get loyalty discounts, and what we are
 [14] talking about here. You have blended two together.
 [15] **MR HOBBS:** Thank you, my Lord. My question was within the
 [16] frame of reference of co-operating retailers of whatever
 [17] it is. I mean, you are aware, are you not, that there
 [18] have been frequent flyer schemes where you can gain your
 [19] rewards from other participants in the scheme, not just
 [20] one particular airline; you are aware of that, are you
 [21] not?
 [22] **A:** I have to confess that I am not. I am not denying that
 [23] that is not the case. You may be able to point me in
 [24] the right direction there but it is not something I am
 [25] familiar with, as we sit here.

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[1] **Q:** The commune or kibbutz principle is not in itself a
 [2] revolutionary concept in retailing, is it?
 [3] **A:** No. Your other example of a department store would
 [4] verify that by the fact that many department stores used
 [5] to rent out space to concessionaires.
 [6] **Q:** Store in store?
 [7] **A:** Store in store.
 [8] **Q:** Let me take you then behind tab 5 in the same
 [9] bundle that you have open. This is Mr Perkins' report.
 [10] He mentions, on stamped page 136, a shopping centre
 [11] scheme.
 [12] **A:** Mmm.
 [13] **Q:** Do you recollect reading about the Takashimaya Shopping
 [14] Centre scheme?
 [15] **A:** Yes, I do.
 [16] **Q:** Was it known to you before you read it in this report?
 [17] **A:** Yes, it was.
 [18] **Q:** My understanding - correct me if yours differs - is
 [19] that this is one of a number of schemes known as mall
 [20] card schemes.
 [21] **A:** (Witness nods)
 [22] **Q:** You are agreeing with me, I think?
 [23] **A:** I am sorry. There are a number of schemes indeed in the
 [24] UK of mall schemes.
 [25] **Q:** When was the earliest one you can think of?

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[1] A: In the UK?
[2] Q: No, that you knew of.
[3] A: That is a very difficult question, if you do not mind me
[4] saying so.
[5] Q: Generally. Would I be right in thinking that the idea
[6] of having mall cards which you could use at all the
[7] shops in the shopping mall goes back to the early 1990s?
[8] A: Particularly in an American context, I think that would
[9] probably be the case.
[10] Q: The cards, do you know of any examples where they were
[11] Smartcards as opposed to magnetic stripe cards?
[12] A: No, I do not, to be honest. That is the case that there
[13] may be now, with Smart technology moving on, but not in
[14] that early period of 1990, not that I am aware of.
[15] Q: The advantages of having the mall card can and
[16] frequently do include, do they not, rewards for loyalty
[17] and frequent shopping at that particular shopping mall?
[18] A: Yes, they do, in the same way that sometimes individual
[19] retailer cards involve some reward. I am thinking of a
[20] payment card.
[21] Q: Okay. One last question, just a couple of last
[22] questions, how is Mr Donovan known to you, Mr John
[23] Donovan known to you?
[24] A: We met for the first time this morning.
[25] Q: You have never had any connection with him before,

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[1] (Short adjournment)
[2] (2.05 pm)
[3] MR JUSTICE LADDIE: I am sorry to have kept everybody
[4] waiting.
[5] MR COX: Professor Worthington, I want to examine with you,
[6] please, the nature and the structure of the
[7] relationships, first in a scheme which has either owning
[8] it or jointly owning it, but certainly controlling it -
[9] such as Powerpoints - and, second, one in which there
[10] is a consortium of partners who operate the scheme as a
[11] consortium.
[12] The first question I want to ask you is this,
[13] before we come to look at some documents: in
[14] recent years, has the field which you have specialised
[15] in, or one of the areas of that field, come to be known
[16] as relationship marketing?
[17] A: It has.
[18] Q: Why is it called relationship marketing?
[19] A: It represents a new mindset, really, in which the idea
[20] is to establish, maintain and build relationships with
[21] customers.
[22] Q: Does it amount to a study and an examination of what
[23] it is that builds that central long-term loyalty
[24] relationship between the customer and a retailer?
[25] A: Yes, it does, and I guess it also depends on a supplier

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[1] except by correspondence?
[2] A: When you said "known to you" I was thinking personally.
[3] Only by correspondence.
[4] Q: You were strangers to one another when you received his
[5] letters in 1997?
[6] A: That is correct.
[7] Q: Would your Lordship just forgive me for a second,
[8] please? (Pause)
[9] My Lord, I have no further questions.
[10] Re-examination by MR COX
[11] MR COX: My Lord, I am going to ask, since my learned friend
[12] has cross-examined at some length on documents which the
[13] witness was not familiar with before he gave his
[14] answers, for a slightly longer short adjournment than
[15] normal so that he can refresh his memory and have an
[16] ample opportunity to look at the GHA Powerpoints
[17] document, amongst others.
[18] MR JUSTICE LADDIE: He will be in purdah. So you want me to
[19] rise now and sit at what time?
[20] MR COX: 2 o'clock, my Lord.
[21] MR JUSTICE LADDIE: No objection to that, Mr Hobbs?
[22] MR HOBBS: No, as long as the witness is in purdah.
[23] MR COX: He most certainly will be, my Lord.
[24] MR JUSTICE LADDIE: We will rise now.
[25] (12.50 pm)

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[1] of goods and services learning more about those
[2] customers so as to serve them better.
[3] Q: So it is about the relationship between customer,
[4] long-term it is hoped, and retailer?
[5] A: Yes, retailer in that broad sense of the word "retail".
[6] Q: Does the concept, which consumers know they are buying
[7] into when they join one of these schemes, make a
[8] difference to their perception of the scheme? I want
[9] you to think about this question quite carefully, so let
[10] me repeat it for you. The concept which customers know
[11] they are buying into, the nature of the scheme itself,
[12] does that make a difference to their perception of the
[13] scheme, the level of comfort they feel with it, for
[14] example?
[15] A: Yes, I think it would. I mean, we as consumers have a
[16] wide range of choice. We can choose, for example, to
[17] buy into a scheme such as Argos Premier Points which
[18] does not involve any exchange of information,
[19] personalised information, and we can choose that sort of
[20] scheme if we so wish.
[21] Q: Yes.
[22] A: We could also choose another that does involve an
[23] exchange.
[24] Q: Let us just look at this a little bit more closely, if
[25] we can. If I, as a card holder or a card purchaser,

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[1] direct my mind to these things, the structure of the
[2] scheme I know I am entering in with, the persons I am
[3] having the relationship with, is that something
[4] recognised as being important?
[5] **A:** I believe it is.
[6] **Q:** In the Shell Smart Scheme, the consortium scheme, who
[7] are the persons with whom the customer has the
[8] relationship?
[9] **A:** With the members of the consortium.
[10] **Q:** In a third party scheme, who are the persons or the
[11] person with whom the customer would have the direct
[12] relationship?
[13] **A:** With the third party supplier.
[14] **Q:** Now, let me just see if we can illustrate that a bit.
[15] Suppose I lost my card, heaven forbid, and on it were
[16] accumulated hundreds of points that I had exhausted my
[17] family, trailing round, looking for a Shell forecourt to
[18] accumulate them for. Who would I telephone if the card
[19] was a Powerpoints type card?
[20] **A:** I would presume, in that case, you would telephone the
[21] Powerpoints customer service line.
[22] **Q:** Indeed, but if I were - and it is a fact, is it not -
[23] if I were a Smartcard holder and I lost my card, who
[24] would I communicate with about that?
[25] **A:** The Smartcard customer service line.

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[1] customer may not know - let us say that he acquired his
[2] Powerpoint card from Boots, and it has the Boots
[3] trademark on it -
[4] **A:** Mmm.
[5] **Q:** - and the paperwork that comes with it says, "If
[6] you have a problem, phone our service centre". He would
[7] have no idea that he was phoning Powerpoint. He might
[8] think that he is phoning Boots. He probably does not
[9] know and would not care, would he?
[10] **A:** The only answer I can give to that is that in most of
[11] those types of situations, even if Boots, in your
[12] example, had their brand on the card, there would also
[13] be the brand of the scheme provider, in this
[14] hypothetical example Powerpoints. So the card would be
[15] dual branded at least and therefore it would presumably
[16] have some sort of telephone helpline on it through which
[17] you would get to someone who could answer your question.
[18] **MR COX:** Of course, there is this, is there not: you are
[19] aware of the announcements, publicity, campaign that was
[20] launched by Shell when it first rolled out its
[21] multi-partner consortium scheme? You were aware at the
[22] time of its publicity?
[23] **A:** Yes, I was.
[24] **Q:** One of the features that Shell drew powerful attention
[25] to, in addressing the consumer as it announced it, was

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[1] **Q:** Which is based - do you know where?
[2] **A:** I am sorry, I do not.
[3] **MR JUSTICE LADDIE:** Sorry, can you just stop? You said in
[4] the Powerpoint one you would phone the Powerpoint
[5] customer line. Of course, the customer may not know
[6] that he is phoning Powerpoint. It depends how it is put
[7] on the card. The card could say, "Phone our service
[8] centre at such and such a number". He would not know
[9] he was phoning Powerpoint at all, would he?
[10] **A:** Not necessarily, but you would - yes, not necessarily
[11] I guess, but you would be looking to - I mean, this is
[12] all very hypothetical because I do not know if
[13] Powerpoint ever came to fruition, I do not think it
[14] did.
[15] **MR COX:** It did not, no.
[16] **A:** In a scheme such as that, you would want to know
[17] obviously where you could telephone to find out how many
[18] points you had on the card that you had lost in this
[19] example. I think, in that instance, you would - other
[20] schemes of that nature have a central customer service
[21] point which is of the scheme run by the third party
[22] provider.
[23] **Q:** Yes.
[24] **MR JUSTICE LADDIE:** No, I do not think you have answered the
[25] question I put to you, Professor. I said that the

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[1] exactly the fact that the relationship was one of a
[2] consortium, was it not?
[3] **A:** I believe it was.
[4] (2.15 pm)
[5] **Q:** Why would it be that somebody would wish to publicise
[6] and advertise that they were operating it directly as
[7] membership partners of a consortium? Would that have a
[8] difference on the impact it made on the consumer?
[9] **A:** I did not follow the question, I am sorry, when you
[10] said -
[11] **Q:** Why would it be that somebody would wish to draw that to
[12] the public's attention?
[13] **A:** That it was a consortium-based operation?
[14] **Q:** Yes.
[15] **A:** My opinion on that would be because that would, in a
[16] sense, reassure cardholders that their information,
[17] their data, would be held by that grouping.
[18] **Q:** Of course, if you have a third party operator, and
[19] we are going to go through some of the key and central
[20] differences in a minute, but, if you have a third party
[21] operator, he may make available his database to the
[22] participants but it would not stop him making it
[23] available to somebody else, would it?
[24] **A:** Within the bounds of the Data Protection Act, no.
[25] **Q:** No.

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[1] **A:** I mean, within the confines of that particular
 [2] legislation.
 [3] **Q:** I want to come back, if I can, to this idea because, the
 [4] marketing image of a consortium, would you expect it to
 [5] be any different from the marketing image of a third
 [6] party organised scheme?
 [7] **MR HOBBS:** My Lord, I am afraid I must rise to object.
 [8] **MR JUSTICE LADDIE:** I was wondering when you would.
 [9] **MR HOBBS:** To be perfectly honest, this witness –
 [10] **MR JUSTICE LADDIE:** This is supposed to be a re-examination,
 [11] Mr Cox. This sounds to me just like an
 [12] examination-in-chief.
 [13] **MR COX:** My Lord, my learned friend has cross-examined on
 [14] the reasons why you could not slip a piece of paper
 [15] between Powerpoints and Shell Smart and the claimant's
 [16] idea. My submission is that re-examination is clearly
 [17] permissible when I am addressing the centre and heart of
 [18] my learned friend's thrust and attack upon this
 [19] evidence.
 [20] He has put it to him, and I quote his words, that
 [21] "there is no difference of substance", and on another
 [22] occasion "no difference at all", between a scheme
 [23] operated, such as Powerpoints, by a third party and a
 [24] scheme operated as a consortium. I am exploring, for
 [25] your Lordship's help and assistance, what the centre of

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[1] front of you, and particularly tab 3 of that bundle. At
 [2] the back, at page 54, you will find a document entitled
 [3] "Customer Loyalty Schemes" by a Miss Sue Rayner. Have
 [4] you been able to read that?
 [5] **A:** I have read this document in its entirety as – when
 [6] it was published by the publishers.
 [7] **Q:** Yes. It is appended, my Lord, to the expert report of
 [8] Mr Christian and the witness has seen it, as has,
 [9] of course, Mr Hobbs.
 [10] If you turn to page 59 of the bundle, it is the
 [11] larger number not the smaller, under the title "Building
 [12] a Multi-Collection Scheme", do you see the last bullet
 [13] on the bottom of page 59:
 [14] "Shell has been running various types of loyalty
 [15] promotion for the last 20 years, but Shell SMART is the
 [16] first one to really bring the Shell organisation into
 [17] direct contact with end customers of the retail
 [18] business."
 [19] Do you see that?
 [20] **A:** I do.
 [21] **Q:** If you turn the page to page 64, the larger number
 [22] rather than the smaller, under the title "Communicating
 [23] with the customer", do you see the paragraph which
 [24] begins:
 [25] "This is the first time that Shell has had a

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[1] the case is for the claimant on that, that there is a
 [2] vital and fundamental difference, and in my submission
 [3] it arises plainly out of cross-examination.
 [4] **MR HOBBS:** My Lord, quite apart from the leading nature of
 [5] many of the questions, as the transcript will show, and
 [6] I am seriously concerned –
 [7] **MR JUSTICE LADDIE:** This is not before a jury, Mr Hobbs. Do
 [8] not worry about it. If I come to the conclusion that
 [9] the questions are too leading, I will just ignore the
 [10] answers, so do not worry about that.
 [11] **MR HOBBS:** All right, but I have a more fundamental
 [12] objection. The expertise of the witness does not
 [13] extend, as I understand it, on anything I have seen or
 [14] heard so far, to an ability to give evidence about what
 [15] is in the mind of other people. He is not brought here
 [16] as an expert in advertising or marketing at all and
 [17] there is a fundamental rule, very well-known in criminal
 [18] cases as I understand it, that one man is not entitled
 [19] to give evidence as to the operation of a healthy human
 [20] mind, and I think this re-examination is breaking that
 [21] rule.
 [22] **MR JUSTICE LADDIE:** Carry on, Mr Cox.
 [23] **MR COX:** I am very grateful. I shall, of course, take some
 [24] care.
 [25] Would you turn to the bundle D that you have in

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[1] direct relationship with the end customer. 'They
 [2] telephone us!' says Gary Anderton in astonishment.
 [3] 'We have had to set up a dedicated customer
 [4] service ...'
 [5] Then he describes a little anecdote about a
 [6] distressed customer who had lost his card with 1500
 [7] points:
 [8] "I was able to tell him that we would send a
 [9] replacement card preloaded with his points. The
 [10] customer couldn't believe it; I don't think he believed
 [11] that our system could do that. He was so relieved!"
 [12] That direct relationship with the consumer, as
 [13] you understand third party schemes that we are talking
 [14] about, such as Air Miles, which is one of them; is that
 [15] right? Would that exist in the same way between
 [16] retailer when there was a third party owner and
 [17] administrator?
 [18] **A:** Well, no, because the communication and any ingoing or
 [19] outgoing communication would be with that third party.
 [20] **Q:** Have a look at page 66 of the document.
 [21] Under "Conclusions", you see the paragraph:
 [22] "The multi-partner, multi-currency scheme devised
 [23] by Shell is unique, and the achievement of co-ordinating
 [24] the concepts into a scheme which the customers can
 [25] understand and feel comfortable using is almost more

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[1] impressive than the technical achievement of
[2] implementing it", which, of course, refers to the
[3] technology; do you agree with that?
[4] **A:** Well, certainly, yes, I would do. The technological
[5] achievement was considerable in terms of the
[6] introduction of a Smartcard, but the actual handling of
[7] the relationships between the members of the consortium
[8] is difficult enough, as well as, of course, the handling
[9] of a relationship with the cardholders.

[10] **Q:** Yes. That is what I want to come on to, please, the
[11] handling of the relationships between the members of the
[12] consortium. In a typical third party scheme such as Air
[13] Miles, or the putative and never-adopted Powerpoints,
[14] who handles the relationship between the participating
[15] members?

[16] **A:** Whichever third party scheme originator is running the
[17] scheme.

[18] **Q:** Let us take Air Miles, for example. Who negotiates with
[19] the members?

[20] **A:** The participating retailers; it would be Air Miles.

[21] **Q:** Air Miles. Is there any direct relationship,
[22] contractual or otherwise, between the members of
[23] Air Miles?

[24] **A:** Between the members, no. The relationship, as
[25] I understand it, is between the retailer and Air Miles.

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[1] moment ago, the relationships within the consortium,
[2] mean - well, let me ask you this. If the relationships
[3] are direct, in other words that each major retailer is
[4] co-operating and sorting out their problems directly
[5] with each other -

[6] **A:** Mmm.

[7] **Q:** - do you consider that to have any distinguishing
[8] feature between the relationship they would have in a
[9] third party scheme?

[10] **A:** Well, yes, because you have a multiplicity of
[11] relationships between consortium partners with each
[12] other. It is a multiplicity of relationships which, in
[13] a sense, is inherently more complex than a one-to-one
[14] relationship between, in your example, Air Miles and a
[15] member of the Air Miles scheme.

[16] **Q:** Yes. Let me come on to one or two other things, if
[17] we can. In a third party scheme - let us have a look
[18] at Powerpoints at file 2.

[19] This idea that we have been dealing with is,
[20] of course - it is page 857 that I want to deal with
[21] first with you. We are dealing here with an idea, just
[22] to recap if we can, of an exclusive consortium of
[23] non-competing retailers, major high street retailers,
[24] non-competing in their own fields, issuing and redeeming
[25] a common currency.

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[1] **Q:** Yes. Just have a look, if you would, at volume 10,
[2] which is, I think, to your side.

[3] **A:** Volume?

[4] **Q:** Volume 10. That is section E.

[5] **A:** Is this file 10?

[6] **Q:** File 10, yes.

[7] **A:** Is there a page number?

[8] **Q:** Page 4555. Do you see that document is a document
[9] entitled, "Shell UK Limited and John Menzies
[10] (UK) Limited" -

[11] **A:** Yes.

[12] **Q:** - "relating to participation in the Shell Smart
[13] promotion"?

[14] **A:** Yes.

[15] **Q:** If you turn the page, you will see that paragraph 2.1.9
[16] at 4558, for example, is an agreement between what are
[17] called participating partners, meaning:

[18] "...retailers and providers of goods and services
[19] who are participating in the Promotion whether as
[20] redeemers and/or issuers of Smart Points."

[21] Would there be any need for such a contract and
[22] such an arrangement directly between the partners in a
[23] third party scheme such as Air Miles?

[24] **A:** I do not believe so.

[25] **Q:** Now, the problems of handling, as you put it just a

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[1] Let us just focus on the issue of the currency,
[2] can we?

[3] **A:** Mmm.

[4] **Q:** In the consortium model, the arrow immediately to the
[5] right of the square box, "sells points to", would that
[6] be present?

[7] **A:** I do not think so because, in the consortium model,
[8] surely the consortium would be itself the issuer of the
[9] points.

[10] **Q:** Yes. What is happening in this model, it appears, is
[11] that, as my learned friend put to you, Powerpoints is
[12] selling its currency to the members, is it not?

[13] **A:** According to the diagram, yes.

[14] **Q:** That is what happens in Air Miles, is it not?

[15] **A:** It is.

[16] **Q:** As I think we in this country know, the issue of who
[17] owns a currency can have quite considerable
[18] significance. Who, if the third party owns the
[19] currency, fixes its value?

[20] **A:** In terms of the redemption, that would be the third
[21] party.

[22] **Q:** Because the currency can have different values. For
[23] example, one retailer could issue at one purchase so
[24] many points; another retailer a slightly different
[25] value. Is that right?

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[1] **A:** Indeed it is, depending on the margin, the profit margin
 [2] they have to play with.
 [3] **MR JUSTICE LADDIE:** Sorry, just a second.
 [4] Professor Worthington, how can you say that it is the
 [5] third party that sets the value? Does it not depend
 [6] upon the relative strength of their bargaining position?
 [7] If Greenshield Stamps is desperate to have Harrods
 [8] as a customer, to take it as an example, then Harrods
 [9] has the negotiating power to say what – it is not
 [10] a priori, surely, or is there some special rule of
 [11] commerce that applies in this field that does not apply
 [12] everywhere else in the world?
 [13] **A:** I think, even if Harrods had been a member of
 [14] Greenshield Stamps, there was nothing to stop Harrods
 [15] issuing Greenshield Stamps according to their own rules,
 [16] but the redemption was all done through Greenshield
 [17] itself and they set the values of the redemption. If
 [18] you wanted to redeem your Greenshield Stamps for a water
 [19] carafe, it was X amount of Greenshield Stamps, whether
 [20] they were acquired at Harrods or AN Other retailer.
 [21] It was the redemption value that is set by the third
 [22] party; how many points, stamps, per item.
 [23] **Q:** And how many Greenshield Stamps are issued by Harrods
 [24] per purchase is up to Harrods?
 [25] **A:** Indeed it is.

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[1] **Q:** The currency.
 [2] **A:** – the currency of issuing, having retailers buy the
 [3] stamps from them.
 [4] **Q:** Right, so they had to buy the stamps?
 [5] **A:** Mmm.
 [6] **Q:** Much, as is here contained, referred to with the idea of
 [7] buying the points?
 [8] **A:** That is correct. There is a sale and purchase.
 [9] **Q:** Can we look at this. We have examined a number of
 [10] points. One is that the members are not in a direct
 [11] relationship; there is no need for any contract between
 [12] them.
 [13] The second is that the marketing image, the
 [14] consortium idea itself has a value and apparently was,
 [15] as you were aware, presented by Shell as having a
 [16] value –
 [17] **A:** Mmm.
 [18] **Q:** – in achieving a comfort level. The third is that the
 [19] currency has to be purchased; do you agree?
 [20] **A:** Yes.
 [21] **Q:** The fourth is that the value of the currency is, to an
 [22] extent, fixed by the third party?
 [23] **A:** In its redemption terms.
 [24] **Q:** In its redemption terms. The fifth, in relation to the
 [25] database and information, though it may be made

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[1] (2.30 pm)
 [2] **MR COX:** Let us just move on a little from that, if we can,
 [3] because these are matters of some importance, it may
 [4] be. This, I think, follows from what you have said:
 [5] there is obviously, and if we look at the Powerpoints
 [6] presentation at page 864, there is, in the intervention
 [7] of a third party, a cost, is there not? For example, at
 [8] the bottom of the page, under "Network Member Benefits",
 [9] there is "access to the Powerpoint database", which is
 [10] expressed as being pay for access rather than ownership,
 [11] "at low cost".
 [12] **A:** Mmm.
 [13] **Q:** So they would have to buy it?
 [14] **A:** That is the inference from this statement, yes.
 [15] **Q:** Now, in the same way, when they bought the currency, how
 [16] would the third party make their profit?
 [17] **A:** From a number of directions one could suppose or
 [18] suggest. One would be from charging the participating
 [19] companies for the buying the points or stamps off them,
 [20] and another one, as is demonstrated here, could be
 [21] through charging them to access data.
 [22] **Q:** Yes. How did it happen, for example, with Greenshield
 [23] Stamps?
 [24] **A:** There was no data involved in that case. It was merely
 [25] through –

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[1] available to the participants, the ownership of the
 [2] database resides with the third party, does it not?
 [3] **A:** That is true.
 [4] **Q:** I want to deal with some of the other schemes then.
 [5] You had a chance to look at the GHA Powerpoints document
 [6] in a little bit more detail, I hope; is that right?
 [7] **A:** That is correct.
 [8] **Q:** Do you have any further comments that you want to make
 [9] about that now that you have had a chance to read it?
 [10] **A:** Yes, I do. It was not clear to me – and again going
 [11] back to page 857 – where, as I read it initially, the
 [12] idea was that there would be various gift catalogues
 [13] from each retailer, and yet on the diagram on 857
 [14] it would appear that Powerpoints handles the
 [15] administration of the system and the catalogues, so that
 [16] whereas I imagine previously one could have gone to each
 [17] retailer and redeemed your points via the catalogue in
 [18] that retail outlet, the circular diagram on 857 seems to
 [19] imply that you would have had to have gone to Powerpoint
 [20] to redeem the points you collected, or gone through
 [21] them, or whatever.
 [22] **Q:** Albeit, if you look at 858, each party is seen to have a
 [23] different catalogue.
 [24] **A:** Indeed, but my reading of 858 initially was that, having
 [25] collected points, you could also redeem them at that

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[1] very retailer, at their outlets, through their
 [2] catalogue.
 [3] Having read the document in full for the first
 [4] time, it is not clear to me whether that actually was
 [5] the case or whether you would have had to have gone to
 [6] Powerpoints to effect the redemption against whatever
 [7] catalogues were available.
 [8] Q: Yes.
 [9] MR JUSTICE LADDIE: It could be worked either way, could it
 [10] not?
 [11] A: It could be worked either way. In that sense, the two
 [12] diagrams we are looking at are somewhat in conflict in
 [13] that they appear to give -
 [14] Q: Or neither is sufficiently specific.
 [15] A: Indeed.
 [16] Q: That is what it comes down to. You could either do it
 [17] centrally or have separate catalogues in each of the
 [18] partners in partnership?
 [19] A: Yes, you could.
 [20] Q: Yes, I see.
 [21] MR COX: Again, what I want to ask you generally, if I may,
 [22] is this. Looking at this scheme now, do you consider
 [23] that there is a difference in substance or principle
 [24] between this Powerpoints proposal and that which is the
 [25] Shell Smart Scheme?

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[1] Would you look down the page to the second last
 [2] paragraph:
 [3] "The idea is to create ..."
 [4] Do you see that?
 [5] A: Mmm.
 [6] Q: "The idea is to create a brand so powerful that card
 [7] owners will shop exclusively at organisations involved
 [8] in the Smart scheme. In addition to the consortium
 [9] partners, Shell is seeking up to 20 associate partners,
 [10] which will provide and redeem Smart points."
 [11] Do you see that?
 [12] A: I do.
 [13] Q: Again, does that conform to your understanding of the
 [14] intention and evolution of the Shell Smart Scheme?
 [15] A: Yes, it does, in that it was intended to cover a fairly
 [16] high proportion of every person's wallet or purse spend.
 [17] Q: Could you turn now to 4638? The Financial Times of
 [18] 12th March 1997, "Shell launches smart card revolution":
 [19] "Shell yesterday announced a landmark development
 [20] in the use of microchip smart cards with news that a
 [21] consortium of retailers is joining the oil company's
 [22] loyalty scheme."
 [23] Further on:
 [24] "The smart scheme, which could revolutionise
 [25] shopping on the high street, will be launched in

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[1] A: The difference, I think, is still there in principle in
 [2] terms of who would own the relationships and, having had
 [3] the chance to look through the information over the
 [4] break there, there may be indeed a difference in
 [5] substance in the way that the redemption is fulfilled,
 [6] which is, as we have discussed, still relatively unclear
 [7] in what is merely a proposal.
 [8] Q: Do you consider ownership to be mere bagatelle, or
 [9] something significant?
 [10] A: I personally consider it to be very significant.
 [11] Q: Is it significant not only among the members, the
 [12] partners themselves, but also for the consumer?
 [13] A: I believe that is the key - a key issue: how
 [14] comfortable we feel with other people holding
 [15] information about ourselves.
 [16] Q: Could I ask you to look at one or two other documents.
 [17] If you turn now to file number 10, starting off please
 [18] with page 4688, this is an article from
 [19] The Sunday Times, dated 21st July 1996, dealing with the
 [20] Shell Smart Scheme. It begins with the introduction
 [21] that Shell is seeking up to six partners to invest in a
 [22] Smartcard consortium:
 [23] "The new company, specialising in customer loyalty
 [24] programmes, will operate as independent business and may
 [25] be floated on the market in a few years."

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[1] Scotland on Friday and rolled out throughout the rest of
 [2] Britain in the autumn. It links high street retailers
 [3] Dixons, Currys, Victoria Wine, Vision Express,
 [4] John Menzies and The Link with Commercial Union,
 [5] the RAC, Hilton Hotels and Shell.
 [6] "Eventually the Smart consortium aims to cover
 [7] 70 per cent of consumers' weekly shopping", and it
 [8] describes certain talks with Sainsburys and Lloyds Bank.
 [9] If you turn towards the end of that article, four
 [10] paragraphs from the end:
 [11] "About 140 loyalty schemes operate in the UK, most
 [12] of which are single company programmes using magnetic
 [13] strips. Supermarkets have been particularly aggressive
 [14] in the use of loyalty schemes to lock in customers in a
 [15] fiercely competitive market. Tesco, Sainsbury and
 [16] Safeway have all linked up with banks or building
 [17] societies to offer loyalty club members financial
 [18] services such as credit and debit facilities, as well as
 [19] product discounts.
 [20] "However, Mr Gary Anderton, manager of Smart, the
 [21] operating company for the brand, claimed the Smart
 [22] loyalty programme broke new ground. 'No one has anything
 [23] like this,' he said. 'We are the first multi-partner
 [24] programme in the world to bring both earning and
 [25] spending of points together into one group of

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[1] companies!"
 [2] Do you see that?
 [3] A: I do.
 [4] Q: I will not take you to it all, but were you aware of
 [5] this publicity when it came out at the time?
 [6] A: I was.
 [7] Q: As it occurred to you then, did it seem to be something
 [8] distinctly different from schemes that were around?
 [9] A: In the sense that it involved a consortium of retailers
 [10] in separate market sectors. Many of the other previous
 [11] schemes in this country had been single company schemes.
 [12] Q: Yes. Insofar as the difference is adverted to in the
 [13] announcements and words used by Shell, they emphasise,
 [14] do they not, the consortium principle?
 [15] A: Yes, they do, certainly in the use of "multi-partner
 [16] programme".
 [17] Q: Bringing together points into one group of companies.
 [18] If they had simply been signed up to an Air Miles
 [19] principle, a third party operated scheme, could they
 [20] have made the claims for newness that they did make?
 [21] A: I do not think they could have done because in many ways
 [22] it would have been an updating of a Greenshield Stamps
 [23] type of situation with a more modern technology.
 [24] Q: Yes. Could I just ask you one more thing, which is
 [25] based upon something that may feature in other evidence

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[1] Q: Let us assume that somebody runs a car, has a Shell
 [2] garage next door -
 [3] A: Mmm.
 [4] Q: - has an Esso garage next door but buys all his food
 [5] and everything else from British Home Stores.
 [6] A: Mmm.
 [7] Q: Is this right: in theory, he could spend not a penny at
 [8] Esso -
 [9] A: Mmm.
 [10] Q: - and acquire all the currency from British Home
 [11] Stores?
 [12] A: That is correct.
 [13] Q: In theory, everybody could do that -
 [14] A: Mmm.
 [15] Q: - so that one member of the consortium ends up selling
 [16] nothing, but having to redeem the currency -
 [17] A: Mmm.
 [18] Q: - which will not make it terribly happy.
 [19] A: Indeed.
 [20] Q: How is that sorted out?
 [21] A: Because, I guess, in both theory and in practice, for
 [22] every one person that you have described who shops
 [23] entirely at BHS but redeems entirely at Esso, there is
 [24] another person who shops entirely at Esso and redeems
 [25] entirely at BHS.

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[1] because, of course, ordinarily your evidence would come
 [2] at a different stage, Professor Worthington,
 [3] you understand, and -
 [4] MR HOBBS: I hope this is not breaking new ground.
 [5] MR COX: No, my Lord. I hope not because it is adumbrated
 [6] in - may I just have a word with Mr Hobbs, my Lord, to
 [7] make sure it is not a question that we ...
 [8] I have asked Mr Hobbs; I am denied. I will leave
 [9] it at that. Thank you, Professor Worthington.
 [10] (2.45 pm)
 [11] MR JUSTICE LADDIE: Before you leave, I have three questions
 [12] to ask you.
 [13] In the Smart consortium, let us concentrate on two
 [14] members - not the Smart consortium, but a consortium
 [15] like Smart?
 [16] A: Mmm.
 [17] Q: Assume that two members were Esso and British Home
 [18] Stores.
 [19] A: Mmm.
 [20] Q: You could acquire currency at Esso or British Home
 [21] Stores or any other members of the consortium.
 [22] A: Mmm.
 [23] Q: You could sell, or you could spend the currency in any
 [24] member of the consortium; correct?
 [25] A: Mmm.

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[1] Q: So -
 [2] A: It averages out.
 [3] Q: I see. All right.
 [4] MR COX: My Lord, may I -
 [5] MR JUSTICE LADDIE: No, just wait, Mr Cox.
 [6] MR COX: Forgive me.
 [7] MR JUSTICE LADDIE: You said, in answer to a question put by
 [8] Mr Cox, who owns the relationship is critical to members
 [9] of the public?
 [10] A: Mmm.
 [11] Q: Is that not dependent on what the public are told,
 [12] because they may not know who owns a relationship?
 [13] A: And, indeed, many members of the public may not want a
 [14] relationship with their suppliers of goods or services.
 [15] I understand the question, obviously.
 [16] People may not understand - my personal opinion
 [17] on this is that many consumers do not understand the
 [18] amount of data that is being held on them by companies,
 [19] and in that sense they are, yes, unconcerned, but
 [20] I think as this information potentially in years to come
 [21] is used, I think our levels of concern will rise. That
 [22] is my opinion.
 [23] Q: There may be people who are unconcerned, but is it not
 [24] also true that they may not realise that there is a
 [25] difference between the members of the consortium and the

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[1] person who owns a relationship, depending upon what they
 [2] are told; is that not right?
 [3] **A:** I follow that, yes, indeed.
 [4] **Q:** So you may have something owned by a third party but
 [5] members of the public have no knowledge that it is
 [6] actually separate from the members of the consortium; is
 [7] that not right?
 [8] **A:** Yes, that could be the case. If we take Air Miles,
 [9] there may be some people who would imagine that that is
 [10] owned and operated by the members of the partners who
 [11] subscribe to Air Miles.
 [12] **Q:** Would you look at the very last document that was put to
 [13] you by Mr Cox, page 4638.
 [14] **A:** 4638?
 [15] **Q:** Yes. Can I ask you to look at the penultimate column in
 [16] this article:
 [17] "However, Mr Gary Anderton, manager of Smart, the
 [18] operating company ..."
 [19] **A:** Mmm.
 [20] **Q:** That company could be entirely independent or it could
 [21] have been owned by Shell, one or the other; is that not
 [22] right?
 [23] **A:** Yes.
 [24] **Q:** The perception of the public would be dependent upon
 [25] what they are told.

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[1] a loyalty scheme and you felt you were a suitable
 [2] provider of goods and services, you would want people to
 [3] know that it was your loyalty scheme.
 [4] **Q:** Yes. Thank you very much. My Lord, that is all.
 [5] **MR JUSTICE LADDIE:** Thank you very much, Professor.
 [6] **A:** Thank you.
 [7] (The witness withdrew)
 [8] **MR COX:** My Lord, Professor Worthington is, of course, heard
 [9] out of the ordinary turn and I am grateful to Mr Hobbs
 [10] for not contesting that because ordinarily I would have
 [11] called him together with other expert evidence.
 [12] **MR JUSTICE LADDIE:** Yes. By the way, of course each witness
 [13] who finishes in the witness box is automatically
 [14] released. You do not need to ask for it.
 [15] **MR COX:** I am very grateful. My Lord, my next witness will
 [16] be Mr Donovan, please.
 [17] **JOHN ALFRED DONOVAN (sworn)**
 [18] Examination-in-chief by MR COX
 [19] **MR JUSTICE LADDIE:** Please take a seat.
 [20] **THE WITNESS:** Thank you.
 [21] **MR COX:** Mr Donovan, could you take from the carousel to the
 [22] right of you bundle C1, please? In there, at tab 1,
 [23] you should, I think, find a witness statement which is
 [24] signed by you at the end; is that right?
 [25] **A:** That is correct.

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[1] **A:** Yes, it would, about what is the relationship of Smart
 [2] as an operating company to ... mmm.
 [3] **Q:** Thank you very much. Yes, sorry, Mr Cox.
 [4] **MR COX:** Save only that in this article, of course, they are
 [5] being told – but I think it is a matter of comment
 [6] rather – that it is Shell who have launched the
 [7] revolution and the multi-partner programme.
 [8] Professor Worthington, I should have asked you
 [9] perhaps, and perhaps I need not now, about the – it is
 [10] said by his Lordship that the public would not
 [11] necessarily know. It would, of course, depend on
 [12] whether it is made a feature of the advertising of that
 [13] scheme that it was a consortium; is that right?
 [14] **A:** Again, I keep saying "yes" to everyone, but very often
 [15] people – I would contend that loyalty programme
 [16] providers, be they third party or in-house, particularly
 [17] those who are in-house and coming from the company
 [18] itself, really, if they wish to gain the trust of
 [19] customers, then it is important to let customers know
 [20] from whom this scheme is emanating, and it would be
 [21] almost – not foolish, but it would not be good practice
 [22] perhaps to disguise, if it was your company's scheme, to
 [23] disguise from whence it was coming.
 [24] My theme on this again is relationships and trust
 [25] between consumers and providers, and I think if you had

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[1] **Q:** I think it is right to say that you have read that
 [2] statement; indeed, I think you prepared it?
 [3] **A:** Correct.
 [4] **Q:** Does your Lordship have it?
 [5] **MR JUSTICE LADDIE:** I did have it. I hope I have not left
 [6] that at home as well.
 [7] **MR COX:** We may be able to provide your Lordship with a
 [8] copy.
 [9] **MR JUSTICE LADDIE:** I know I have certainly read it.
 [10] **MR COX:** My Lord, would it help to have a copy?
 [11] **MR JUSTICE LADDIE:** It was a thin bundle, was it not?
 [12] **MR COX:** I think it is probably a yellow bundle.
 [13] **MR JUSTICE LADDIE:** I am sorry, it is at home.
 [14] **MR COX:** Can I give your Lordship pro tem a copy at least?
 [15] (Handed)
 [16] My apologies. I am sorry that it is not bound,
 [17] my Lord, if you can make do for now.
 [18] **MR JUSTICE LADDIE:** Do not worry. That is very silly of
 [19] me.
 [20] **MR COX:** Do you confirm that the contents of that are true
 [21] to the best of your recollection and knowledge?
 [22] **A:** I do.
 [23] **Q:** Would you wait there, Mr Donovan?
 [24] Cross-examination by MR HOBBS
 [25] **MR HOBBS:** I think my learned friend said just now to you

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[1] that the statement that we are looking at was prepared
 [2] by you; is that correct?
 [3] A: It is true.
 [4] Q: That is your typewriter, is it not, your own printer,
 [5] and you wrote this statement yourself, did you not?
 [6] A: No, it is not my own. It was sent by e-mail.
 [7] Q: I am not quite following you.
 [8] A: It was sent over the Internet by e-mail, so it was not
 [9] my printer.
 [10] Q: I see. Right. Now, what I would like to begin with,
 [11] please, if I can, is a document I would like you to look
 [12] at in volume E5. Could you turn in that, please, to a
 [13] page which carries the number at the bottom 2375.
 [14] A: Yes. I have file 4.
 [15] Q: You should have file 5.
 [16] A: I cannot find - hold on a sec. Sorry. Two thousand
 [17] and?
 [18] Q: The page is 2375.
 [19] A: Right, I have it.
 [20] Q: Do you recognise that document, Mr Donovan?
 [21] A: Yes, I do.
 [22] Q: This, as we see, is June and July, some time in June
 [23] and July 1993; correct?
 [24] A: Correct.
 [25] Q: This is a transcript of part of a conversation that

[1] you had and that you tape-recorded with a man from
 [2] Senior King; correct?
 [3] A: Correct.
 [4] Q: Although it is indicated in the typescript there that
 [5] that is Mike Seymour, in fact it was someone called
 [6] Fairhurst, was it not?
 [7] A: Correct.
 [8] Q: Right. Let us get our frame of reference clear. In the
 [9] middle of 1993 you had effectively been more than six
 [10] months ended on your business relationship with Shell,
 [11] had you not? It was over in 1992?
 [12] A: No.
 [13] Q: All right.
 [14] A: No, no, the business relationship was still going on.
 [15] I was regularly phoning Mr Lazenby.
 [16] Q: Were you working for Shell at all during 1993?
 [17] A: No. I was in regular contact with them.
 [18] Q: For what purpose?
 [19] A: Pursuing the proposals that I put to them.
 [20] Q: But to no avail, I think?
 [21] A: I was still waiting to hear from them as to what
 [22] they were going to do.
 [23] Q: When was the last time that you worked - when I say
 [24] "you", I mean you or your company - for Shell?
 [25] A: 1991, I would guess.

[1] Q: Right. First of all, may I ask you this. This is
 [2] plainly an incomplete transcript. Did you make a tape
 [3] recording of the whole of the conversation?
 [4] A: No.
 [5] Q: When did you decide to switch the tape recorder on?
 [6] A: Because I already had it set up because I had been
 [7] speaking to Mr Lazenby and, when the gentleman I was
 [8] speaking to started making certain comments about him,
 [9] I decided to put it on.
 [10] Q: Right. For what particular purpose were you contacting
 [11] Senior King in June or July of 1993?
 [12] A: This was after the Nintendo claim had arisen - or Shell
 [13] had launched a Nintendo promotion on, I think, 18th June
 [14] 1993.
 [15] Q: Am I right in thinking that Senior King had no
 [16] involvement whatever in the Nintendo promotion?
 [17] A: Correct.
 [18] Q: Am I right in thinking that you made contact with this
 [19] gentleman from Senior King with a view to finding out
 [20] what information you could, from these people, hostile
 [21] to Mr Lazenby?
 [22] A: No.
 [23] (3.00 pm)
 [24] Q: Is this an accident then that you decided to switch this
 [25] on and have this conversation that we see recorded in

[1] this transcript?
 [2] A: No, it was because of the comments that he was making
 [3] about Mr Lazenby.
 [4] Q: Yes, and how did those comments come to be made in a
 [5] conversation with you?
 [6] A: The reason for the phone call was because I had put a
 [7] Megamatch proposal to Mr Lazenby and got his agreement
 [8] to approach Woolworth with it for a joint partnership
 [9] promotion, and when I contacted Woolworth they told me
 [10] that another agency had been in there with the same
 [11] idea.
 [12] Q: Which year are you speaking about then?
 [13] A: 1992.
 [14] Q: How is it that you come to ring Senior King in June
 [15] or July of 1993?
 [16] A: Well, as far as I was aware, up to that stage I had an
 [17] ongoing relationship with Shell, putting up proposals
 [18] that they were interested in and that I thought were on
 [19] hold with them -
 [20] Q: You still thought -
 [21] A: - and then when the Nintendo - when I opened the
 [22] Daily Mail on 18th June and I saw the Nintendo promotion
 [23] in there, then of course I was very interested in the
 [24] circumstances and I reflected on what had happened with
 [25] Woolworth. I spoke to Mr Paul King, the former National

[1] Promotions Manager of Shell, and he gave me the
[2] telephone number for Mr Mike Fairhurst, and I phoned
[3] Mr Fairhurst and asked him about the Woolworth
[4] situation.

[5] Q: You have mentioned Mr Paul King's name and it would be
[6] appropriate, I think, to get the facts straight on that
[7] at this stage.

[8] Mr King had left his employment with Shell at the
[9] end of 1992, had he not?

[10] A: Correct.

[11] Q: Upon leaving his employment with Shell, he in fact wrote
[12] to you or your company and asked you whether you would
[13] employ him; correct?

[14] A: I do not think the letter said that. I think he wanted
[15] advice. He was thinking of starting up his own
[16] consultancy. I would have to read the letter again.

[17] Q: Mr Roberts will help me to find the letter for you, but
[18] my recollection is that he contacted you in writing and
[19] asked whether there would be an employment opportunity,
[20] and you wrote back and said words to the effect that in
[21] the prevailing economic climate the answer would be no,
[22] unfortunately. Do you remember?

A: That may be the case. As I say, I would have to read
the correspondence.

[25] Q: I will take you to it in a second. In fact it is right,

[1] Q: You were in communication with Mr King after he had left
[2] Shell; correct?

[3] A: Yes.

[4] Q: Right. Amongst the things that you communicated with
[5] him about, you communicated with him, did you not, on
[6] the subject of the multibrand loyalty game that Shell
[7] was planning during 1991, 1992, 1993, 1994, did you not?

[8] A: No. No, I did, I think, discuss my proposal to Shell
[9] with him at that - I met him twice after he left Shell,
[10] soon after he left Shell: once at his leaving do, and
[11] secondly at a restaurant with another gentleman called
[12] John Chambers, and Mr King was interested in starting up
[13] his own consultancy and he wanted advice from us, and
[14] during that second - the meeting in the restaurant,
[15] I believe that the proposal to Shell was mentioned.

[16] Q: You did, in fact, discuss it with him on that occasion
[17] and on other occasions, did you not, after 1992?

[18] A: I have met with Mr King a number of times over the
[19] years, probably the last time about two years ago, and
[20] he would have been aware of this litigation.

[21] Q: Because you would have made him aware?

[22] A: Yes.

[23] Q: And you would have discussed the subject matter of the
[24] litigation; correct?

[25] A: I mentioned it to him and I thought that he understood

[1] is it not, that you kept in contact with Mr Paul King
[2] after he had left Shell?

[3] A: He kept in - well, you could say that, but he actually
[4] contacted - he wrote to me, he telephoned me.
[5] I actually met with him after he left Shell. I went to
[6] his leaving do, if you like, when he left Shell.

[7] Q: It was to him that you turned when you wished to make
[8] contact with Mike Fairhurst of Senior King; correct?

[9] A: I knew that Mr King had appointed Senior King some years
[10] earlier.

[11] Q: And you wanted him, Mr King, to provide you with the
[12] name and the contact number; correct?

[13] A: Correct.

[14] Q: That is right, and that is what led to this conversation
[15] in June or July of 1993?

[16] A: That is correct.

[17] Q: Right. In your relationship with Mr King, and Mr King,
[18] of course, had been an insider at Shell until the end of
[19] 1992, you did, did you not, after he had left Shell,
[20] discuss with him the Smart scheme in its evolutionary
[21] stages? You asked him for information about it, did you
[22] not?

[23] A: Can you rephrase that? Can you say that again?

[24] Q: Yes, I will take it up in small morsels.

[25] A: Right.

[1] what I was saying and what we were talking about, but
[2] later on I found out from him that he has no
[3] recollection of his last years at Shell because of
[4] medicine that he was on.

[5] Q: In fact, what you are referring there to is his
[6] illness -

[7] A: Correct.

[8] Q: - during the last two or three years of his employment
[9] at Shell, are you not?

[10] A: Correct. But I did not know about that until after
[11] he had left Shell.

[12] Q: All right. In this portion of transcript that we have
[13] here, do you know the contents without me taking you
[14] through it piece by piece? Can you recollect the nature
[15] of this document?

[16] A: Yes.

[17] Q: Right. Let us try to keep it as simple as we can. You
[18] are asking for information from him and what excites
[19] your interest is that he starts to speak ill of
[20] Mr Andrew Lazenby, and that prompts you to switch the
[21] tape recorder on?

[22] A: Correct.

[23] Q: Right. You had, at this stage, a very strong personal
[24] animosity towards Andrew Lazenby, did you not?

[25] A: Not at that stage, no.

[1] Q: At what stage did you acquire your strong personal
 [2] animosity towards Mr Andrew Lazenby?
 [3] A: After we had sued Shell one, two, three times, and
 [4] I still do not have a strong personal animosity towards
 [5] him. I am not very happy with what has happened, but it
 [6] does not go a lot further than that.
 [7] Q: It does not? You really would not then be happy to see
 [8] him lose his job? It is not something you would wish to
 [9] see happen?
 [10] A: That is not within my control, is it, really.
 [11] Q: I did not ask you that. Surely you would be as happy as
 [12] could be if one of the consequences of this litigation
 [13] was that Mr Lazenby lost his job?
 [14] A: I do not think that is the case, no.
 [15] Q: Why is it that in your campaigning materials you
 [16] frequently go on to say, as you have done, that you are
 [17] surprised that Shell is still employing Mr Lazenby
 [18] notwithstanding its statement of general business
 [19] ethics?
 [20] A: Well, you have to remember that I am not the sole person
 [21] involved in writing those leaflets.
 [22] Q: You are one of them?
 [23] A: I do not have the ultimate right as to what goes in
 [24] there. I can complain about it, but it was in my
 [25] father's name and he holds stronger views than I do.

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[1] A: It was not - it was because he started saying this.
 [2] I did not ask him to. He started making comments and
 [3] naturally I was interested in view of what had just
 [4] happened.
 [5] Q: Right. We can see for ourselves what is said here, but
 [6] one of the things you have learned at this point in
 [7] time, as a result of this conversation, is that they,
 [8] that is Senior King, believe they have some claim
 [9] themselves in respect of the multibrand loyalty scheme.
 [10] Do you remember learning that in this conversation?
 [11] A: Yes, it was mentioned.
 [12] Q: Right. For example, on 2375, the page we have open,
 [13] he is starting to tell you, in that second response that
 [14] you have marked "SEY":
 [15] "He has turned round all sorts of things that
 [16] we've put forward .. and in particular this one ..
 [17] I mean I can't say too much about it cause obviously its
 [18] (sic) in the hands of the lawyers.
 [19] DON: Right."
 [20] A: Correct.
 [21] Q: You say, "Right", and then just below that:
 [22] "SEY: If that comes out I mean we actually
 [23] exposed a lot of confidential information we also put a
 [24] lot of .. there was a very big document ...", and so on
 [25] and so forth.

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[1] Q: You have written letters and signed them yourself, have
 [2] you not?
 [3] A: Yes.
 [4] Q: In which you make the point, to anyone who will bother
 [5] to read the letters, that you are astonished that Shell
 [6] continues to employ Mr Lazenby despite its statement of
 [7] general business ethics?
 [8] A: That is true.
 [9] Q: Right. Therefore you would be perfectly happy, indeed
 [10] you would be delighted, to see Mr Lazenby by lose his
 [11] job, would you not, as a result of this litigation?
 [12] A: No, I would not. No.
 [13] Q: Really?
 [14] A: No.
 [15] Q: You were prompted to switch the tape recorder on in this
 [16] conversation here and we can see for ourselves what you
 [17] said. You exchanged views with Mr Fairhurst, did you
 [18] not, on what you both seem to have thought about
 [19] Mr Lazenby?
 [20] A: Yes.
 [21] Q: Do you remember this?
 [22] A: Yes, I do.
 [23] Q: Your interest was aroused because Mr Fairhurst was
 [24] willing, as you perceived it, to say bad things about
 [25] Mr Lazenby, and that is what excited your interest; yes?

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[1] You know what he is talking about there, do you
 [2] not? He is talking about Senior King's involvement in
 [3] the multibrand loyalty scheme; correct?
 [4] A: Senior King's involvement in a loyalty scheme, yes.
 [5] Q: Yes, the one which you now know has matured into the
 [6] Shell Smart Scheme. That is what he is talking about to
 [7] you here?
 [8] A: Yes.
 [9] Q: You knew, did you not, that Fairhurst, of Senior King,
 [10] perceived on behalf of Senior King that they had a claim
 [11] in respect of the Shell multibrand loyalty scheme? You
 [12] knew that, did you not?
 [13] A: No, I did not, no. How would I know that?
 [14] Q: He is just telling you here in this conversation, and if
 [15] you turn to page 2377 you are, in fact, recommending
 [16] specialist counsel to him. Look at 2377.
 [17] A: But he did not disclose what the idea was that he was
 [18] concerned about. I did not know what the concept was
 [19] that he was talking about at all at that stage.
 [20] Q: You knew that he was talking about the loyalty scheme?
 [21] A: No, I did not, no.
 [22] Q: I thought you said a moment or two ago that you did know
 [23] that he was talking about the multibrand loyalty scheme?
 [24] A: No, I did not know that. No, no -
 [25] MR COX: My Lord, I have to say that I did not understand

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[1] him to say that and I have been listening to the
 [2] answers. Certainly, unless your Lordship has any
 [3] different recollection, there is no such -
 [4] **MR JUSTICE LADDIE:** Whether that is what we understood or
 [5] not, I think he has now said he did not intend to.
 [6] **MR HOBBS:** All right. This conversation ends on the basis
 [7] that you will get in touch with one another again;
 [8] correct?
 [9] **A:** Correct.
 [10] **Q:** Did he get in touch with you subsequently?
 [11] **A:** I think that he did.
 [12] **Q:** In what connection did he get in touch with you?
 [13] **A:** About Woolworth.
 [14] **Q:** Are you saying that you were at no stage aware that his
 [15] company, Senior King, claimed to have rights in respect
 [16] of the multibrand loyalty scheme that Shell turned out?
 [17] (3.15 pm)
 [18] **A:** I did not have a clue about that, other than that he
 [19] thought that Mr Lazenby was turning around ideas that
 [20] his company had put forward. I did not know what those
 [21] ideas were.
 [22] **Q:** You did know, did you not, from Mr Paul King that
 [23] Senior King were people who were involved in the work
 [24] that was done in relation to the Shell Multibrand
 [25] Loyalty Scheme?

[1] **Q:** That is the letter that you just referred to where you
 [2] sent out to various people a request for expert witness
 [3] opinions?
 [4] **A:** That is correct.
 [5] **Q:** And this letter is dated 8th November 1994?
 [6] **A:** Correct.
 [7] **Q:** You are saying that it was only when you received
 [8] information back from Senior King that you became aware
 [9] of Shell's multiparty loyalty scheme; is that correct?
 [10] **A:** I did not become aware that it was a multiparty loyalty
 [11] scheme, no. He did mention the Shell Smart Scheme in
 [12] his report.
 [13] **Q:** In his report. Okay. Let us look at this document on
 [14] 4298. To how many people did you send this document,
 [15] approximately?
 [16] **A:** I would guess at twenty.
 [17] **Q:** Twenty?
 [18] **A:** Yes.
 [19] **Q:** What was the purpose of sending this document out?
 [20] **A:** To try to find one or two experts quickly.
 [21] **Q:** Right. Was that your only purpose?
 [22] **A:** (Pause). It may not have been. It may be that I wanted
 [23] other agencies to know that I was - the circumstances
 [24] that I was in with Shell.
 [25] **Q:** You wanted to humiliate Shell by means of a sort of

[1] **A:** No.
 [2] **Q:** You did not know that?
 [3] **A:** No, I did not know. Mr King never give me any
 [4] information about what was happening at Shell, other
 [5] than staff changes and so on.
 [6] **Q:** When did you first become aware that Shell was working
 [7] upon a Multibrand Loyalty Scheme?
 [8] **A:** (Pause). I first became aware of Senior King's
 [9] connection with a Shell loyalty scheme - I did not know
 [10] at that time that it was a multiparty - when I sent a
 [11] fax out to a number of advertising and promotional
 [12] agencies and said that I was involved in potential
 [13] litigation with Shell and I was looking for expert
 [14] witnesses. I got a response from Mr Steve King of
 [15] Senior King and, when he supplied an expert report, it
 [16] mentioned the smart loyalty scheme in there.
 [17] **Q:** Right. -
 [18] **A:** But at that stage it still was not - it never mentioned
 [19] it was a multiparty scheme.
 [20] **Q:** I shall return to that topic with you. Would you
 [21] therefore, in view of what you have just said, take out
 [22] volume 9B. Keep the volume you already have in front of
 [23] you and take out volume 9B. In that volume would you
 [24] please turn to page 4298.
 [25] **A:** I have that.

[1] "round robin" letter, did you not?
 [2] **A:** I do not think at that time that that was fair, no.
 [3] I do not think it was for that purpose. Later on, yes,
 [4] but not at that stage.
 [5] **Q:** How much later on?
 [6] **A:** I would have to look at the documents.
 [7] **Q:** Look at the penultimate paragraph on that page:
 [8] "Given the importance of the issue at stake and
 [9] your agency's reputation and experience, we wonder if,
 [10] for an agreed fee, you would be prepared to provide our
 [11] solicitors with an impartial one-page expert opinion.
 [12] We are also approaching oil company promotion managers
 [13] to obtain opinions from the client perspective."
 [14] Do you see that?
 [15] **A:** Yes.
 [16] **Q:** What was the purpose of that?
 [17] **A:** The same thing, but we did not do that. But I had it in
 [18] mind that other petrol companies, petrol station
 [19] promotion managers, would have experience and might be
 [20] prepared and then, when I gave it further thought,
 [21] I decided that it was not right.
 [22] **Q:** You are saying you did not do what you said you were
 [23] actually doing in this letter?
 [24] **A:** Correct. I did not do that, no.
 [25] **Q:** Is that something you often do: write letters saying you

[1] are doing something and then not do it?
 [2] **A:** It is not often, but I have done it on other occasions.
 [3] **Q:** Look at the last paragraph:
 [4] "If you are willing to provide your services, we
 [5] would supply a detailed briefing on a confidential basis
 [6] with copies of our proposal to Shell, relevant
 [7] correspondence, tape transcripts, a joint opinion from
 [8] specialist counsel, expert opinions already obtained.
 [9] You would probably find some of this information to be
 [10] invaluable as far as your own business is concerned.
 [11] Please note that, due to a disputed secrecy agreement
 [12] between ourselves and Shell, we cannot give you any
 [13] information until such time as you are formally
 [14] retained. Let me know ASAP if you are interested."
 [15] You wanted to, in fact, take other people into
 [16] your confidence relating to this dispute, did you not?
 [17] **A:** If they were willing to supply expert witnesses, expert
 [18] witness statements or reports, I would have to do that.
 [19] **Q:** Turn to page 4301, a few pages on beyond this document.
 [20] Do you see that memo there?
 [21] **A:** I do.
 [22] **Q:** Do you recognise that document?
 [23] **A:** I do.
 [24] **Q:** Do you remember that conversation?
 [25] **A:** I do.

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[1] **A:** They were considering that, yes.
 [2] **Q:** Who told you that?
 [3] **A:** Andrew Lazenby. But not a multiparty scheme, just a
 [4] Shell-only Smart Card loyalty scheme.
 [5] **Q:** Right. Let us just turn over again to page 4312 in this
 [6] file. Do you recognise this document?
 [7] **A:** I do.
 [8] **Q:** This is the expert opinion that was provided to you by
 [9] Steven King; correct?
 [10] **A:** That is correct.
 [11] **Q:** And it is the one foreshadowed by the telephone
 [12] conversation in the letter we were just looking at.
 [13] When you received this, if not before, you saw, did you
 [14] not, that he was giving information to you about the
 [15] work that Senior King had done in relation to the
 [16] Multibrand Loyalty Scheme?
 [17] **A:** That is correct.
 [18] **Q:** And this appears from page 4314 and into 4315. If we
 [19] look at 4314, he is dealing, in the fourth
 [20] paragraph, with his company having had firsthand
 [21] experience of working with Shell and Andrew Lazenby?
 [22] **A:** Yes.
 [23] **Q:** All right?
 [24] **A:** Yes.
 [25] **Q:** Then he goes on to explain broadly at a general level

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[1] **Q:** Here you have Senior King coming back to you. It is
 [2] Mr Steve King of Senior King and you are reporting him
 [3] as making the statement that:
 [4] "There were no problems at all until
 [5] Andrew Lazenby took over as Promotions Manager."
 [6] There is a reference to a visit to France?
 [7] **A:** Yes.
 [8] **Q:** Then there is a reference to David Watson. Then you
 [9] say:
 [10] "Happy to write expert opinion ... no fee
 [11] required! May sue Shell themselves over card scheme."
 [12] Do you see that?
 [13] **A:** Correct.
 [14] **Q:** Are you saying you did not know at that
 [15] stage - November 1994 - that Shell were proposing a
 [16] card scheme which we know -
 [17] **A:** I did know that there was a prospect of a loyalty card
 [18] scheme because Andrew Lazenby had mentioned that to me
 [19] himself.
 [20] **Q:** When do you say that?
 [21] **A:** November 24th 1992, and that it would probably be a
 [22] Shell-only scheme.
 [23] **Q:** You are saying that you were told by Andrew Lazenby in
 [24] November 1992 that they had a proposal to run a card
 [25] scheme?

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[1] what their involvement was. Then he goes into more
 [2] detail in those numbered paragraphs 1, 2, 3 and 4 at the
 [3] bottom of 4314. Do you see that?
 [4] **A:** I do.
 [5] **Q:** Then at 4 he says:
 [6] "The only available solution was the Smart Card
 [7] which featured a microchip." Right?
 [8] **A:** Correct.
 [9] **Q:** He says:
 [10] "They recommended Shell should move swiftly to a
 [11] pilot scheme to test market Shell Smart."
 [12] He goes on at the top of page 4315:
 [13] "Along with several agencies, we were invited to
 [14] present specific proposals for an electronic loyalty
 [15] scheme. The Shell Smart promotion now launched is
 [16] remarkably similar to our confidential presentation
 [17] called Onyx." Right?
 [18] **A:** Yes.
 [19] **Q:** Then in his very last paragraph:
 [20] "The reader of this opinion should be aware that
 [21] we are considering our position with regard to any
 [22] breach of confidential information or copyright in
 [23] regard to the recent presentation to Shell regarding
 [24] Shell Smart."
 [25] **A:** Correct.

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[1] Q: The fact of the matter is, is it not, that you knew
 [2] before you received this letter from Senior King that
 [3] Senior King's dispute or potential dispute with Shell
 [4] related the loyalty card scheme, did you not?
 [5] A: I knew that from the telephone conversation I had had
 [6] with him.
 [7] Q: That is the one I showed you in the other volume, is it?
 [8] A: With Mr King, when he took up the invitation to supply
 [9] the expert report.
 [10] Q: I put it to you that in fact in 1993, in the
 [11] conversation I showed you the tape recording of, you
 [12] knew, either then or not long afterwards, that Shell had
 [13] a proposal to bring out a Smart Card Multibrand Loyalty
 [14] Scheme?
 [15] A: No.
 [16] Q: I put it to you that you knew at that stage?
 [17] A: I did not know.
 [18] Q: Right. You did not know?
 [19] A: I definitely did not know.
 [20] Q: If you care to close up bundle 9B and turn to bundle E6,
 [21] please. In bundle E6 would you please turn to
 [22] page 2712. Do you recognise that document?
 [23] A: Yes, I do.
 [24] Q: This is another of your tape recorded conversations.
 [25] This time it is with Mr Watson, David Watson, of Shell

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[1] Q: You in fact got that information from Senior King, did
 [2] you not?
 [3] A: I first got it through Mr Lazenby.
 [4] Q: You in fact got that information from Senior King, did
 [5] you not?
 [6] A: I got it from Senior King first when I spoke to
 [7] Mr Steve King when he responded to my fax.
 [8] Q: In order to be able to make this statement when you
 [9] did - on 1st November 1993 - you were basing yourself
 [10] on information you had received from Senior King, were
 [11] you not?
 [12] A: No.
 [13] Q: You had had a conversation, had you not - and I have
 [14] shown you the earlier transcript - with Senior King and
 [15] you knew they were in a dispute or potentially in a
 [16] dispute with Shell, did you not?
 [17] A: I knew from Mr Fairhurst that he was making accusations
 [18] that several ideas had been turned around by
 [19] Mr Lazenby. He never, ever mentioned loyalty schemes at
 [20] all. The first I knew about loyalty schemes from
 [21] Senior King was from Mr Steve King when he phoned.
 [22] Q: I put it to you that in fact, not only did you recommend
 [23] them to go to specialist counsel - being the specialist
 [24] counsel that you were using, or proposing to use - but
 [25] that you discussed with them at some stage prior to this

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[1] and it takes place on Monday, 1st November 1993. Do you
 [2] remember this conversation?
 [3] A: Yes, I do.
 [4] Q: Turn to page 2716. Do you have that?
 [5] A: Yes, I do.
 [6] Q: Look about eight lines from the top. This is you
 [7] speaking -
 [8] A: Yes.
 [9] Q: We have a reference to the NASA Space Centre in Florida
 [10] and Professor Steven Ward King, a chap whose name you
 [11] know:
 [12] "I got approval from both of them to put a
 [13] proposal up to you but of course it was thwarted by what
 [14] has happened here. It is probably too late in any
 [15] event. But I understood that you are going to run this
 [16] new scheme with the Smart Cards fairly early next year,
 [17] in any event. So that really we would be out of the
 [18] running, would we not, for any promotion of games?"
 [19] Do you see that?
 [20] A: Yes.
 [21] Q: You knew, did you not, they were proposing, and it was
 [22] their proposal at that stage, to bring out a Smart Card
 [23] scheme next year? You knew that, did you not?
 [24] A: I knew that, yes, because Mr Lazenby had told me that,
 [25] or he thought it likely.

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[1] telephone conversation the nature of their dispute with
 [2] Shell, or their prospective dispute with Shell?
 [3] A: The first time I became aware of the loyalty scheme - a
 [4] Shell loyalty scheme from Senior King was in that
 [5] telephone conversation with Mr Steve King.
 [6] Q: What do you say the source of this information was here
 [7] on page 2716?
 [8] A: The gentleman sitting in front of
 [9] you: Mr Andrew Lazenby.
 [10] Q: He told you, did he, that they were going to run the
 [11] scheme out in 1994? He told you that, did he?
 [12] A: I cannot remember his exact words, but I was left with
 [13] the impression that Shell were about to make a
 [14] fundamental decision on their long-term plans. It would
 [15] probably be a stand-alone Shell loyalty scheme. So it
 [16] was no surprise when Senior King mentioned that to me.
 [17] (3.30 pm)
 [18] Or when Mr Watson mentioned it in that telephone
 [19] conversation.
 [20] Q: What do you mean "when Mr Watson mentioned it"?
 [21] A: When it was raised in the telephone conversation with
 [22] Mr Watson that you have just been referring to.
 [23] Q: But it was not just raised: you raised it. You
 [24] mentioned it.
 [25] A: When I mentioned it.

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[1] Q: I ask you again: what do you say the source of your
 [2] information was?
 [3] A: The same answer as I have given twice before:
 [4] Mr Andrew Lazenby, who is sitting in front of you.
 [5] Q: You say he told you that in, what, 1992?
 [6] A: 24th November 1992. Which was the last meeting I had
 [7] with him.
 [8] Q: Right. This is not true, is it, Mr Donovan?
 [9] A: It is true.
 [10] Q: In fact you had had conversations during 1993 with
 [11] Senior King and you had had conversations with
 [12] Mr Paul King, had you not? And, from either or both of
 [13] those sources, you learned what Shell's intentions were;
 [14] correct?
 [15] A: The only information there is about that is what you
 [16] have seen. Mr Paul King never gave me any information
 [17] about inside matters at Shell. He is a man of the
 [18] highest integrity.
 [19] Q: What did you talk about then, when you discussed this
 [20] Multibrand Loyalty Scheme with him? What did you talk
 [21] about with him?
 [22] A: I only mentioned to him that litigation was likely.
 [23] Q: When did you mention that to him?
 [24] A: I would guess probably early in 1997.
 [25] Q: Are you saying that you did not discuss with him at any

[1] to your multibrand loyalty proposal?
 [2] A: Correct.
 [3] Q: Right. You are here, in this letter
 [4] of 19th November 1993, putting down a marker, are you
 [5] not?
 [6] A: It was a throw-away comment on the end of the letter.
 [7] Q: No, it was not, Mr Donovan. This was a clear calculated
 [8] statement intending to put down a marker, was it not?
 [9] A: But, if that had been the case, I would probably have
 [10] gone to a bit more trouble about what I said. I was
 [11] concerned because we had put a number of ideas up to
 [12] Shell and we had had problems with it and, therefore,
 [13] I added that to the end of the letter, which was really
 [14] about Make Money.
 [15] Q: This is in fact the multibrand proposal in which you
 [16] envisaged that Make Money goes into Megamatch mode,
 [17] yes? The joint promotion. That is what you are talking
 [18] about; right?
 [19] A: Yes.
 [20] Q: You are talking about here in fact what we know from
 [21] other circumstances is Concept Four, are you not?
 [22] Whereby the common currency: points, vouchers, tokens
 [23] and so forth are collected or awarded at outlets
 [24] belonging to the various types of retailer participating
 [25] in the activity. Yes?

[1] stage between 1992 and 1997 the Multibrand Loyalty
 [2] Scheme?
 [3] A: Only on the occasions that I have mentioned, which was
 [4] when he left Shell.
 [5] Q: I am afraid I have to go to another bundle. Would you
 [6] take volume E7, please. In that bundle would you please
 [7] turn to page 2976. Do you remember this letter?
 [8] A: I do.
 [9] Q: Can I take you, please, to the third block paragraph:
 [10] "Like Andrew Lazenby, you expressed some doubt
 [11] over our proprietary claim to the Megamatch concept
 [12] involving retailers in different trades participating in
 [13] a single promotion with a common promotional currency.
 [14] Please note that I am in possession of a multitude of
 [15] documents regarding presentations and contact with Shell
 [16] over several years which confirm our right of that
 [17] concept. These proposals also cover promotional schemes
 [18] whereby the common currency: points, vouchers, tokens
 [19] et cetera are collected or awarded at outlets belonging
 [20] to the various types of retailer participating in the
 [21] activity."
 [22] Do you see that?
 [23] A: I do.
 [24] Q: You have said yourself in your witness statement that
 [25] this reference in those last four lines is a reference

[1] A: Yes.
 [2] Q: This is a reference to Concept Four, is it not?
 [3] A: Correct.
 [4] Q: You are doing this for a reason, are you not?
 [5] A: Well, there must have been a reason to put it there.
 [6] Q: There must be, must there not?
 [7] A: What had happened is Mr Lazenby, in a telephone
 [8] conversation with him, had mentioned or claimed that he
 [9] could run Make Money and the Megamatch scheme without us
 [10] if he wanted to. So I suppose that, in my mind, I was
 [11] wondering what else he might do or claim rights to and
 [12] so I mentioned that on the tail of the letter.
 [13] Q: This in fact follows on, does it not, from that
 [14] reference in the last tape recorded conversation
 [15] with Watson. What you are doing here is putting down a
 [16] marker in relation to a scheme which you anticipate is
 [17] going to roll out in 1994; correct?
 [18] A: The scheme I anticipated was going to be launched in
 [19] 1994 was the Shell-only loyalty card scheme.
 [20] Q: You anticipated at the date of this letter that there
 [21] would be a Smart Card scheme rolled out by Shell in 1994
 [22] which was based on or involved in some way Concept
 [23] Four. That is what you thought?
 [24] A: No.
 [25] Q: You did not?

[1] A: No.
 [2] Q: I put it to you that what you are doing here is putting
 [3] down a marker; do you agree?
 [4] A: Yes.
 [5] Q: Right. And I put it to you that you have two big
 [6] problems: the first problem you have is that you know at
 [7] the date of this letter that Senior King is claiming
 [8] rights over it. What do you say to that?
 [9] A: No, I did not know that, no.
 [10] Q: I put it to you, secondly, that you have another
 [11] problem: you do not know the precise format in which the
 [12] scheme is going to roll out at the date of this letter.
 [13] So you want to bide your time to see what the scheme
 [14] looks like when it comes out?
 [15] A: No, I had no idea that Shell were already working on
 [16] such a scheme. I knew they were thinking about a
 [17] Shell-alone scheme. I had no idea they were working on
 [18] a multiparty scheme.
 [19] Q: You were in fact waiting to see what was going to come
 [20] out in 1994 and the purpose of this letter was to
 [21] gingerly state your position without committing yourself
 [22] too far at this stage; correct?
 [23] A: Incorrect. Not true.
 [24] Q: When the Shell Smart Scheme rolled out in 1994, you were
 [25] watching it like a hawk, were you not?

[1] Q: And you were aware by then that they were making claims
 [2] over it?
 [3] A: Yes, because that was a month later.
 [4] Q: Right. You yourself, in the letter which I think we
 [5] still have open, had put down a marker in respect of
 [6] that Smart Card Scheme?
 [7] A: No, sir, not that Smart Card Scheme. A Shell-only Smart
 [8] Card Scheme. In fact I am not sure if I knew it was
 [9] Smart Card or not. I knew that Shell were thinking
 [10] about running a loyalty scheme on their own.
 [11] Q: Mr Donovan, you foresaw when you wrote this letter
 [12] of 19th November 1993 that there would be a scheme, a
 [13] Smart Card Scheme, from Shell which you perceived might
 [14] involve Concept Four?
 [15] A: No, I did not know.
 [16] Q: Why did you write then in terms of Concept Four at the
 [17] bottom of that letter of 19th November?
 [18] A: Because it was closely related to Megamatch. It worked
 [19] on the same sort of principle: a Shell-led consortium of
 [20] major retailers using a common currency. And because
 [21] often, when we have talked about Megamatch, it has led
 [22] us to think about the other scheme and it did on this
 [23] occasion. Because I had written down about Megamatch,
 [24] I added that to the end of the letter. I did not have a
 [25] clue what Shell were doing. I did not know -

[1] A: No, sir, I was not.
 [2] Q: You were not?
 [3] A: No. I did notice it had been launched and it was
 [4] exactly in the sort of mode I had expected, or
 [5] Mr Lazenby had informed me about. Which seemed to be a
 [6] Shell loyalty scheme.
 [7] Q: What, you really took no particular notice of the
 [8] scheme?
 [9] A: No, because I was totally focused on suing Shell on the
 [10] other ideas.
 [11] Q: When, to the best of your recollection, did the Shell
 [12] Smart Scheme roll out in 1994?
 [13] A: I think it was in October.
 [14] Q: We have already established from the other documents
 [15] that, by the back end of 1994, you know - because you
 [16] have seen a sort of draft expert opinion from
 [17] Senior King - that Senior King have claims that they
 [18] wished to make in relation to that scheme?
 [19] A: Can you say that again? Sorry.
 [20] Q: You were aware, were you not, by the time you received
 [21] back from Senior King that draft expert opinion, that
 [22] they were making claims over the Shell Smart Scheme?
 [23] A: That was in November 1994, was it not?
 [24] Q: Yes.
 [25] A: Yes.

[1] Q: I put it to you that you did foresee, based on
 [2] information you received, either from Paul King or
 [3] Senior King or both, what was about to happen in 1994?
 [4] A: I did not know. I only knew - I did not know about the
 [5] multiparty scheme, I only knew about the Shell-alone
 [6] scheme.
 [7] Q: You must have been extremely interested to see what the
 [8] configuration of the Shell Smart Scheme was when it
 [9] rolled out in 1994? You must have been, Mr Donovan?
 [10] A: I was - as I say, I was absolutely focused on the other
 [11] disputes with Shell at that time. There was a lot of
 [12] activity on the other cases and I do remember seeing an
 [13] article about it. But what I read just confirmed what
 [14] I had expected from what Andrew Lazenby had said to me.
 [15] Q: You read many documents, did you not, in your usual
 [16] promotional magazines which you read? You read many
 [17] documents relating to the Shell Smart Scheme?
 [18] A: I do not know. I certainly read one.
 [19] Q: You read more than one in 1994. It was one of the major
 [20] events in the field of promotions in 1994, was it not?
 [21] A: It was a major event, but I certainly read at least one
 [22] article. I cannot remember how many I read. I do not
 [23] think it was a lot of them. I certainly read one.
 [24] Q: In fact you read quite a few journals, because it is one
 [25] good way of keeping up with what is going on in your

[1] industry, is it not?
 [2] **A:** It is standard practice that my father would read
 [3] newspapers et cetera and anything to do with Shell, he
 [4] would cut it out and bring it to my attention. The same
 [5] with some trade magazines.
 [6] **Q:** And you would do the same: you would read the trade
 [7] magazines yourself and anything to do with Shell, you
 [8] would cut it out, would you not?
 [9] **A:** I was so busy with what we were doing on the other
 [10] disputes with Shell that I left that to my father. But
 [11] he certainly passed at least one article to me about the
 [12] Smart Scheme.
 [13] **Q:** In fact the true position is that you and your father
 [14] were watching it extremely closely and you saw the
 [15] write-ups that appeared in relation to it in the
 [16] mainstream promotional magazines, did you not?
 [17] **A:** As I have said, I did see at least one article. It
 [18] could have been more than one but I can only remember
 [19] one for definite. I certainly read something that
 [20] outlined the scheme and, from what I saw, it was not the
 [21] scheme that I put up to Shell.
 [22] **Q:** What was it lacking?
 [23] **A:** It was not a multiparty scheme. It was not a scheme
 [24] where a number of major retailers in the High Street
 [25] were all issuing and redeeming a common currency.

[1] concerned about those also. I think, by that time,
 [2] I had had a letter from Mr Lazenby on Megamatch that
 [3] said that he had been talking to a variety of potential
 [4] partners direct, which concerned me a great deal.
 [5] Because I had put the idea to him in confidence and
 [6] I had no idea that he was out contacting other people.
 [7] **MR JUSTICE LADDIE:** Mr Hobbs has put to you that, at the
 [8] time of writing this letter, you had in mind that a use
 [9] of Concept Four might be about to take place and you
 [10] were worried about that?
 [11] **A:** I understand. No, that was not the case. The letter
 [12] was about Make Money first of all, because my suspicions
 [13] had been aroused by the number of times that Mr Lazenby
 [14] had raised the subject and said that they could run it
 [15] without us and, since I had mentioned Megamatch, which
 [16] was a similar principle, I added that.
 [17] **MR JUSTICE LADDIE:** What you said before was that it was a
 [18] sort of throw-away at the end of the letter?
 [19] **A:** Yes. If I had seriously thought that they were
 [20] producing that concept behind the scenes, I would have
 [21] been more specific in what I said in the letter.
 [22] I would have said Concept Four in there. I did not
 [23] because I did not think - I did not know that was
 [24] happening.
 [25] **MR JUSTICE LADDIE:** Could you tell me: why did you underline

[1] **Q:** When do you say you first realised that that is what the
 [2] scheme would become?
 [3] **A:** It was in July 1996.
 [4] **Q:** You realised that in July 1996?
 [5] **A:** Yes. I think it was 21st July there was an article -
 [6] I think it was in The Sunday Times Business Section
 [7] - that my father drew to my attention.
 [8] **Q:** Would you, please, now -
 [9] **MR JUSTICE LADDIE:** Just before you do that, are you
 [10] finished with this letter, Mr Hobbs?
 [11] **MR HOBBS:** Yes.
 [12] **MR JUSTICE LADDIE:** So I get all the answers in one place,
 [13] Mr Donovan. As I understand it, at the time of this
 [14] letter of 19th November 1993 you were in dispute with
 [15] Shell?
 [16] **A:** On the Nintendo claim.
 [17] **MR JUSTICE LADDIE:** What, to put none too fine a point on
 [18] it, you thought they had double-crossed you?
 [19] **A:** Correct.
 [20] **MR JUSTICE LADDIE:** And, by this time, you had come to the
 [21] conclusion that Mr Lazenby was not to be trusted?
 [22] **A:** I was very concerned about that. Not only on the
 [23] Nintendo, but also in telephone conversations he had
 [24] mentioned other proposals that I had put to him which
 [25] was Make Money and one called Megamatch and I was

[1] the word "also"?
 [2] **A:** Just to stress that that was the case.
 [3] **MR JUSTICE LADDIE:** You were stressing that you had rights
 [4] on Concept Four as well?
 [5] **A:** Yes.
 [6] **MR HOBBS:** I said that I thought I had finished on that
 [7] letter. I have one question to ask you on this letter:
 [8] can you offer my Lord any explanation as to why, in this
 [9] letter, in this context, you did not refer to the fact
 [10] that Shell had taken an option on your multibrand
 [11] loyalty proposal?
 [12] **A:** Because, as I say, the main subjects of the
 [13] letter - well, the number one subject was Make Money.
 [14] The second subject was Megamatch and that was - because
 [15] I was talking about Megamatch, I decided to make a
 [16] reference to the other concepts as well.
 [17] **Q:** It is your case, as I understand it, having heard it
 [18] opened by your counsel, that you are saying that there
 [19] was an option in place over the proposal which is being
 [20] referred to in those last four lines?
 [21] **A:** That is correct, yes.
 [22] **Q:** Yes. Can you offer my Lord any explanation as to why
 [23] you should refer to the proposal and not go on to
 [24] mention the existence of the option that you now say
 [25] Shell had in respect of it?

[1] **A:** As I say, it was not a thought out – it was something
 [2] I just put at the tail end of the letter and I never
 [3] gave it a lot of thought. If I had given it any
 [4] thought, I would have spelt out more precisely what
 [5] I was talking about: that it was Concept Four
 [6] et cetera. My main interest was Make Money and
 [7] Megamatch.
 [8] **Q:** I put it to you that in fact what you are doing here is
 [9] putting down a warning sign to Shell and that the very
 [10] fact that you proposed to warn them off from the use of
 [11] the Concept Four is inconsistent with your position that
 [12] they had an option to use it?
 [13] **A:** I was only reminding them that the concept belonged to
 [14] Don Marketing, as did Megamatch and Make Money. Or, in
 [15] the case of Make Money, it was a joint rights
 [16] agreement. You have to remember that I was being told
 [17] that, although we had a joint rights agreement on Make
 [18] Money, that that did not count and that Shell could run
 [19] that without me, or without the company.
 [20] **Q:** You understood what I just put to you, did you not?
 [21] That in fact you are treating this as a letter of
 [22] warning to Shell and that is not consistent with your
 [23] story that there was an option in Shell's favour under
 [24] that proposal?
 [25] **A:** As I say, it was not the main subject of the letter. It

[1] **Q:** Sales Promotion Magazine?
 [2] **A:** Sales Promotion Magazine I have read.
 [3] **Q:** Forecourt News?
 [4] **A:** Forecourt News for periods of time, yes.
 [5] **Q:** The Shell Smart Scheme received, on its roll out,
 [6] coverage in all journals of that kind, did it not?
 [7] Because it was an event of importance?
 [8] **A:** It probably did. As I said earlier, I can certainly
 [9] remember reading at least one article.
 [10] **Q:** Turn to the second page of this article, which is about
 [11] "Shell Gets Smart" and it is the Smart Scheme. Look at
 [12] 4315/B at the bottom on the left-hand side. It says at
 [13] the bottom of that left-hand column:
 [14] "For the future too Shell is considering extending
 [15] the scheme to third party retailers inviting
 [16] non-competing stores to join in with issuing points or
 [17] Air Miles via the same cards and infrastructure. The
 [18] technology is very flexible, so this is quite possible'
 [19] adds Anderton."
 [20] Do you see that?
 [21] **A:** I do.
 [22] **Q:** You knew in 1994, did you not, that there was in fact an
 [23] intention to use the Shell Smart Scheme on a consortium
 [24] basis? You knew that?
 [25] **A:** No, I did not know.

[1] was not even the second most important subject. It was
 [2] just a tail end comment, just to remind them that we
 [3] held the rights to that concept, that it belonged to
 [4] Don Marketing.
 [5] **Q:** We go into 1994. You can close up that file and restore
 [6] it to the carousel.
 [7] (3.45 pm)
 [8] I would like you, please, to take out volume 9B.
 [9] Please turn to page 4315/A.
 [10] **A:** I have that.
 [11] **Q:** Do you recognise this document?
 [12] **A:** No – from the last few days I have seen some cuttings
 [13] from this magazine but I had never heard of that
 [14] magazine before.
 [15] **Q:** Really? Are you quite sure about that?
 [16] **A:** Absolutely.
 [17] **Q:** What magazines have you heard of? In the promotions
 [18] field of course.
 [19] **A:** Marketing, Marketing Week, Promotions and Incentives,
 [20] Incentive Today.
 [21] **Q:** Campaign?
 [22] **A:** Campaign I certainly know of. I have not read it for
 [23] years.
 [24] **Q:** Precision Marketing?
 [25] **A:** I know of it. I have never read it.

[1] **Q:** When you learned, as you did, at the back end of 1994,
 [2] through that draft expert opinion, that Senior King were
 [3] in dispute or about to become in dispute with Shell, you
 [4] had discussions with them, did you not?
 [5] **A:** Yes, I spoke to them over the telephone.
 [6] **Q:** And you wanted to know more about the nature of the
 [7] dispute that was brewing between them and Shell, did you
 [8] not?
 [9] **A:** Not to any degree. We did discuss it and I recommended
 [10] the lawyers that we were using.
 [11] **Q:** The reason you discussed it was because it was in the
 [12] draft expert report they had sent you?
 [13] **A:** Correct.
 [14] **Q:** Correct, and what you did was to discuss the ins and
 [15] outs of it with them, did you not?
 [16] **A:** Not to any degree, because I was focused on what was
 [17] happening with the Nintendo dispute and Make Money,
 [18] which was the reason for contacting them.
 [19] **Q:** I put it to you that you did in fact discuss this with
 [20] Senior King. It was one of the reasons that brought you
 [21] into contact with them in the first place and you
 [22] discussed the nature of their dispute; correct?
 [23] **A:** The loyalty scheme was discussed. The multiparty scheme
 [24] was never discussed.
 [25] **Q:** In that connection, you discussed with them the nature

[1] of their work for Shell; correct?
 [2] **A:** Not to any degree.
 [3] **Q:** You did discuss the nature of their work for Shell when
 [4] they were providing proposals for Shell?
 [5] **A:** Not much beyond you can see with the document that he
 [6] provided.
 [7] **Q:** You did. You discussed the information with Senior King
 [8] people, did you not?
 [9] **A:** I did.
 [10] **Q:** Right. In those discussions you learned from them, did
 [11] you not, that the work that they had done had been work
 [12] in connection with a proposed multibrand loyalty card
 [13] scheme? You learned that?
 [14] **A:** No, definitely not.
 [15] **Q:** What do you say they told you about their work for
 [16] Shell?
 [17] **A:** Not very much.
 [18] **Q:** I did not ask you that. What do you say they actually
 [19] told you?
 [20] **A:** Not much beyond you can see in the document that they
 [21] supplied.
 [22] **Q:** How much beyond what I see in that document?
A: I cannot recall. I was focused on our disputes with
 Shell and the report that he was supplying. The Smart
 [25] Scheme came up in conversation because he had put it in

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[1] for the letter. Since I had mentioned Megamatch, I went
 [2] on to mention the other scheme.
 [3] **Q:** Can you close up that file you had open. Can you please
 [4] now take the bundle marked B, core bundle, trial
 [5] bundle B.
 [6] **A:** I have that.
 [7] **Q:** Would you, in that bundle, please, turn behind tab 3.
 [8] Do you recognise that document?
 [9] **A:** Yes, I do.
 [10] **Q:** This is the document we know in this case as the Funding
 [11] Deed?
 [12] **A:** Correct.
 [13] **Q:** This is a document with which you are closely
 [14] familiar; am I right?
 [15] **A:** Yes, I am.
 [16] **Q:** Remind yourself, please, of clause 3C on the second
 [17] page of that document at the bottom.
 [18] **A:** Yes.
 [19] **Q:** You understand the general tenor of what is said there,
 [20] do you not?
 [21] **A:** I do.
 [22] **Q:** It was your understanding at the time, was it not, that
 [23] the funding for the litigation provided by this deed was
 [24] on the basis that all disputes were upfront and in the
 [25] open between yourself and Shell?

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[1] that report, but it was not discussed at any length. As
 [2] far as I was concerned, it was the scheme I was
 [3] expecting to see and, since he thought that it was based
 [4] on the proposal that he had put to Shell, I recommended
 [5] that he contact Mary Vitoria QC.
 [6] **Q:** I put it to you that in fact you learned from your
 [7] discussions with Senior King by, at the very latest, the
 [8] end of 1994 what the precise nature of the scheme was?
A: I did not.
 [10] **Q:** I put it to you that you made it your business to find
 [11] out precisely what the nature of the scheme was in the
 [12] market place by reading all the relevant journals and
 [13] making whatever enquiries you thought were appropriate?
 [14] **A:** I had no idea that Shell had been working on the
 [15] multiparty scheme. I was never given any information to
 [16] that effect.
 [17] **Q:** So it is just a coincidence that you wrote that letter
 [18] in November 1993 to Watson referring to Concept Four?
 [19] **A:** It was not a coincidence. It was because of what
 [20] Mr Lazenby had said about the Megamatch scheme: that he
 [21] could run it without us. Even when he was aware of the
 [22] long history with that proposal and that it was put to
 [23] him in confidence. He had also been mentioning Make
 [24] Money. I thought that something may have been imminent
 [25] with either of those promotions and that was the reason

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[1] **A:** I only went on the wording of this document and that
 [2] I was not aware of any other potential claims other
 [3] than that we had already issued proceedings or had been
 [4] discussed with Mr Lazenby.
 [5] **Q:** Right. You did not, at this stage, hint or suggest that
 [6] you had any claim against Shell in respect of its Smart
 [7] Card Scheme, did you?
 [8] **A:** No, because I did not know that I had one.
 [9] **Q:** What you in fact knew was that Senior King was making a
 [10] claim in respect of the Smart Card Scheme?
 [11] **A:** I knew that they were thinking of doing that.
 [12] **Q:** You had had a draft expert report from them at the back
 [13] end of the previous year?
 [14] **A:** Correct.
 [15] **Q:** Right.
 [16] (4.00 pm)
 [17] You did not feel able, did you, to unveil your
 [18] claim in those circumstances?
 [19] **A:** I did not know there was a claim at that time.
 [20] **Q:** I put it to you that you knew perfectly well what Shell
 [21] was doing with its Smart Card Scheme, but the reason you
 [22] stayed silent was because you knew there was an
 [23] unresolved claim by Senior King over the concepts which
 [24] lie behind that scheme?
 [25] **A:** At some point I had spoken to Steve King of Senior King

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[1] and I got the impression from him that he probably would
 [2] not pursue the claim with Shell because he was worried
 [3] about the effect on his other clients and, therefore,
 [4] I did not know what really was happening. I thought
 [5] they probably would not go forward with it.
 [6] **Q:** The truth is that you in fact maintained contact with
 [7] Steve King and you wanted to know what progress, if any,
 [8] he was making with his claim, did you not?
 [9] **A:** No.
 [10] **Q:** In fact you learned eventually that his claim was not
 [11] proceeded with, did you not?
 [12] **A:** As I just said, I got the impression from Mr King that
 [13] they probably would not proceed with it.
 [14] **Q:** Would you please keep the document that we have open in
 [15] bundle B - keep bundle B on one side and would you for
 [16] one moment, please, look at volume E10 first of all.
 [17] **A:** I have that.
 [18] **Q:** Would you please turn to the page stamped 4505 in that
 [19] volume?
 [20] **A:** I have that, yes.
 [21] **Q:** Here is a letter from Senior King dated 5th June 1995 to
 [22] Dr Faye, the Chairman of Shell Oil UK. Do you see that?
 [23] **A:** I do.
 [24] **Q:** The letter says:
 [25] "Dear Dr Faye, it is a matter of record that the

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[1] **A:** No, I have not.
 [2] **Q:** Really?
 [3] **A:** Absolutely.
 [4] **Q:** Have you made notes of them?
 [5] **A:** No, I have not, no.
 [6] **Q:** Really?
 [7] **A:** No.
 [8] **Q:** Are you sure?
 [9] **A:** Absolutely.
 [10] **Q:** You see, you appear, from all these files here, to have
 [11] a strong proclivity for making contemporaneous notes and
 [12] for making tape recordings when you believe you are
 [13] going to learn useful information. Are you seriously
 [14] saying that you made no notes of any of your
 [15] communications with Senior King?
 [16] **A:** Only the one you have seen and the transcript that you
 [17] have seen. I do not normally tape people's
 [18] conversations. I went out of my way to tape the
 [19] conversations with Mr Lazenby and with Mr Watson because
 [20] of the events. I had the equipment set up when
 [21] Mr Fairhurst called me and, because of things he started
 [22] to say about Mr Lazenby, I turned the machine on. It
 [23] must have been very close to when I had been talking to
 [24] Mr Lazenby.
 [25] **Q:** We have open a letter of 5th June 1995 on 4505. Just

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[1] initiative strategy and full promotional systems
 [2] recommendation for a major Smart Card promotion came
 [3] from Senior King in 1992, 1993 and 1994 when we worked
 [4] closely with Andrew Lazenby. It is our view, having
 [5] taken professional advice, that it would be helpful to
 [6] all parties to ensure clarity of title and rights to all
 [7] our recommendations in this respect. In the interests
 [8] of avoidance of any future dispute, we are therefore
 [9] willing to transfer all our rights in all our
 [10] recommendations to Shell in this area of activity for a
 [11] single nominal charge of £100,000."
 [12] You knew, did you not, from discussions with
 [13] Senior King that they were making this claim?
 [14] **A:** I knew that they were considering making a claim and at
 [15] some stage I was told that he probably would not go
 [16] ahead with it.
 [17] **Q:** It was not an accident that you learned that they were
 [18] not going ahead with it, because in fact you wanted to
 [19] maintain close tabs on the progress of their claim, did
 [20] you not?
 [21] **A:** No, I have not spoken to them regularly. I have never
 [22] met with Mr Steve King. I have spoken to him from time
 [23] to time, probably - maybe two or three times over those
 [24] years.
 [25] **Q:** Have you tape recorded those conversations?

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[1] turn to the preceding page, 4504. That is an invoice or
 [2] a demand - an application for payment - which was
 [3] enclosed with the letter you have just looked at with me
 [4] on 4505. That contains the statement that:
 [5] "During 1992, 1993 and 1994 Senior King carried
 [6] out a series of projects that reviewed forecourt
 [7] promotional strategy and promotional technology ..."
 [8] You can see:
 [9] "... this included a detailed analysis of Swipe
 [10] Cards, Smart Cards and alternative advanced technology
 [11] code name Cipher. The agency was then requested to
 [12] prepare specific recommendations for the use of advanced
 [13] technology in forecourt promotions by Andrew Lazenby.
 [14] The subsequent presentation and strategy using advance
 [15] technology Smart Cards included detailed promotion
 [16] mechanics, costings, concept boards, test markets and
 [17] all analysis and technology support, including
 [18] installations and data base management."
 [19] Are you saying that you did not know this was the
 [20] nature and contour of Senior King's claim against Shell?
 [21] **A:** I did not know the details. I have never seen these
 [22] documents until they came from Shell's discovery.
 [23] **Q:** It was a matter of great interest to you, was it not, to
 [24] know they had this dispute with Shell?
 [25] **A:** It was a matter of great interest that someone else

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[1] seemed to be in similar circumstances with the same
 [2] Shell manager and that might be going to sue Shell. We
 [3] thought that that might help us.
 [4] **Q:** And you wanted to know whether it would help and you
 [5] wanted to know the details, did you not?
 [6] **A:** I did not have the details beyond what you have seen.
 [7] **Q:** You wanted to know the details to know whether it would
 [8] be of assistance to you? You made enquiries of
 [9] Senior King, did you not?
 [10] **A:** The enquiries with Senior King started out as Woolworth.
 [11] **Q:** Is the answer to my question: yes, you did make
 [12] enquiries of Senior King with a view to ascertaining the
 [13] nature and details of their claim against Shell?
 [14] **A:** There is very little beyond what you have seen on that
 [15] note.
 [16] **Q:** How much more beyond what I have seen in that note -
 [17] **A:** Very little.
 [18] **Q:** - is there. You keep saying "very little". Give me
 [19] some details of what that "very little" consists of.
 [20] **A:** I cannot recall. As I have said before, my focus of
 [21] attention at that time was on my disputes with Shell and
 [22] how Senior King, the similar fact evidence, might help
 [23] us. I never discussed the details. I thought it was a
 [24] Shell stand-alone scheme and that it was not the same
 [25] scheme that I had put to Shell.

[1] matter?
 [2] **A:** Yes.
 [3] **Q:** He - Senior King - presses his claim against Shell UK
 [4] in October. If you would look, please, to the
 [5] penultimate paragraph on 635, he states what his
 [6] position is:
 [7] "Our response to this briefing outside of the
 [8] retainer arrangement was a presentation made in
 [9] October 1991 with detailed proposals for the promotion
 [10] mechanic and software which would optimise the Smart
 [11] Card and Cipher, providing Shell with a flexible
 [12] promotion software package enabling more than one
 [13] promotion to be run."
 [14] All right. You see he is pressing his claim?
 [15] **A:** Yes.
 [16] **Q:** If you turn to page 634, 20th November 1995, it is from
 [17] Mr Pirret to Graham Senior of Senior King?
 [18] **A:** Yes.
 [19] **Q:** Was Graham Senior the man you spoke to at Senior King?
 [20] **A:** No.
 [21] **Q:** You will see from this letter that Mr Pirret declines to
 [22] accept the claim that has been made against Shell and
 [23] his position is in the last paragraph:
 [24] "I must reiterate that Senior King has no
 [25] intellectual right or other interest in the Shell Smart

[1] **Q:** You thought that Senior King could provide you with what
 [2] you have just described as "similar fact evidence", did
 [3] you not?
 [4] **A:** Correct.
 [5] **Q:** Therefore you wanted to know what the nature of their
 [6] claim was, did you not?
 [7] **A:** This was if they went forward with it. But I never got
 [8] into any details of it, because he had put down his
 [9] account in that report and he never mentioned - there
 [10] was no mention of multiparty. I do not think that was
 [11] ever discussed with him at all.
 [12] **Q:** When do you say you discovered that they were not going
 [13] ahead with their claim against Shell?
 [14] **A:** I do not know when that was.
 [15] **Q:** Think hard and try and remember as to when you learned
 [16] that information?
 [17] **A:** I could take a guess at it. I would guess in 1995.
 [18] **Q:** Yes. Now, with that guess, would you please turn to
 [19] volume E2. In E2 I would like you, please, to turn to
 [20] page 635. Here is a letter from Senior King to
 [21] Mr Pirret. You know who Mr Pirret is within Shell?
 [22] **A:** I do.
 [23] **Q:** This letter is on October 12th 1995 and it is pursuing
 [24] the matters that were raised in that letter we were just
 [25] looking at in the other file. This is pursuing that

[1] promotion and that no payment is due or payable by Shell
 [2] in respect of the work carried out by Senior King, nor
 [3] any recommendations made by them in relation to
 [4] Project Onyx."
 [5] It was about this time, was it not, Mr Donovan,
 [6] that you knew that Senior King were not going to go
 [7] forward beyond that?
 [8] **A:** I do not know exactly what time that was. I think it
 [9] probably was in 1995.
 [10] **Q:** Right. I think you would agree, looking at these
 [11] letters, would you not, that the most likely timing for
 [12] that was the back end of 1995?
 [13] **A:** It may well have been.
 [14] **Q:** Right. The position that we arrive at then is that, by,
 [15] let us say, the back end of 1995 you have reached a
 [16] position where you know that there is a Shell Smart
 [17] Scheme out there in the market place. You know that,
 [18] correct?
 [19] **A:** I knew from October 1994. Probably I read an article.
 [20] I think they launched the pilot scheme in Scotland, if
 [21] my memory serves me correctly.
 [22] **Q:** It is the case, is it not, that, by 1995, you were aware
 [23] that they were going to launch it and run it as a
 [24] Multibrand Loyalty Scheme?
 [25] **A:** Sorry, can you repeat the date?

[1] Q: I am saying – I said by 1995. Did you, during 1995,
 [2] know that –
 [3] A: No.
 [4] Q: You say no?
 [5] A: About the multiparty scheme? No, I did not know until
 [6] I read the article in The Times on 21st July 1996.
 [7] Q: So, on your version of events, it is July 1996 that
 [8] changes your whole perspective in relation to the Shell
 [9] Smart Scheme; is that correct?
 [10] A: The Shell Multiparty Scheme, yes.
 [11] Q: That is because, up until that particular point in time,
 [12] you say that you had no knowledge and no expectation
 [13] that it was going to be a multiparty scheme?
 [14] A: Correct.
 [15] Q: You know that I do not agree with you on that and that
 [16] I put the contrary case to you. You know that, do you
 [17] not?
 [18] A: I do.
 [19] Q: Tell me this then: knowing, as you say you did, in
 [20] July 1996 that you had a claim, can you tell my Lord why
 [21] it is that you said nothing about that claim to Shell
 [22] until 1997?
 A: You are saying from September 1996 until March 1997 –
 Q: I believe the date of your article –
 [25] MR JUSTICE LADDIE: I think you just said 21st July.

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[1] was at a much later date. I believe after – it may
 [2] have been from that article that their name was
 [3] mentioned in it actually. So it would have been
 [4] 21st July 1996 and then I made enquiries. I went to the
 [5] British Library and checked publications et cetera and
 [6] I found out that they had launched a pilot operation in
 [7] mid-July 1995.
 [8] Q: You went to the British Library?
 [9] A: Yes, I did.
 [10] Q: You need a member's ticket, do you not, to get into the
 [11] British Library?
 [12] A: You do not have to have – you just sign up for the day.
 [13] Q: And did you?
 [14] A: I did.
 [15] Q: You were that interested to know what the details were
 [16] that you went to the British Library?
 [17] A: Yes. Because I knew I had signed this Funding Agreement
 [18] with Shell on 6th July 1995 and, therefore, I wanted to
 [19] know – since that article said that John Menzies was
 [20] part of the scheme I wanted to find out more about it.
 [21] Q: What you wanted to know was whether the public
 [22] announcement of John Menzies' involvement postdated that
 [23] Funding Deed, did you not?
 [24] A: Yes. I wanted to find out exactly – well, whatever
 [25] information I could about it. Because John Menzies was

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[1] A: 21st July, there was a mediation coming up for the Now
 [2] Showing and Nintendo dispute. I think it was in
 [3] September and I asked – I obtained advice about it and
 [4] I was told that I did not have a claim because they had
 [5] not launched the scheme.
 [6] MR HOBBS: I am not following you, and the reason I am not
 [7] following you is because I understood you to have known
 [8] in July 1996 that it was a multibrand/multipartner
 [9] scheme?
 [10] A: Correct, but the article was about the plans to set up a
 [11] consortium. Dr Faye was making presentations to various
 [12] major companies and after that I think a consortium was
 [13] set up called Project Rainbow. But there was no
 [14] scheme. It was all in the planning stage.
 [15] Q: Are you saying that you believed that the very thing
 [16] that you feared was going to happen had happened, but
 [17] that you felt you had no claim to bring forward?
 [18] A: I sought advice on it and I understood that I had no
 [19] claim against Shell. That there would be no – it would
 [20] not be right to commence an action against them or
 [21] approach them about it because they had not actually
 [22] launched the scheme.
 [23] Q: When, to your knowledge, did John Menzies become
 [24] involved in the Shell Smart Scheme?
 [25] A: I now know of course when they became involved, but it

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[1] mentioned in there.
 [2] Q: At what point in time did you go to the British
 [3] Library? This must have been, on your version of
 [4] events, in 1996?
 [5] A: After that date.
 [6] Q: The reason you went there with that motive in mind was
 [7] to find out whether you could set up a story that your
 [8] knowledge of Menzies' involvement postdated that Funding
 [9] Deed; correct?
 [10] A: No, not correct. I went there to try to find out when
 [11] John Menzies had become involved in the scheme.
 [12] Q: Because, if you found out that it was prior to the date
 [13] of the Funding Deed, your perception of it was that you
 [14] would not be able to raise that claim?
 [15] A: I knew I would have to get legal advice on it. I knew
 [16] it could be a factor.
 [17] (4.15 pm)
 [18] Q: In fact you knew prior to 1996 that there was a
 [19] consortium proposal and you knew that the scheme was
 [20] capable of being run on a consortium basis?
 [21] A: I did not know until 21st July 1996.
 [22] Q: I put it to you that the only thing holding you back
 [23] from making the claim over the scheme that you have now
 [24] subsequently gone on to make was your knowledge that
 [25] Senior King was making a claim over the same concept?

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[1] A: No. Senior King's claim, if they had have made
[2] one - and they were talking to Shell soon after
[3] October 1994. That was when Shell had launch a
[4] stand-alone scheme, not the multiparty scheme. So their
[5] claim was in respect of the original scheme.

[6] Q: Do you still have volume B open in front of you, on your
[7] bench?

[8] A: Yes, I do.

[9] Q: Would you turn behind tab 4, please. Do you recognise
[10] this document?

[11] A: Yes, I do.

[12] Q: Turn behind tab 5 and I will ask you whether you
[13] recognise that document. The two documents go
[14] together.

[15] A: Yes, I do.

[16] Q: We can agree, can we not, that this letter agreement
[17] behind tab 4 and this order made by the court, which
[18] appears behind tab 5, this is the material which
[19] compromised the litigation and the dispute that you had
[20] had in two actions. One relating to - well, you can
[21] tell me.

[22] A: Now Showing and Nintendo.

[23] Q: I put to you what in fact the position is is this: you
[24] bided your time, you waited until you knew that
[25] Senior King was out of the way, you waited until you had

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[1] A: 21st July 1996.

[2] MR JUSTICE LADDIE: That one only talked about plans?

[3] A: Correct, sir, yes.

[4] MR HOBBS: Take volume E10, please. In that volume please
[5] turn to page 4689.

[6] A: I seem to have the wrong file, sorry, what was the ...

[7] Q: E10.

[8] A: Page number?

[9] Q: 4689.

[10] A: I have it now.

[11] Q: Do you recognise that document?

[12] A: I do.

[13] Q: This is the thing that you put forward as the source of
[14] your information. It is The Sunday Times Business
[15] Section.

[16] A: That is correct.

[17] Q: You are referring to the fact that it says in July 1996

[18] "Shell Plans Smart Card Consortium"?

[19] A: Correct.

[20] Q: You are saying that, at some later point in time, you

[21] went to the British Library and checked out when

[22] John Menzies became part of that scheme?

[23] A: That is correct.

[24] Q: Turn to 4584 in that volume.

[25] A: Can I say I have just seen - there is where I got it

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[1] entered into these settlement agreements with Shell;
[2] yes?

[3] A: No -

[4] Q: And then, and only then, did you unveil your claim to
[5] Shell in relation to -

[6] A: Senior King was not a factor at all. I had already
[7] heard that they were not going forward with their claim
[8] because they were worried about the effects it would
[9] have on their other clients. As far as I was concerned,
[10] I was advised that we would not have a claim unless
[11] Shell was successful in its plans to set up a
[12] consortium.

[13] Q: What do you mean "successful in its plans to set up a
[14] consortium"?

[15] A: Because, at that time, they were talking of approaching
[16] potential partners. I did not know what had been
[17] happening behind the scenes. I only knew what it said
[18] in that article.

[19] Q: Would you, please, take volume E10.

[20] MR JUSTICE LADDIE: Mr Donovan, you said that you saw an
[21] article -

[22] A: Yes.

[23] MR JUSTICE LADDIE: Which you took advice in relation to?

[24] A: Yes.

[25] MR JUSTICE LADDIE: What time did you see that article?

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[1] from in the middle of this second column. It mentions

[2] John Menzies. It says:

[3] "The retailer link-up agreed last summer ..."

[4] So I obviously wanted to find out more about that.

[5] Q: Have a look, please, in the same volume at 4584. Do you
[6] have that?

[7] A: I do.

[8] Q: Is that Customer Loyalty Today?

[9] A: It is.

[10] Q: Is that a journal you recognise?

[11] A: It is.

[12] MR JUSTICE LADDIE: 4584?

[13] MR HOBBS: Customer Loyalty Today. That is a magazine you
[14] have seen before, is it not?

[15] A: Yes, I have.

[16] Q: Do you see the headline there in the July/August 1995

[17] edition "Menzies Launches Shell Smart into the British

[18] High Street."

[19] Do you see that?

[20] A: Yes.

[21] Q: Unless you want to read over that material, now, in the
[22] same bundle, would you turn to 4625A.

[23] A: I have that.

[24] Q: Do you see the heading there, from Retail Automation?

[25] A: I do.

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[1] Q: September/October 1995 "Menzies goes Smart with Shell".

[2] A: I do.

[3] Q: There was no secret about Menzies' involvement, was
[4] there?

[5] A: I have only seen this particular Retail Automation
[6] within the last few days and I did find a couple of
[7] articles in the - or at least one I think - Marketing
[8] Magazine.

[9] Q: I put it to you that in fact you knew perfectly well of
[10] Menzies' involvement more or less about the time it
[11] became public in 1995?

[12] A: I did not know.

[13] Q: I put it to you that you knew and I put it to you that
[14] you in fact bided your time before you moved a muscle
[15] until you knew that Senior King was not pursuing its
[16] claim over the concept and you waited until after there
[17] was the settlement agreement with Shell that we were
[18] just looking at?

[19] A: No, that is not correct.

[20] MR HOBBS: Would your Lordship find that a convenient
[21] moment?

[22] MR JUSTICE LADDIE: Yes. No pressure on you, Mr Hobbs, but
[23] just tell me how much longer you expect to be with this
[24] witness.

[25] MR HOBBS: I will guess half a day. It could be less, but

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[1] has known for several days exactly the batting order of
[2] the first four witnesses. He has had the opportunity of
[3] preparing his cross-examination. But I have no idea at
[4] all at the moment who I shall be confronting.

[5] MR JUSTICE LADDIE: You just work on the assumption that you
[6] are going to face them all simultaneously on the first
[7] day. If that has caused you enormous inconvenience, as
[8] I have already said, and it is costing your clients a
[9] farthing more and I consider that is unreasonable, it
[10] will be visited in costs.

[11] There we are, Mr Hobbs.

[12] MR HOBBS: It could not be clearer, my Lord.

[13] MR JUSTICE LADDIE: Thank you.

[14] (4.30 pm)

[15] (The court adjourned until 10.30 am
[16] on Thursday, 17th June 1999)

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[1] I guess half a day.

[2] MR JUSTICE LADDIE: Thank you.

[3] MR COX: May I enter this caveat; I still have not been
[4] given any indication which witnesses will be called.

[5] MR JUSTICE LADDIE: Mr Hobbs is keeping his cards close to
[6] his chest. He knows the possible repercussion in costs,
[7] but he can, at the last minute, choose not to call a
[8] single witness. He may say he has no claim to answer.

It is up to him.

[9] MR COX: That is perfectly true. But, on the assumption -

[10] MR JUSTICE LADDIE: It is not the normal way of progressing,
[11] I understand.

[12] MR COX: On the assumption that the matter reached to his
[13] case, then I must confess that I understood that I would
[14] know.

[15] MR JUSTICE LADDIE: I am sure Mr Hobbs will take your
[16] concerns to heart. If he does not, I will take your
[17] concerns to heart and Mr Hobbs will pay the price. I do
[18] not think I need to say any more about it than that, do
[19] I, Mr Hobbs?

[20] I, Mr Hobbs?
[21] MR HOBBS: Not at all. While my learned friend is on his
[22] feet, can I ask whether it is still intended to call all
[23] the plaintiff's witnesses that I have seen statements
[24] from?

[25] MR COX: I will consider that overnight. My learned friend

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Lawyer's Notes

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1998 D No. 2149.

Court No. 58
The Royal Courts of Justice
The Strand
LONDON EC4

17th June 1999

Before:

MR JUSTICE LADDIE

JOHN ALFRED DONOVAN
(Plaintiff)

-v-

SHELL UK LTD
(Defendant)
(by Original Action)

AND BETWEEN

SHELL UK LTD
(Plaintiff by Counterclaim)

-and-

(1) JOHN ALFRED DONOVAN
(2) DON MARKETING UK LIMITED
(3) ALFRED ERNEST DONOVAN
(Defendants to Counterclaim)
(by Counterclaim)

MR G COX, assisted by MS L LANE, instructed by Royds
Treadwell, appeared on behalf of the Plaintiffs.

MR G HOBBS, assisted by MR P ROBERTS, instructed by DJ
Freeman, appeared on behalf of the Defendant.



SMITH BERNAL
INTERNATIONAL

A LEGALINK COMPANY

[1] Thursday, 17th June 1999
 [2] (10.30 am)
 [3] MR JOHN ALFRED DONOVAN (continued)
 [4] Cross-examination by MR HOBBS (continued)
 [5] MR HOBBS: Mr Donovan, let us just get our bearings. I had
 [6] been pressing you with questions at the adjournment
 [7] yesterday relating to when you first became aware of the
 [8] fact that the Shell Smart Card Scheme was a multibrand
 [9] scheme; yes?
 [10] A: Yes.
 [11] Q: I had been asking you why it took you until April 1997
 [12] to make your claim upon Shell. Do you remember that?
 [13] A: I do.
 [14] Q: Do you remember I put certain propositions to you, one
 [15] of which was that you were lying in wait until after you
 [16] had finished with the settlement negotiations and it was
 [17] only after that that you decided to unveil your claim,
 [18] Do you remember me putting those points to you?
 [19] A: Yes, I do.
 [20] Q: What I would like to do now is to show you the letter
 [21] before action which you yourself wrote to Shell. This
 [22] has somehow or other escaped the bundles, but I am going
 [23] to hand up a copy to you, (Handed). I think it might
 [24] end up in a core bundle when we have finished with this
 [25] one.

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[1] Q: Just before we get into the detail of this, I would like
 [2] you to take, please, volume E6. In that volume, please
 [3] turn to page 2712.
 [4] A: I have that.
 [5] Q: This was a document that we looked at yesterday for
 [6] another point. This is the transcript of one of your
 [7] telephone conversations with David Watson. This one is
 [8] 1st November 1993?
 [9] A: Right.
 [10] Q: I want to draw your attention, please, to what we see on
 [11] page 2714. You are discussing ideas and the
 [12] protectability of ideas and you are discussing this with
 [13] Mr Watson. This is in the context, as I understand it,
 [14] of your Nintendo dispute. Am I correct?
 [15] A: Yes, that would be correct.
 [16] Q: Right. Watson is saying to you, if you see about four
 [17] inches from the top of the page:
 [18] "Well, clearly there are a lot of these ideas,
 [19] You say in this instance, without the approval of
 [20] Nintendo, it is no idea at all. Which is why we went to
 [21] Nintendo before we ever approached Shell and
 [22] they provided those materials which we brought along for
 [23] the presentations."
 [24] Watson says: "I mean, okay."
 [25] Then you say:

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[1] MR JUSTICE LADDIE: It either is or is not, Mr Hobbs. Let
 [2] us make up our minds now.
 [3] MR HOBBS: I think it should go in a core bundle.
 [4] MR JUSTICE LADDIE: Do we have a file for a core bundle?
 [5] MR HOBBS: B is the core bundle. I cannot remember what
 [6] tab number we have reached now, but it is probably about
 [7] tab 8.
 [8] MR JUSTICE LADDIE: Thank you.
 [9] MR COX: My Lord, we will not object to it going into a core
 [10] bundle. I do not suppose it is going to attract any
 [11] greater significance in your Lordship's mind because it
 [12] is there than anywhere else. However, if the principle
 [13] of this selection operated for the core bundle was to be
 [14] consistent, we do not think it should go there.
 [15] MR JUSTICE LADDIE: I never bother reading the outside of
 [16] the bundles. Do not worry about it.
 [17] MR HOBBS: Just before I get into the text of this with you,
 [18] Mr Donovan, can I ask you, first of all, is Mr McMahon,
 [19] Mr Armstrong-Holmes or Mr Sotherton in court? Are any
 [20] of those people in court?
 [21] A: Mr McMahon is sitting at the back.
 [22] Q: But neither of the other two people I mentioned are in
 [23] court; is that correct?
 [24] A: Correct. Mr Sotherton certainly is not. I would not
 [25] know Mr Armstrong-Holmes.

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[1] "I think you said in the conversation last week
 [2] that being first, that your legal people say that has
 [3] not got too much relevance to it. But, of course, if
 [4] they speak to the Patent Office, it is the thing which
 [5] is most important: who is first? Who can prove they
 [6] thought of an idea first of all? We did, and we put it
 [7] to Shell and we got Nintendo's approval first of all,
 [8] We could not have gone about this in a more professional
 [9] way but to no avail."
 [10] Watson says to you:
 [11] "But obviously patents are quite different."
 [12] And you say:
 [13] "No, I am just talking about the idea of the
 [14] importance of being first with something. It really
 [15] does make a difference."
 [16] Watson says:
 [17] "I mean, you may be right, that it may be better
 [18] just to get the legal people to have a chat ..."
 [19] Then you go off onto other matters.
 [20] The point I am putting to you is this: it was, at
 [21] the time of this conversation - and it remained right
 [22] down really to the commencement of the present
 [23] proceedings - your view that it was important to
 [24] demonstrate that you were the first with the idea for
 [25] which you were claiming protection?

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[1] A: I felt that, yes.
 [2] Q: Yes. That was something that in fact you believed very
 [3] firmly?
 [4] A: Yes.
 [5] Q: With that introduction then, can I close this file with
 [6] you and go to the letter which I have just handed up to
 [7] you. It is a rather long letter and I am afraid I am
 [8] going to spend a bit of time on it with you, I shall do
 [9] it as quickly as I can, but I think it needs close
 [10] attention.
 [11] You are writing to Dr Faye, and we see from the
 [12] top of this letter that he is the Chairman of Shell UK
 [13] Limited. You are writing on 27th March 1997. I am
 [14] right, am I not, Mr Donovan, in thinking this is your
 [15] first communication on the subject of the Multibrand
 [16] Loyalty Scheme?
 [17] A: After all of the putting the proposals, et cetera, yes.
 [18] Q: This is the letter in which, as I have said already, you
 [19] unveil your complaint?
 [20] A: Correct.
 [21] Q: You have, by the time you write this letter, put your
 [22] head together with Roger Sotherton, have you not?
 [23] A: I am not sure if I had, I had certainly spoken to the
 [24] solicitors.
 [25] Q: Think harder please, Surely - and we will see it as we

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[1] I apologise, We will press on.
 [2] Did you in fact, before writing this letter, make
 [3] investigations?
 [4] A: I am sure that I did, yes.
 [5] Q: If you think about it, it would be right, would it not,
 [6] that part of your investigations involved speaking to
 [7] Roger Sotherton?
 [8] A: It may be the case, I cannot remember offhand. If
 [9] I read the letter, then perhaps it would bring it back
 [10] to me.
 [11] Q: Is this a letter you would have written without careful
 [12] thought before writing it?
 [13] A: No, I would have had careful thought, yes.
 [14] Q: Let us look at the contents of the letter. You start
 [15] off by saying:
 [16] "After the succession of astonishing developments
 [17] in what Mr John Jennings has described as the
 [18] 'Don Marketing saga' we would all be entitled to
 [19] believe that no more bombshells were in prospect.
 [20] However, evidence confirms that the Smart Consortium
 [21] Scheme launched in Scotland on 14th March 1997 is making
 [22] wrongful use of a concept we disclosed to Mr Lazenby in
 [23] strictest confidence, under cover of our standard
 [24] trading conditions. Specialist counsel advised us on
 [25] 21st March that we have an even stronger claim against

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[1] go on in this letter, frankly - you have put your head
 [2] together with Roger Sotherton about what this letter
 [3] should say and how it should say it?
 [4] A: I would have to read the letter again, because obviously
 [5] it is over two years ago.
 [6] Q: Do you have no recollection then of speaking to
 [7] Sotherton independently of what you might see in this
 [8] letter?
 [9] A: No.
 [10] Q: No recollection of speaking to him?
 [11] A: I do not. But, if I could read the letter, then it
 [12] would jog my memory.
 [13] Q: On your own version of events, you knew on
 [14] 21st July 1996 that Shell was involved with John Menzies
 [15] in a multi-retailer scheme? On your own view of it,
 [16] What were you doing between 21st July 1996 and
 [17] 27th March 1997?
 [18] A: Having a rest from the previous bouts of litigation.
 [19] Q: Do not be flippant with me, Mr Donovan.
 [20] A: I am not -
 [21] MR JUSTICE LADDIE: Mr Hobbs, that is quite unnecessary,
 [22] You asked him an immensely vague question: what were you
 [23] doing in the course of the year? He answered with as
 [24] much precision as your question demanded.
 [25] MR HOBBS: I apologise, my Lord, I accept the rebuke and

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[1] Shell in this case than those already settled,"
 [2] Look at that date of 14th March 1997.
 [3] A: Right.
 [4] Q: That is not correct, is it?
 [5] A: In what way?
 [6] Q: I thought we had agreed yesterday that you were
 [7] aware - because you had been to the British
 [8] Library - that in fact the consortium scheme had been
 [9] launched with Menzies in Scotland back in 1995?
 [10] A: Yes, I was aware from September 1996.
 [11] Q: And you did some research, including at the British
 [12] Library, and you found out, did you not -
 [13] A: Yes.
 [14] Q: - that it had been launched in 1995?
 [15] A: Correct.
 [16] Q: Why are you writing in this letter with reference to a
 [17] date of 14th March 1997?
 [18] A: That was the date when Shell launched what I considered
 [19] to be my scheme: the multiparty scheme with ten
 [20] partners. I did not view John Menzies myself when they
 [21] joined as being a multiparty scheme of the type that
 [22] I had put forward.
 [23] Q: Why not?
 [24] A: Because it was only one relatively small company.
 [25] Q: What, John Menzies?

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[1] A: John Menzies,
 [2] Q: One relatively small company?
 [3] A: Yes,
 [4] Q: If it had been WH Smith, would you have taken the same
 [5] view?
 [6] A: Probably not,
 [7] Q: Why not?
 [8] A: Because I perceive WH Smith as being a bigger company
 [9] with more outlets, I did not know - I had never had
 [10] any contact with John Menzies, I did not know the scale
 [11] of their operation, I thought they were a fairly small
 [12] company,
 [13] (10.45 am)
 [14] Q: Are you saying you did not think you had a claim against
 [15] Shell until, either somebody very big joined with them,
 [16] or more than one party joined with them? Is that what
 [17] you are saying?
 [18] A: That was my view at the time myself that John Menzies
 [19] was not the leading brand with national representation,
 [20] That may have been wrong in that they did have more
 [21] outlets than I thought, but I had never had any contact
 [22] or dealings with them and I did not see them as being a
 [23] major retailer,
 [24] Q: Have you not seen their shops when you go shopping on a
 [25] Saturday morning in different town centres?

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[1] I did and it was a factor and I passed -
 [2] Q: A different view on what, please?
 [3] A: On the significance of John Menzies,
 [4] Q: So you thought that somebody other than yourself might
 [5] think that the involvement of John Menzies amounted to
 [6] the use of your idea?
 [7] A: Yes, In fact that has transpired to be the case,
 [8] Because other people seem to take the view that it
 [9] became a multiparty scheme when John Menzies joined,
 [10] When I became aware of that, I did not recognise that as
 [11] being my scheme because I had proposed a collection of
 [12] the leading multiples in the country and I did not see
 [13] it as being that,
 [14] Q: So is this right then: you had no complaint of your own
 [15] which you would wish to make in relation to the
 [16] involvement of John Menzies? It is only when more than
 [17] two people are involved in the Smart Scheme?
 [18] A: That was the way I saw it, yes,
 [19] Q: So are you saying that the essence of your proposal then
 [20] was that there should be - can I say - a plurality of
 [21] people beyond two?
 [22] A: I was putting forward the idea of the leading - a
 [23] collection of the leading High Street brands with a
 [24] common currency, redemption and collection,
 [25] Q: Are you aware that HMV and UCI were already redeeming

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[1] A: I have seen John Menzies shops, but they are not a shop
 [2] that I had ever used,
 [3] Q: They look just like WH Smith, do they not?
 [4] A: Similar, yes,
 [5] Q: And you see them as frequently, do you not, as you see
 [6] WH Smith shops?
 [7] A: I had not myself, no, I was more familiar with
 [8] WH Smith, Often John Menzies, the ones that I have
 [9] seen, have been smaller: smaller scale shops,
 [10] Q: Are you seriously telling my Lord that you went to the
 [11] British Library to find out about when Menzies became
 [12] involved even though you thought that the involvement of
 [13] Menzies did not involve a use of your scheme?
 [14] A: Yes, I am saying that,
 [15] Q: Why did you go to the British Library to find out about
 [16] them?
 [17] A: Because I was interested, because of the dates, that
 [18] when they started could have a bearing,
 [19] Q: What was your interest?
 [20] A: On the date that they actually commenced operation -
 [21] Q: Why was that a matter -
 [22] A: - in reference to the Funding Deed,
 [23] Q: I see, Tell me then, in your own words, why you thought
 [24] that was important?
 [25] A: Because someone else could take a different view than

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[1] partners in the Shell Smart Scheme from 1994?
 [2] A: I am aware now and I may have seen it in the press
 [3] cuttings at the time,
 [4] Q: Assume you did see it in the press cuttings - because
 [5] this was not a secret at the time - are you telling
 [6] my Lord you thought the involvement of HMV, UCI and
 [7] John Menzies was not enough to constitute what you would
 [8] regard as the use of your concept?
 [9] A: I did not feel that that was the case at the time, yes,
 [10] Q: I am afraid I have to put it to you, Mr Donovan, that
 [11] what you are trying to do in this letter by referring to
 [12] 14th March 1997 is to create the impression that you
 [13] have only recently come across information relating to
 [14] what you would regard as the misuse of your ideas, You
 [15] are trying to create that impression?
 [16] A: As far as - that was the correct impression, As far as
 [17] I was concerned, I recognised my scheme being launched
 [18] on 12th March 1997,
 [19] Q: And not at any stage prior to that?
 [20] A: Not at any stage before that,
 [21] Q: In which case, why were you investigated what Shell were
 [22] doing before that?
 [23] A: Because, as I say, that was my view and I knew that
 [24] other people - if I was going to ask for advice on it,
 [25] I had to give all the information that I could that was

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[1] relevant. Since John Menzies had been mentioned in that
 [2] article, I thought I ought to find out exactly when they
 [3] started and what they were doing.
 [4] Q: Sorry, Mr Donovan, but I must put it to you that in fact
 [5] you were taking the view well in advance of
 [6] 27th March 1997 that there had been a use by Shell of a
 [7] concept over which you were going to make some claims:
 [8] that you had already taken that view some time well in
 [9] advance of 27th March?
 [10] A: No, no, that is not the case. The first time that
 [11] I became aware that someone else viewed the John Menzies
 [12] involvement as being multiparty was when I read the
 [13] Sue Rayner report at the end of 1996. Or 1997 I think
 [14] it was that I got that. Then I realised that someone
 [15] else took a different view than I did.
 [16] Q: What do you say the date of Sue Rayner's report was?
 [17] A: I think it was 1997, I cannot remember the month.
 [18] Q: Mr Roberts will look at the date. It has a copyright
 [19] notice of 1996 on it.
 [20] A: Because it said in there that John Menzies - it said
 [21] words to the effect that led me to believe that that was
 [22] her opinion: that it became a multiparty scheme when
 [23] John Menzies joined.
 [24] Q: So you needed, as it were, the views of Sue Rayner to
 [25] tell you whether you had a claim, as you perceived it,

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[1] Mr Lazenby's predecessors as National Promotions
 [2] Manager, Mr Paul King and Mr Stuart Carson."
 [3] Pausing over that paragraph, you are there
 [4] referring to what we know as Concept Four, are you not?
 [5] A: Correct, yes.
 [6] Q: And Concept Four was part of the document in which
 [7] I think you proposed the Megamatch game as well. Is
 [8] that correct, or have I got that wrong?
 [9] A: No, I think the Megamatch proposal was on its own on
 [10] 12th May. There was no mention of the multiparty
 [11] loyalty scheme in that proposal, no.
 [12] Q: No. But your reference in this letter we can agree is
 [13] to Concept Four? In that third paragraph there?
 [14] A: Yes, the last part of that certainly.
 [15] Q: You go on to say,
 [16] "Roger Sotherton and I subsequently disclosed the
 [17] concepts to Mr Lazenby during a presentation to him on
 [18] 12th May 1992 and, during a subsequent meeting at
 [19] Shell-Mex House in November 1992, we gave Mr Lazenby a
 [20] copy of Don Marketing's correspondence with Sainsburys
 [21] covering the loyalty consortium concept."
 [22] A: Yes.
 [23] Q: I will come to that in a while. Turn the page:
 [24] "We have contacted a number of potential
 [25] witnesses, including Shell and senior agency staff

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[1] over the concept?
 [2] A: Well, it was the first time that I realised that someone
 [3] else looked at that and thought that it was a
 [4] multiparty. As I say, if you look at my proposal, you
 [5] can see quite clearly what I was putting forward. It
 [6] was for a group of the leading retailers.
 [7] Q: So, let us be clear on this. You are saying that you
 [8] did not recognise what Shell was doing - when you
 [9] looked at it in 1996, you did not recognise it as the
 [10] use of any concept you put forward?
 [11] A: No, I saw John Menzies as being a secondary brand.
 [12] Q: You said "no". You are agreeing with me you did not
 [13] recognise it, when you examined it, as being a putting
 [14] into practice of your concept?
 [15] A: That was my view, but I decided it was right to find out
 [16] what I could about it and pass it on to my own lawyers
 [17] so that they could take that into account.
 [18] Q: You go on in the third paragraph on this page to say:
 [19] "We presented to Shell two alternative executions
 [20] of our proposals for a Shell-led consortium of
 [21] participating retailers to issue and/or redeem a common
 [22] promotional currency. One was the Megamatch game, the
 [23] other a loyalty promotion using a common currency:
 [24] points, tokens et cetera which could be run as a
 [25] separate business. Both were disclosed to two of

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[1] involved in Project Hercules, your code name for the
 [2] Smart project. They confirm that Mr Lazenby headed up
 [3] the project team and that Smart was designed from the
 [4] outset to eventually become a consortium promotion.
 [5] This is further confirmed by a recent report in
 [6] Marketing Week which stated Smart, the Shell scheme, was
 [7] deliberately named and designed to allow it to play down
 [8] the link with Shell and encompass many partners."
 [9] Do you see that?
 [10] A: Yes, I do.
 [11] Q: You say there you have "contacted a number of potential
 [12] witnesses, including Shell and senior agency staff
 [13] involved in Project Hercules."
 [14] I put it to you, as I put it to you yesterday,
 [15] that amongst the Shell staff that you contacted was
 [16] Paul King?
 [17] A: Correct.
 [18] Q: And I put it to you that amongst the senior agency staff
 [19] involved in Project Hercules that you had discussed this
 [20] matter with were the people from Senior King?
 [21] A: Yes, I discussed it with Mr Mike Fairhurst, who was a
 [22] former employee.
 [23] Q: And Mr Mike Fairhurst it was whose conversation you tape
 [24] recorded, and we looked at that yesterday afternoon?
 [25] A: Originally, yes.

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[1] Q: You had discussed the involvement of that company,
[2] Senior King, in Project Hercules, had you not?
[3] A: Yes.
[4] Q: You say so here.
[5] A: I did not know it was called Project Hercules, but
[6] I discussed their involvement in the loyalty card
[7] scheme.
[8] Q: Right. You discussed it at some length with them, did
[9] you not?
[10] A: No.
[11] Q: You must have done, surely?
[12] A: No, not - I would guess five or ten minutes.
[13] Q: No, no. Come now. You are discussing detail. You want
[14] to know what has been going on. You went into it with
[15] them in considerable detail, did you not?
[16] A: No, I did not, no.
[17] Q: Did you know Senior King were making a claim against
[18] Shell in respect of that concept?
[19] A: I did. Not in respect of the multiparty scheme, no.
[20] The ordinary stand alone Shell scheme, yes. I knew they
[21] had been contemplating making a claim.
[22] Q: Just read into this letter you have written. The third
line:
[24] "They confirmed that Mr Lazenby headed up the
[25] project team and that Smart was designed from the outset

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[1] A: I think about December last year.
[2] Q: And you did not see it in discovery documents at the
[3] date of this letter, did you?
[4] A: Just let me think about this. It was June 1997 in the
[5] DJ Freeman report.
[6] Q: Did you in fact learn that the project was called
[7] Project Hercules from these people, from Senior King and
[8] Paul King? Did you in fact learn from them that this
[9] was called Project Hercules?
[10] A: Possibly, but I cannot remember for certain. Obviously,
[11] if it is in there, I got it from somewhere, because
[12] I did not know it myself. Whether I had read it in an
[13] article, or one of those gentlemen mentioned it to me,
[14] I cannot recall now.
[15] Q: You must have a recollection of your discussions with
[16] these people? You must, surely, Mr Donovan?
[17] A: I recollect that I asked them questions about the scheme
[18] and they gave me answers. None of the conversations
[19] were long conversations. They were all fairly short.
[20] Q: Tell me then, please, what questions you would have
[21] asked them?
[22] A: Well, it would be primarily whether Mr Lazenby had any
[23] involvement in the scheme.
[24] Q: And what sort of scheme it was; correct?
[25] A: I cannot recall that.

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[1] to eventually become a consortium promotion."
[2] Do you see that?
[3] A: I do.
[4] Q: Who told you that?
[5] A: Mr Fairhurst and I believe that I probably also spoke to
[6] Mr Steve King, who, by then I think, had broken away
[7] from Senior King and formed his own agency.
[8] Q: You spoke to Paul King as well, did you not?
[9] A: And I spoke to Paul King.
[10] Q: You gave yourself, by means of at least those three
[11] contacts, a full briefing on the way Project Hercules
[12] had worked and how it had been set up, did you not?
[13] A: Well, as much as they gave me, I did not get
[14] information - nobody ever mentioned the project name,
[15] for example.
[16] Q: How do you know it is called Project Hercules then?
[17] A: Because of the discovery documents.
[18] Q: Which discovery documents?
[19] A: Because I must have read an article - at that time
[20] there were not any discovery documents. That is right.
[21] Q: That is right. You quickly remembered that just then,
[22] did you not?
[23] A: No, there was not any discovery.
[24] Q: When do you say you saw the name Project Hercules in
[25] discovery documents?

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[1] Q: Surely it was a matter of great interest to you to know
[2] what the scheme was?
[3] A: It was, but I cannot recall exactly what I said.
[4] Q: If it was a matter of great interest to you, as you
[5] agree it was, you must surely have asked them what the
[6] nature of the scheme was, what the configuration of it
[7] was?
[8] A: I may have done, I cannot recall that.
[9] Q: How are you able to write this letter at all then
[10] without knowing what the scheme was designed to be like?
[11] A: Certainly based on information obtained from those
[12] people and from any articles that I had read.
[13] Q: And, to get the information out of them, you had to ask
[14] questions about the subject matter that they were
[15] discussing with you, did you not?
[16] A: I certainly asked them questions. I raised the subject
[17] with them, yes.
[18] Q: Did you take any notes or did you make any tape
[19] recordings of your conversations with these people?
[20] A: I did not. I explained yesterday that I did not make
[21] tape recordings of anyone other than Mr Lazenby and
[22] Mr Watson and that conversation with Mr Fairhurst. No,
[23] I did not take any notes, no.
[24] Q: You are quite sure about that?
[25] A: Yes, other than the notes you have seen, the

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[1] conversation with Mr Steve King,
[2] Q: So you are going to say to me, are you not, that, if
[3] there is not a document in the bundles, there is no
[4] other document to be seen?
[5] A: Sorry, I do not understand that.
[6] Q: I am trying to find out from you whether there are more
[7] documents than we know about from these bundles which
[8] are before the court presently in which you have
[9] recorded the subject matter of your discussions with any
[10] of these people?
[11] A: No,
[12] Q: You kept it all stored in your head?
[13] A: Yes,
[14] Q: You trusted your memory?
[15] A: Yes, Because all I was doing was writing - I did not
[16] expect that Shell were going to defend the case in the
[17] way that they have, I thought they would be willing to
[18] discuss it,
[19] Q: You have your finger on a point there, have you not?
[20] You never expected to be there in this witness box
[21] answering questions about this, did you?
[22] A: No, I did not, no,
[23] Q: You thought they would back down on the face of this
[24] letter, did you not?
[25] A: Not - well, partly on that letter, but partly on what

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[1] had happened in the past,
[2] Q: You thought you could send them this letter and threaten
[3] them with publicity and bring pressure to bear in that
[4] way and that they would back down, That is what you
[5] thought, did you not?
[6] A: I thought that Shell would talk to me about it, because
[7] we seemed to have got on a better basis with the letter
[8] of apology from Dr Faye, I thought they would be
[9] willing to discuss it and see if we could resolve it
[10] amicably,
[11] Q: The letter of apology that you refer to was part of the
[12] agreed terms of the settlement that you had reached in
[13] 1996, was it not?
[14] A: It was, It was a letter that was offered to me,
[15] Q: Let us go on with this document, You are about to
[16] identify a string of documents, It may be convenient if
[17] I give, for the transcript, the bundle references to
[18] each of these documents as I go through this letter,
[19] You say:
[20] "We have supplied a selection of key documents as
[21] follows ;;; Number 1 is the DM proposal to Shell dated
[22] 23rd October 1989, That is E1/331, That is Concept
[23] Four; correct?
[24] A: That is correct, yes,
[25] Q: You say:

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[1] "I draw your attention to Concept Four,"
[2] Item 2; Sainsburys letter to Don Marketing dated
[3] 20th June 1990, Volume E1 at page 420, You say:
[4] "This is a self-explanatory letter from
[5] Sainsburys, This was a response to a teaser letter from
[6] Don Marketing, of which we do not have a copy,"
[7] That is where Sainsburys wrote to you and said to
[8] the effect that, if you have a proposal to make, send it
[9] to us and we will think about it?
[10] A: Correct,
[11] Q: Item 3; Don Marketing's letter to Shell dated 25th June
[12] 1990, E1/421, This was, you say:
[13] ";;; a copy of your company's letter to Mr Carson
[14] confirming a telephone discussion with him earlier that
[15] day, when he gave his approval on behalf of Shell for
[16] Don Marketing to explore the prospect of a multibrand
[17] promotion involving Shell and Sainsburys,"
[18] Just to have this clear, the approval you got from
[19] Mr Carson, according to that letter, was a promotional
[20] game, was it not?
[21] A: It was, yes,
[22] Q: It is not a loyalty scheme that you got approval from
[23] him -
[24] A: That is correct,
[25] Q: Item 4 is Don Marketing's letter to Sainsburys dated

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[1] 10th July 1990, E1/422, This was the letter offering a
[2] Disneytime promotion:
[3] "This happened to be a DM project which Shell had
[4] cancelled after they discovered that Disney had an
[5] exclusive tie-up with Esso,"
[6] You will agree with me, will you not, that that
[7] letter to Sainsburys on 10th July 1990 proposed a game,
[8] not a loyalty scheme?
[9] A: Correct,
[10] Q: Item 5 is Don Marketing's letter to Sainsburys dated
[11] 24th July 1990, E1/449, This is the letter to
[12] Mr Brian Horley; correct?
[13] A: That is correct,
[14] Q: You say there:
[15] "On 24th July 1990 we sent a further letter to
[16] Sainsburys following discussions which Mr Sotherton and
[17] I had had with Mr Brian Horley, their Advertising and
[18] Marketing Manager, We sent with the letter a copy of
[19] Concept Four from the October 1989 proposal, plus the
[20] cover page of the proposal,"
[21] I notice - and you will see for yourself - that
[22] you do not mention in this list of letters the letter of
[23] 24th July 1990 which you are supposed to have sent to
[24] Mr King at Shell, That is E1/446, Is there a reason
[25] for that not being mentioned here?

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[1] A: I really do not know.
[2] Q: Do you know the letter I am talking about? The letter
[3] to Mr King?
[4] A: Yes, I do, I think I know where that came from, yes,
[5] (11.00 am).
[6] Q: That letter, which is dated 24th July 1990 to Mr King,
[7] contains, at the back end of it, a reference to an
[8] option. Do you remember that?
[9] A: Yes, I do.
[10] Q: Can you please tell my Lord why that letter to Mr King
[11] is not mentioned or referred to, even obliquely, in this
[12] letter that we are looking at here?
[13] A: Because I did not realise I had the letter. What
[14] happened is, I got the report from DJ Freeman in
[15] June 1997 and in there it referred to the Collect and
[16] Select Scheme and research. I then checked some
[17] documents which I had, which included a report published
[18] by Promotions & Incentive Magazine in July 1991 and that
[19] set out about the background to the research that we had
[20] carried out on Collect and Select. That set me to
[21] looking for the research documents. I went through a
[22] lot of files and, when I found it in a box that had
[23] information about the Fundraiser Scheme, and because
[24] Mr King had somebody called Jill Shaw, who I think was a
[25] research person at Shell, to look at the Fundraiser

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[1] your side of it?
[2] A: That is correct, yes.
[3] Q: Therefore it is material you would have looked at before
[4] you wrote this letter in 1997, is it not?
[5] A: No. It was because there was information that came in
[6] the report from DJ Freeman that I had not been aware of
[7] before and it set me off looking for that information
[8] about Collect and Select. I then found the article from
[9] Promotions & Incentives Magazine and
[10] I realised - I then checked all of the research that we
[11] ever had on any project and I found that, in the
[12] Fundraiser file was the letter. Because it had a
[13] reference to the fact that Jill Shaw at Shell looked at
[14] the scheme.
[15] Q: You are saying, are you, that, at the date of this
[16] letter you have open in front of you now, you had
[17] forgotten about the letter to King?
[18] A: Yes, I had.
[19] Q: Are you saying also that you had forgotten about the
[20] existence of an option granted to Shell?
[21] A: I think I had, yes.
[22] Q: Are you saying, when you found that letter subsequently,
[23] that was what brought to mind the idea that there might
[24] be an option in place?
[25] A: Yes.

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[1] Scheme and that letter had ended up in that file.
[2] MR COX: My Lord, I wonder if I might interrupt my learned
[3] friend, not in any spirit of criticism, but since my
[4] learned friend does occasionally invite the witness to
[5] address your Lordship, I wonder whether I might invite
[6] the witness to address your Lordship when giving his
[7] answers.
[8] MR JUSTICE LADDIE: Why? I do not care who he addresses.
[9] If he finds it more convenient speaking to Mr Hobbs,
[10] I can hear him either way.
[11] MR COX: I know your Lordship can, but sometimes it is
[12] easier if your Lordship is looking -
[13] MR JUSTICE LADDIE: What, straight into his eyes? No, it
[14] does not matter.
[15] MR COX: No, not at all, but just to address your Lordship
[16] when answering.
[17] MR JUSTICE LADDIE: No, Mr Donovan, you address your
[18] answers to whoever you like, I will listen.
[19] A: Thank you.
[20] MR HOBBS: You were just telling us about finding the letter
[21] to Mr King of 24th July 1990 in amongst some research
[22] papers.
[23] A: That is correct.
[24] Q: That is research material that you looked at for the
[25] purposes of deciding what the history of this was from

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[1] Q: You had forgotten all about that; correct?
[2] A: Yes. It was seven years earlier.
[3] Q: Absolutely. So there is -
[4] A: It was five years earlier.
[5] Q: So there is no possibility, is there, that you could
[6] have mentioned it to Mr Lazenby then?
[7] A: Yes, I did mention it to Mr Lazenby. Because that was
[8] in 1992 and of course it was only 18 months earlier that
[9] we had arranged that with Shell.
[10] Q: You see, if I understand your case correctly - the case
[11] that is being put on your behalf - there came a time
[12] when you say you actually showed that letter of
[13] 24th July 1990 to Mr King. Are you saying you handed a
[14] copy of that to Mr Lazenby?
[15] A: Yes, I did.
[16] Q: You did, did you?
[17] A: Yes, I did. At his request.
[18] Q: Really?
[19] A: Really.
[20] Q: But you yourself forgot all about it?
[21] A: Yes. You have to remember, in the intervening period,
[22] I had been involved in these long battles with Shell on
[23] other subjects.
[24] Q: Before writing this letter, you checked your files and
[25] you checked your position and you made it a matter of

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[1] very careful deliberation what you would say in this
 [2] letter, did you not?
 [3] A: Yes, I did.
 [4] Q: You are telling my Lord, are you not, that you had no
 [5] recollection, even when you went back to all the
 [6] documents that you had surrounding your communications
 [7] with Shell, that you had no recollection at the date of
 [8] this letter of the existence of that option letter?
 [9] A: It had not come into my mind, no.
 [10] Q: Are you sure you are telling the truth?
 [11] A: Yes, I am. If I could just say that, even now, there
 [12] are so many documents involved that, every time I look
 [13] at a selection of them, I find something that I had not
 [14] remembered. There is just so much volume of documents.
 [15] Q: Turn the page, please, on the letter I have given you.
 [16] The sixth document you refer to is Don Marketing's
 [17] proposal to Shell dated 12th May 1992. This is E2/973.
 [18] This is the proposal that you put to Mr Lazenby the
 [19] first time you met him; correct?
 [20] A: That is correct - well, let us just get this right.
 [21] Megamatch, yes, that is correct.
 [22] Q: You had never met Mr Lazenby before 12th May 1992?
 A: Correct.
 [24] Q: You say:
 [25] "The proposal you put to him included the

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[1] 24th July 1990. You have never claimed that, have you?
 [2] A: To have sent him it? No.
 [3] Q: No.
 [4] A: No.
 [5] Q: We shall be coming, in due course, to the meeting in
 [6] May. I shall press on for the moment. Item number 8: a
 [7] Shell letter to Don Marketing dated 4th August 1992.
 [8] That is E3/1200. You say:
 [9] "This is the letter in which Mr Lazenby casually
 [10] mentioned that he had been speaking to a variety of
 [11] suitable partners about the Megamatch project. The
 [12] disclosures were made without our knowledge or consent
 [13] and were, therefore, a flagrant breach of the
 [14] confidentiality terms on which we had disclosed the
 [15] concept to him. We still do not know who he had spoken
 [16] to or on what basis of confidentiality, if any."
 [17] A: Correct.
 [18] Q: You had in fact made enquiries, had you not, about what
 [19] Mr Lazenby had done around and about the time of that
 [20] letter on 4th August 1992? You made enquiries about
 [21] that, did you not?
 [22] A: Sorry, I do not understand you.
 [23] Q: You made enquiries around and about what Mr Lazenby had
 [24] done in this connection with regard to Megamatch and
 [25] approaches to suitable partners, did you not? You made

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[1] Megamatch game."
 [2] Then you say:
 [3] "It was at this time that we first discussed the
 [4] loyalty card consortium proposal with him, as is
 [5] confirmed by notes made by Don Marketing during the
 [6] meeting which were handwritten on the last page of our
 [7] copy of the proposal."
 [8] A: Correct.
 [9] Q: You know he denies any recollection of you discussing
 [10] that proposal with him at that meeting?
 [11] A: Yes, I do.
 [12] Q: Item 7 is a letter to Shell dated 14th May 1992.
 [13] E2/981. You say:
 [14] "A copy of our letter to Mr Lazenby two days later
 [15] which enclosed a copy of [Concept Four]."
 [16] Right?
 [17] A: Yes.
 [18] Q: It has been your position up until now, has it not -
 [19] and I think it remains your position - that the only
 [20] document you sent to Lazenby in May 1992 was the Concept
 [21] Four document?
 [22] A: That is correct.
 [23] Q: You do not claim - and you have never claimed - to
 [24] have sent him a copy in May 1992 of the letter to
 [25] Brian Horley of 24th July 1990 or the letter to King of

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[1] enquiries about that?
 [2] A: With whom?
 [3] Q: Did you make enquiries?
 [4] A: I did make enquiries about the approach to Woolworth.
 [5] Q: Of whom did you make those enquiries?
 [6] A: This was Senior King and Mike Fairhurst in the
 [7] conversation that you have a copy of.
 [8] Q: Is that conversation that we have had a copy of the
 [9] totality of your discussion with him on this topic?
 [10] A: No, because he phoned me back some time later.
 [11] Q: What did he tell you when he phoned you back?
 [12] A: That he could not find the documents.
 [13] Q: You have a clear recollection of that?
 [14] A: Yes, I have.
 [15] Q: Are you sure that is your recollection of what he said
 [16] to you when he phoned you back?
 [17] A: Yes.
 [18] Q: At this point I would like to play to you a tape which
 [19] you disclosed on discovery of these proceedings, which
 [20] we re-listened to last night. At the same time I would
 [21] like to hand to you a transcript of the conversation
 [22] that we are just about to hear.
 [23] Would your Lordship permit me to do this, please?
 [24] MR JUSTICE LADDIE: Yes, of course.
 [25] (11.15 am)

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[1] MR HOBBS: I am going to hand up the transcript so we can
[2] listen to it together and I am hoping that the tape will
[3] be at the correct starting point. (Handed). It says
[4] "Mike Hawkis". In fact we know from other documents in
[5] the case it should be H-A-W-K-Y or H-A-W-K-E-Y. We are
[6] not quite sure, but it is Hawkey.
[7] A: I think it probably should be Mike Fairhurst.
[8] Q: You will see that he actually says his name on the
[9] tape.
[10] A: Okay.
[11] (Tape recording played in court)
[12] Q: Do you remember that conversation now?
[13] A: I do now, yes.
[14] Q: You did not remember it a little while ago, did you?
[15] You did not remember it until I just played that to you?
[16] A: Correct.
[17] Q: Or did you? You remembered surely that you made
[18] enquiries of Senior King? You remembered surely that
[19] they came back to you with a response and that we have
[20] just listened to at least one of their responses, if
[21] there was more than one?
[22] A: There was some confusion, because I thought that I was
speaking to Mike Fairhurst, I think in the other
[23] transcript that you have it said "Hawkey" on it and then
[24] I changed it to "Fairhurst" and it appears that

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[1] somewhere along the way that this one - I do not think
[2] that this is in discovery, is it? This particular one?
[3] No.
[4] Q: You tape recorded all your conversations, did you not,
[5] with Senior King?
[6] A: No, I did not.
[7] Q: You did, Mr Donovan, did you not?
[8] A: I did not.
[9] Q: And in fact they came back to you in response to your
[10] enquiries for documentation and they told you in this
[11] letter to your satisfaction that Mr Lazenby had not, as
[12] you thought, been going behind your back on Megamatch.
[13] That is what they told you, to your satisfaction?
[14] A: I had forgotten all about this conversation. Is this
[15] the same person who is on the other tape?
[16] Q: You are asking me?
[17] A: Yes.
[18] Q: Why are you asking me? You tape recorded these
[19] conversations.
[20] A: Because I did not realise that there was a taped
[21] conversation with - I thought this was Mike Fairhurst.
[22] Q: The tape I have just played to you is a tape that your
[23] side has disclosed to my side in this litigation on
[24] discovery; yes?
[25] A: I do not know.

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[1] Q: It is. It is a tape which came from you originally.
[2] A: Okay.
[3] Q: That was your voice on that tape?
[4] A: It was.
[5] Q: You remember that conversation?
[6] A: I do now, yes.
[7] Q: You made that tape recording?
[8] A: I did.
[9] Q: You never transcribed it?
[10] A: Apparently not.
[11] Q: And the purpose of the enquiries to Senior King was
[12] around and about - as I called it a little while ago -
[13] what was going on in connection with 4th August 1992
[14] letter which you had got back from Lazenby, was it not?
[15] A: Can I first of all just back up a little bit? You said
[16] that I transcribed it.
[17] Q: You did not?
[18] A: In fact I got someone else to do this. As far as
[19] I knew, they had prepared transcripts of all of the
[20] conversations. I think what happened - I can only
[21] guess - is that they did not do that one.
[22] Q: Who did you get to transcribe it?
[23] A: Someone called Mrs Peacock, who was a secretary who used
[24] to work for us some time ago.
[25] Q: She is the reference "SDP" which appears on so many of

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[1] your letters?
[2] A: Yes, correct.
[3] Q: She lives in Bury Saint Edmunds, does she not?
[4] A: No, she lives in Stowmarket.
[5] Q: When did you ask her to transcribe these tapes?
[6] A: At that time.
[7] Q: At what time?
[8] A: Whenever the - after the last conversation, which
[9] I think was in February 1994.
[10] Q: Last conversation with whom?
[11] A: With Shell. At some point, I cannot remember exactly,
[12] certainly she typed in the bulk of the tapes.
[13] Q: When was your last conversation with Senior King?
[14] A: I would have to think about that one.
[15] Q: You have made many records and tape recordings of your
[16] conversation -
[17] A: No, I have not.
[18] Q: You cannot trust your memory, can you? So you have to
[19] make a record, do you not?
[20] A: No, I asked someone else to type out all of it, because
[21] obviously it was quite a considerable job. I asked her
[22] to do it, and she spent a day doing it. I thought that
[23] all of whatever was on the tapes had been represented on
[24] these transcripts.
[25] Q: You had this tape transcription exercise done, I think

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[1] you said, in 1994?
 [2] A: I said that I was not sure and I am still not sure
 [3] exactly when it was done,
 [4] Q: Give us your best guess, on reflection, as to when the
 [5] transcripts were made?
 [6] A: It is possible that there was more than one session as
 [7] well, I would have thought that the - there was
 [8] certainly one, probably towards the end of 1993 and
 [9] possibly another one.
 [10] Q: Did you listen to these tapes again in doing your
 [11] research for the purposes of the letter we have open in
 [12] front of us of 27th March?
 [13] A: No, because I had the transcripts, I did, on some of
 [14] the tapes from Mr Lazenby, listen to them again, but not
 [15] all of them.
 [16] Q: Go back to that letter we were just looking at, Page 3,
 [17] The reference is E3/1200, Item 8; Shell letter to
 [18] Don Marketing dated 4th August:
 [19] "This is the letter in which Mr Lazenby casually
 [20] mentioned that he had been speaking to a variety of
 [21] suitable partners about the Megamatch project. The
 [22] disclosure were made without our knowledge or consent
 [24] and were, therefore, a flagrant breach of the
 [25] confidentiality terms on which we disclosed the concept
 to him. We still do not know who he spoke to and on

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[1] A: I had made enquiries about Woolworth, yes,
 [2] Q: You in fact said, I think, that you spoke to Fairhurst
 [3] in an earlier conversation on this very topic with a
 [4] view to getting information from them?
 [5] A: Now, I do not know whether there is a mix-up on the
 [6] names and whether I spoke twice to Mr Fairhurst or once
 [7] to Mr Hawkey and once to Mr Fairhurst.
 [8] Q: Anyway, you spoke to someone from Senior King and you
 [9] made enquiries on this very topic?
 [10] A: Yes,
 [11] Q: And you had a transcript of one of those conversations,
 [12] did you not?
 [13] A: Yes,
 [14] Q: You are still saying, are you, that that did not jog
 [15] your memory as to help you to remember what the outcome
 [16] of those enquiries was of Senior King?
 [17] A: Correct,
 [18] Q: You just did not remember what they told you?
 [19] A: I had forgotten about this, I knew that
 [20] someone - whoever I spoke to first had phoned me back,
 [21] So it must have been Mr Hawkey phoned me back and
 [22] I could not - I thought he had said they just could not
 [23] find the documents. Because he had left Senior King,
 [24] I had forgotten about the details of the conversation,
 [25] Q: On what basis then did you make this positive statement

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[1] what basis of confidentiality, if any."
 [2] In fact, the tape we have just listened to and the
 [3] transcript we have led you to say, as you say on
 [4] page 1, Mike says:
 [5] "So it was not really anything to do with you?"
 [6] And you say:
 [7] "No, okay. So what he said about that was true
 [8] then."
 [9] And you get to the penultimate page:
 [10] "Well, it was worth the enquiry. At least it has
 [11] cleared that up in my mind."
 [12] When you wrote this letter in 1997 and you made
 [13] that statement in paragraph 8, you did not believe that
 [14] what you were saying there was true, did you?
 [15] A: I had forgotten about that. In fact, the other day,
 [16] when I was reading the documents, I noticed there was
 [17] some reference to Mr Lazenby speaking to Safeways and
 [18] that raised the doubt about it in my mind.
 [19] Q: When you wrote this letter, you did not believe that the
 [20] statement you were making there was true, did you?
 [21] A: I did believe it at the time, yes, I had forgotten
 [22] about this conversation.
 [23] Q: You felt free to make an allegation, did you, even in
 [24] circumstances where, to your own knowledge, you had made
 [25] enquiries on the topic of Senior King?

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[1] in paragraph 8 in 1997?
 [2] A: Because I thought that that was the case.
 [3] Q: On what basis did you think that was the case?
 [4] A: The best recollection that I had,
 [5] Q: And your recollection of the events that you are basing
 [6] this statement on was what?
 [7] A: That I did not recall that Mr Lazenby was talking to
 [8] other parties.
 [9] Q: Sorry, I think you were telling me - correct me if
 [10] I have it wrong - that you thought you had a basis in
 [11] fact for making this statement?
 [12] A: Yes, correct.
 [13] Q: I am asking you to say, if you can, what basis it was
 [14] that led you to include this statement in this letter?
 [15] A: Because I did not remember the conversation that I had
 [16] had here with the chap from Senior King.
 [17] Q: That is what you did not remember. What did you
 [18] remember and what did you think?
 [19] A: I only had the letter of 4th August in front of me.
 [20] Q: You surmised, did you?
 [21] A: Well, it was the best recollection that I had,
 [22] Q: You are accusing Mr Lazenby in this paragraph in this
 [23] letter here of a flagrant breach of the confidentiality
 [24] terms on which you disclosed the concept to him. You
 [25] felt able to do that, did you?

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[1] A: Yes, because I had not recalled this conversation,
[2] Q: I am going to put it to you - and this is a convenient
[3] moment to do it - that you are in fact prepared to say
[4] anything you think you need to say in order to obtain
[5] the objective you wish to obtain and this is an example
[6] of that?
[7] A: No, It is an example of my memory not being one hundred
[8] per cent on every occasion. There is a huge amount and
[9] volume of documents. There are a lot of events. I try
[10] to be as honest and accurate as I can, but I will not
[11] always get it right.
[12] Q: Let us look at item 9 in this letter we have open in
[13] front of us. It is the Don Marketing letter to
[14] Sainsburys of 24/7/1990, given to Shell on
[15] 22nd November 1992. The document reference is E1/450A,
[16] and I say "question mark". You have already mentioned,
[17] you see, at item 5 a letter to Sainsburys and you are
[18] now drawing a distinction between that letter at item 5
[19] and this letter at item 9. If we look at the text under
[20] item 9, you say:
[21] "During a meeting at Shell-Mex House on
[22] 22nd November 1992, which had been arranged by us to
[23] present several Don Marketing concepts to Mr Lazenby,
[24] Mr Sotherton and I supplied him with a copy of
[25] Don Marketing's letter to Sainsburys dated 24th July

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[1] and probably Mr. Sotherton as well. I imagine I would
[2] have done.
[3] Q: You are drawing attention in paragraph 9 to Mr.
[4] Sotherton's handwritten notes. I will come to that
[5] later on. Item 10: "DM letter to Shell dated 19th
[6] November 1993, E7- 2976. Perhaps we should get it out.
[7] Would you go to E7 please, page 2976?
[8] A: I have that letter, yes.
[9] Q: You remember we discussed this document yesterday?
[10] A: I do.
[11] Q: You remember the last portion of this letter and the
[12] word being underlined and the point you are making
[13] there?
[14] A: Yes.
[15] Q: Have that open alongside you when you look at the letter
[16] I handed up to you:
[17] "DM letter to Shell dated 19 November 1993, My letter
[18] to Mr. Watson following his assertion during a telephone
[19] conversation (your lawyers have the transcript) that
[20] Shell could use DM concepts without involving DM.
[21] Please note the content of the last paragraph of this
[22] letter."
[23] Do you see that?
[24] A: Yes, I do.
[25] Q: Surely you will now accept that your letter of 19th

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[1] 1990. He had specifically asked us to bring it along
[2] with us. The enclosed copy contains Sotherton's
[3] handwritten notes of some relevant matters agreed during
[4] the meeting."
[5] A: That is correct, yes.
[6] Q: I put it to you that seeing what we have seen in this
[7] letter so far has been the second reference to
[8] Sotherton, yes, it is, you wrote this letter, you must
[9] have put your head together with Mr. Sotherton about
[10] what he did not remember about events?
[11] A: As I said, when I had a chance to read this letter it
[12] would jog my memory and it did on the second page where
[13] it said I spoke to a number of people. I am sure I
[14] spoke to Mr. Sotherton.
[15] Q: Now that it has jogged your memory, it would be right
[16] for my Lord to understand you had extensive discussions
[17] with Mr. Sotherton before you wrote this letter?
[18] A: I don't know whether I did. I must have spoken to him,
[19] I am sure, if I said I spoke to a number of the most
[20] important people in there.
[21] Q: Who were a number of the most important people? Name
[22] them.
[23] A: The people I mentioned earlier on, Mr. King, that is
[24] Paul King, I believe I spoke to Steve King and I
[25] believe I spoke to either Mr. Fairhurst or Mr. Hawkins

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[1] November, 1993 and those last three or four lines, did
[2] not contain a casual off- the- cuff throwaway remark, it
[3] was a deliberate marker, was it not?
[4] A: No, it was not. If it had been, if I had any knowledge,
[5] I would have been more careful in what I said there. I
[6] would have mentioned specifically the concept.
[7] Q: I am putting to you now that your last three or four
[8] lines of the letter of 19th November, 1993 were written
[9] with an eventuality in mind which came to fruition in
[10] this letter of 27th March, 1997. You wrote the letter
[11] of 19th November with a view to being able to say what
[12] you did say in the letter of 27th March, paragraph 10?
[13] A: No, I did not.
[14] Q: It is just a coincidence, is it?
[15] A: It is not a coincidence, but I did not know what was
[16] happening, I had no knowledge of it whatsoever. What
[17] was going on behind the scenes I did not know and
[18] because I had been talking about Mega Match I often when
[19] we talk about Mega Match, we think of the other scheme
[20] and on this occasion this happened and I decided to put
[21] it on the bottom of the letter.
[22] Q: Just a piece of passing information, is that it?
[23] A: As I said yesterday, it was a casual throwaway thing,
[24] yes.
[25] Q: Casual throwaway thing not meant by you seriously. Not

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[1] meant to be taken seriously by them?
[2] A: If I had had any knowledge of it I
[3] would have been more careful and precise in what I said,
[4] Q: Stay with the letter I have handed up
[5] to you this morning, please, Item 11, Shell letter to
[6] Don Marketing, E6, 2745, You say that:
[7] "Watson's response later on conceded that Don Marketing
[8] 'may have rights over some particular promotions based
[9] on the concept of various retailers using a common
[10] promotional currency.'" Note the reference in the
[11] plural to 'some particular promotions,'"
[12] Do you see that?
[13] A: Yes, I do.
[14] Q: You are a man who attaches immense
[15] importance to the precise words used in correspondence?
[16] A: Sometimes, sometimes not, because I am
[17] human,
[18] Q: Because you are what?
[19] A: I am human, I am not always right,
[20] Q: E6, 2745 you are treating the use of
[21] the plural as supporting a nuance about a recognition in
[22] relation to more than one promotion, That is what you
[23] are wishing to say in your
[24] paragraph 11 on page 3, are you not?
[25] A: Yes,

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[1] MR COX: I wonder if my learned friend would
[2] like to take him to the letter he has just referred to,
[3] MR JUSTICE LADDIE: Yes, take him to it,
[4] MR HOBBS: Could you go to E6 and it is page
[5] 2745,
[6] A: I was referring to my response letter
[7] to that which is 2746,
[8] Q: Shall we just start, I will go to both
[9] with you, shall we start on 2745, He is replying to
[10] your letter of 19th November, He says in the second
[11] paragraph:
[12] "It may well be that you have rights, jointly with
[13] Shell, in respect of the design, art work and playing
[14] pieces which were used in the 1984 promotion which was
[15] based on the 'Make Money' concept, The 'Make Money'
[16] concept itself, of course, predates the 1984 promotion
[17] and was used in the UK in 1966, following its earlier
[18] successful use in the USA, Therefore, although you may
[19] have some rights as outlined above, those rights would
[20] not in any event extend to a scheme, rule or method for
[21] playing the game or to the original concept for the
[22] promotion,"
[23] Then he says, with reference to your last paragraph:
[24] "I note the last paragraph of your letter regarding the
[25] Mega Match concept, but do not however entirely

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[1] Q: Turn the page,
[2] A: Are we talking about this letter now
[3]
[4] Q: Which letter?
[5] A: The long letter,
[6] Q: The one I handed up this morning,
[7] A: The one you handed up this morning,
[8] yes,
[9] Q: That is correct,
[10] A: You do not want to talk about Mr,
[11] Watson's letter? You made a reference to it,
[12] Q: I did,
[13] A: You don't want to talk about the
[14] letter?
[15] Q: I don't, but if you want to say
[16] anything, this would be a good time,
[17] A: Well, I let the matter rest, I
[18] suggested since we had other disputes going on there was
[19] no point in getting involved in any further problems
[20] unless they were intending to run a promotion in which
[21] case if they told me, we could discuss it, I do not
[22] remember the exact words, but it was along those lines,
[23] Q: You knew they were going to run a card-
[24] based scheme in 1994?
[25] A: No, I did not,

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[1] understand your position, You may have rights over some
[2] particular promotions based on the concept of various
[3] retailers using a common promotional currency but you
[4] cannot have any rights over the concept itself and there
[5] have been many such schemes already, One that readily
[6] springs to mind is the 'Air Miles' promotion,"
[7] Keep that open for a moment, In your letter that I
[8] handed up this morning, you draw attention to the use of
[9] the plural in the last paragraph:
[10] "You may have rights over some particular promotions?"
[11] A: Yes,
[12] Q: And you are drawing attention to the
[13] use of the plural there?
[14] A: Yes,
[15] Q: You are attaching importance to the
[16] nuance that you see in his use of the plural?
[17] A: Yes,
[18] Q: Now, the letter you want me to look at,
[19] I think, is the one on the next page, 2746, You
[20] remember this letter?
[21] A: Yes, I do,
[22] Q: You had a good recollection of writing
[23] it at the time?
[24] A: Yes,
[25] Q: If you then look at it and tell me what

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[1] it is you want to say about that letter?
[2] A: That last paragraph:
[3] "However, unless Shell is actively considering running
[4] one of the relevant promotions, it seems to me that
[5] further discussion is unwarranted at this moment,
[6] Discussions relevant to a particular concept could be
[7] undertaken at the appropriate time, should it ever
[8] become necessary."
[9] Q: What is the point you wish me to
[10] understand?
[11] A: As far as I was concerned, Shell left
[12] the matter to rest on that basis, I had no idea what
[13] was going on behind the scenes and that was it as far as
[14] I was concerned until I read the article in July, 1996,
[15] I thought they were just going to run a Shell stand-
[16] along scheme,
[17] Q: Smart scheme?
[18] A: I probably did not know what type of
[19] loyalty card it was, I knew they were considering
[20] running a stand- alone Shell scheme,
[21] Q: In the conversation that you had which
[22] was tape recorded with Watson on 1st November, I had
[23] shown you yesterday, using the word 'Smart' in relation
[24] to a card scheme?
[25] A: Right,

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[1] Q: You see, I put it to you that there
[2] were two obstacles in your way at that time, The first
[3] was you knew that Senior King were getting ready to make
[4] a complaint of breach of confidence over the concept,
[5] You knew that, I put that to you yesterday?
[6] A: No, no, you have to define the concept,
[7] I knew that they were interested in making a claim in
[8] respect of the stand alone scheme which they said they
[9] put to Shell,
[10] Q: And you knew that did you, in December,
[11] 1993?
[12] A: I think it was the following year in
[13] 1994, I have to check on that, It was after I first
[14] made contact with Senior King with that fax that I sent
[15] to a number of agencies,
[16] Q: I have stated my position to you and my
[17] submission to you and my Lord, in due course, will be
[18] that in fact you were not going to play your cards, You
[19] were not going to reveal your hand in December, 1993 for
[20] the two reasons I suggested to you, the first being you
[21] did not know what Shell were coming out with exactly
[22] and, therefore, you wanted to make your claim after you
[23] had seen it and secondly, you had good reason to believe
[24] that Senior King were going to make a claim in relation
[25] to the concept of the scheme that was about to roll out?

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[1] Q: And that was 1st November, 1993?
[2] A: Right,
[3] Q: I put it to you yesterday and probably
[4] on more than one occasion, that what you were doing was
[5] watching and waiting before you played your hand in
[6] relation to the concept you were going to claim as your
[7] own, You were biding your time?
[8] A: No, I was not, I just did not know
[9] what they were doing in the background,
[10] Q: Therefore, you did not know what to
[11] claim and you wanted to reserve your position until you
[12] had seen what came into the market to see if you could
[13] claim over it?
[14] A: No, I was more concerned about Mega
[15] Match, I thought the interest was in Mega Match and the
[16] comment about the other scheme was just because Mega
[17] Match, when either I think of Mega Match, I think of the
[18] other scheme and I put it on the end of that letter,
[19] Q: You made a reference to concept 4 as a
[20] marker?
[21] A: I do not know what the correct
[22] description would be, but I put it in there to remind
[23] Shell we held the rights to the scheme, If I seriously
[24] thought that they were following that path, I would have
[25] taken more trouble in what I said,

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[1] A: No, I repeat as I did yesterday, that
[2] the Senior King scheme that I was aware of was the Shell
[3] only loyalty scheme, i did not know, in fact they did
[4] not put forward a multiparty scheme in any event, did
[5] they, which you can see from discovery,
[6] Q: Just a minute now, When you say they
[7] did not put forward a multiparty scheme in any event,
[8] what are you referring to?
[9] A: From what I have seen in discovery,
[10] their interest was in the technology, the promotional
[11] part was secondary, They were putting a loyalty scheme
[12] for Shell alone as I understand it,
[13] Q: Go back to the letter I handed you this
[14] morning and look on page 2 and look at the paragraph at
[15] the top please,
[16] A: Right,
[17] Q: It is your complaint that having
[18] contacted a number of potential witnesses including
[19] Shell and senior agency staff involved in 'Project
[20] Hercules':
[21] "your code- name for the Smart project, they confirm
[22] that Mr. Lazenby headed- up the project team and that
[23] Smart was designed from the outset to eventually become
[24] a consortium promotion,"
[25] That is information you had learned as I understood you

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[1] to say, from a number of sources, some of those sources
[2] being Senior King people?

[3] A: I don't know whether I learnt that from
[4] Senior King people, I learnt it from someone or
[5] something I had read.

[6] Q: Let's press on, shall we? Turn to page
[7] 4 in the letter I handed you this morning, Item 12 is
[8] the letter E6/2746 that we recently looked at?

[9] A: Can you repeat that number please?

[10] Q: It is the one we had open, E6- 2746.

[11] A: I have it.

[12] Q: We just looked at it.

[13] A: Right.

[14] Q: We have just been through that.

[15] A/ Right.

[16] Q: Item 13, you are referring to a letter
[17] which came back to you on 17th February, 1994. This is
[18] E8/3741. Shall we have a look at that? I do not want to
[19] be accused of being in any way unfair to you. Let us
[20] have a look at E8/3741. Do you remember this letter?

[21] A: I do.

[22] Q: It reads:

"Dear Mr. Donovan, Thank you for your letter of 20
[24] December 1993. As you may know, David Watson has left
[25] Shell UK to take up a post with Shell International and

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[1] foundations of the Smart consortium. His letter related
[2] mainly to 'Make Money'. As Shell is painfully aware,
[3] his analysis of the legal position on that subject
[4] turned out to be mistaken. He rejected DM's rights to
[5] 'the concept' on this false premise. We cannot be
[6] certain of what 'concept' he had in mind, other than
[7] that it was a game. Despite the comment in the last
[8] paragraph in my letter of 20th December 1993, we heard
[9] nothing further from Shell about the loyalty card
[10] concept."

[11] That is your comment?

[12] A: Yes.

[13] Q: Right. Bearing in mind what your case
[14] is in these proceedings, which is that Andrew Lazenby
[15] knew full well all about concept 5, the letter to
[16] Sainsbury's and all the rest of it from 1992, from at
[17] least October, 1992 you would say, why did you not
[18] respond to Mr. Lazenby's letter by reminding him as you
[19] would have it, of what you had already told him?

[20] A: Because we were already in dispute with
[21] Shell on Nintendo, I was now suspicious that something
[22] was going on with 'Make Money' and those were the focus
[23] of what I was doing. Furthermore, I did not really
[24] understand the end part of his letter in any event.

[25] Q: He is saying he is not certain of the

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[1] your letter has been passed to me for attention, I am
[2] not sure I am able to add much to David's letter of 2
[3] December. This basically set out the legal position in
[4] respect of the 'Make Money' concept. The concept itself
[5] predates your involvement in the 1984 promotion and
[6] therefore you have no proprietary rights in the game
[7] concept, although you may have some rights in the
[8] design, artwork and playing pieces which were used in
[9] the 1984 game. Those rights would not, in any event,
[10] extend to the scheme rules or method of playing the
[11] game. Therefore, I am not certain of the relevance of
[12] the final paragraph of your letter, in that given the
[13] example of 'Make Money', there is no proprietary right
[14] in the concept and therefore discussions would only need
[15] to take place if Shell were considering running the game
[16] using the same design, artwork and playing pieces.
[17] Shell would otherwise be free to promote a game based on
[18] that concept."

[19] That is Lazenby's letter back to you?

[20] A: Yes.

[21] Q: Have that open and go back to the
[22] letter I handed you this morning and see what your
[23] comment is in paragraph 14:

"Mr. Lazenby took over the correspondence. This was at
[25] a time when he was no doubt already laying the

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[1] relevance of the final part of your letter?

[2] A: Yes, but he is talking about a game
[3] whereas I had been talking about a loyalty scheme.
[4] Q: And you did not feel it appropriate to
[5] put him right or relieve him of his uncertainty by
[6] responding to this letter of 17th February, 1994?

[7] A: I telephoned him a couple of days later
[8] and you have got the transcript of the conversation
[9] which was focussed on 'Make Money' and the Nintendo
[10] dispute. I did not have a clue anything was going on
[11] with the loyalty scheme that I put forward.

[12] Q: The last paragraphs of this succession
[13] of letters we have been looking at in each case the last
[14] paragraph is running on from the throwaway remark that
[15] you made in the letter to Watson. Yes, but the main part
[16] of the letters were about 'Make Money'.

[17] Q: You did not feel it necessary or
[18] appropriate to unveil what your stance was in
[19] correspondence to these people in relation to the
[20] loyalty concept, did you?

[21] A: Because in my previous letter I had
[22] said that unless Shell was intent on doing something
[23] with one of those concepts, there was no sense in
[24] discussing it at the time. If they decided they wanted
[25] to adopt one of them, then we should discuss it and they

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[1] should let me know at that time,
[2] Q: I thought you did concede you had
[3] concerns about what they had in time, You wanted them to
[4] know you were claiming proprietary rights?
[5] A: I wanted them to know, I wanted to
[6] remind them of that,
[7] Q: That you had rights to the loyalty
[8] scheme?
[9] A: Correct,
[10] Q: What better opportunity when they are
[11] writing back saying they do not understand the relevance
[12] of your point, for you to come forward and state your
[13] position?
[14] A: Because he was focussing on 'Make
[15] Money', I did not understand what he was saying in his
[16] last paragraph, but he certainly did not say 'We are
[17] interested in the loyalty scheme, We are pursuing it
[18] and we need to discuss it,' He said nothing like that
[19] at all, If he had have done, then we probably would not
[20] have been here today,
[21] Q: Why would we not be here today?
[22] A: Then we would have discussed it and
[23] resolved it, hopefully, in some way, but he chose not to
[24] say anything about it and I was left in the dark, I was
[25] then focussed, of course, on the Nintendo dispute and on

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[1] had established that contrary to the impression that I
[2] got from Mr. Lazenby during the telephone conversation,
[3] in fact Shell was producing a 'Make Money' game in North
[4] Wales at that time,
[5] Q: My point to you is that you are not
[6] saying anything to Lazenby about the multi- brand
[7] loyalty?
[8] A: It is because I was rather excited with
[9] what was going on with 'Make Money' in view of the past
[10] history, I did not have a clue about what was happening
[11] with the multi- brand loyalty concept, no knowledge
[12] whatsoever, I was already suing for Nintendo, I now
[13] discovered that in fact they were producing the 'Make
[14] Money' game although I had a joint rights agreement with
[15] them, My mind was focussed on those things,
[16] understandably, I thought,
[17] Q: Is there anything more you want to say
[18] on that letter of 22nd February, 1994 that we have open?
[19] (Pause)
[20] A: Only as always we were trying to say
[21] that we should meet and try to discuss it and resolve it
[22] without going to litigation,
[23] Q: You can close up file E8 now, thank
[24] you, The letter I handed you this morning, could you go
[25] to page 5 of it?

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[1] my growing suspicion that something was happening with
[2] 'Make Money', I could not, it would have seemed rather
[3] unlikely that there was another venture going on based
[4] on an idea that I put forward to Shell,
[5] Q: My Lord will be the judge of your
[6] answers, Would you go to the letter I gave you this
[7] morning, Keep E8 out on the bench, The letter at
[8] numbered paragraph 14 goes on to refer to Don
[9] Marketing's letter to Shell dated 22nd February, 1994 at
[10] E8/3770, Now, have you got that letter at E8/3770, Mr,
[11] Donovan?
[12] A: Yes, I have,
[13] Q: Do you remember this letter?
[14] A: Yes, I do,
[15] Q: You are responding to the letter we
[16] were just looking t most recently, Mr. Lazenby's letter
[17] of 7th February, you responded to that?
[18] A: Yes,
[19] Q: It is all about other matters, My
[20] point to you is that you did not take this opportunity
[21] to say anything in response to the last paragraph of
[22] Lazenby's letter to you?
[23] A: I believe that in the intervening
[24] period I had spoken to someone and established I would
[25] have to read that letter through, but I believe that I

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[1] A: Right,
[2] Q: You are listing below the main
[3] similarities between the Smart consortium scheme and
[4] DM's proposals, Item (a):
[5] "A Shell- led loyalty promotion consortium using a
[6] Smart card, (b) A wide range of partners operating in
[7] different trade sectors issuing and redeeming a common
[8] promotional currency which enables participants to save
[9] up points for a wide range of redemption options much
[10] more quickly than if issued only by a single retailer,
[11] (c) A loyalty consortium promotion in which the
[12] partners can have a direct influence over the management
[13] of the scheme, (d) Positioned as a separate business in
[14] which potential partners have the option to share the
[15] costs and the benefits, (e) Uses a multi purpose smart
[16] card which can accumulate points and capture customer
[17] data, DM discussed the technology for a Shell
[18] consortium smart card in 1990 with a security print plc
[19] who specialise in supplying loyalty cards, Mr Paul King
[20] was present during one such discussion at the printers
[21] factory, (f) Possibility of using the loyalty
[22] consortium card for financial transactions, (g) A
[23] smart loyalty card which could have a universal identity
[24] across all of the partner companies,"
[25] A: Right,

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[1] Q: What does (d) mean?
[2] A: I am not sure that that is correct, I
[3] think that in the proposal he suggested an option that
[4] it could be set up as a separate business venture
[5] involving the partners in the consortium.
[6] Q: What does that mean, a separate
[7] business venture, what does that mean according to your
[8] understanding?
[9] A: You have to remember that this was the
[10] initial proposal and that normally it would then move
[11] forward in consultation with the client as to how it
[12] would be developed. At that time I just had in mind
[13] that the consortium members might actually want to form
[14] a company to run it consisting of the consortium
[15] members, a separate operation.
[16] Q: A third party administrator?
[17] A: No, not as a third party, with third
[18] parties they do not themselves issue points like Argos
[19] does not issue premier points. This was a consortium of
[20] the issuing company, issuing and redeeming companies.
[21] Q: It is a Shell-led loyalty promotion
[22] consortium?
[23] A: Yes.
[24] Q: And you are proposing it be positioned
[25] as a separate business in which potential partners have

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[1] A: I think that we discussed Smart cards
[2] with a company from Holland called ILS Lottery Systems
[3] which was a subsidiary of Delarue and one of their
[4] sister companies was Tronick and we had the director
[5] come and visit us a couple of times and during one of
[6] those visits we discussed Smart cards.
[7] Q: Is there any written record of that?
[8] A: There is a letter probably in
[9] discovery, I think his name is Mr. John Orick.
[10] Q: You are saying you had several
[11] meetings, did you?
[12] A: We had more than one meeting with him.
[13] This was certainly not on the subject of Smart cards, it
[14] was on the subject of lotteries in general, promotional
[15] games, but during one of those discussions, we discussed
[16] Smart cards.
[17] Q: Tell me more.
[18] A: The cost of them, I think that he said
[19] that they were falling, the costs and it was now getting
[20] to be a viable proposition for a major promotion. But,
[21] it was not his fort, his company. It was one of the
[22] sister companies in the group.
[23] Q: So, what was it, just a throwaway
[24] remark or two?
[25] A: It wa a brief discussion, that is all.

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[1] the potential to share the costs of the benefits?
[2] A: Yes.
[3] Q: Is that a Shell separate business?
[4] A: It would be a consortium of the
[5] partners but it would be Shell that would decide how it
[6] would be set up. It was putting the proposal to Shell
[7] not to any other company, so they could develop it as
[8] they wished.
[9] Q: I think you were indicating a moment
[10] ago when you put forward the proposal whether it was
[11] 1989 or 1990 I cannot remember, but when you put forward
[12] the proposal in the first place it was not a refined
[13] idea, it was something that would need to be worked at?
[14] A: Almost always the case.
[15] Q: That was true of everything that you
[16] said in concept 4 in fact. Something that would need to
[17] be refined by a process of much more detailed
[18] consideration and implementation?
[19] A: We put forward the bare essentials of
[20] it and then it would need to be developed an researched
[21] according to how Shell wanted to go with it.
[22] Q: It is the desirable end objective?
[23] A: No, it was the basics of the promotion.
[24] Q: Have a look at (c) on this page. What
[25] is all this about, you checking out Smart cards in 1990?

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[1] Q: How brief is brief?
[2] A: We are talking about nine years ago,
[3] It certainly was not a detailed discussion, no. Our
[4] discussions were focussed on other promotions, on
[5] lotteries and I think I lent him a video tape of the
[6] game we did.
[7] Q: So, you did not get into any detail
[8] about Smart cards?
[9] A: No, we did not.
[10] Q: You did not get into any detail?
[11] A: No, we did not. We discussed Smart
[12] cards but not in any detail.
[13] Q: They were a thing that cropped up in
[14] the conversation. You exchanged one or two sentences
[15] but did not get into any detail?
[16] A: No, not at all.
[17] Q: And you did not report anything to
[18] Shell about it?
[19] A: No, we did not.
[20] Q: Then look at paragraph (c) on page 5
[21] again. In the second line you say:
[22] "Don Marketing discussed the technology for a Shell
[23] consortium smart card in 1990 with a security print plc
[24] who specialise in supplying loyalty cards. Mr Paul King
[25] was present during one such discussion at the printers

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[1] factory,"
[2] That is not true is it?
[3] A: I do not think it is, I think it was
[4] probably at our offices,
[5] Q: But, you did not discuss the technology
[6] for a Shell consortium Smart card?
[7] A: No, I don't think we did, I think we
[8] discussed Smart cards, but I don't think we got into how
[9] it was going to be used,
[10] Q: This statement here is just false?
[11] A: I am not sure it is correct when it
[12] says about the printers factory, I think it was at our
[13] offices,
[14] Q: And it is not correct to say that:
[15] "Don Marketing discussed the technology for a Shell
[16] consortium smart card in 1990"
[17] - is it?
[18] A: I think that probably we did discuss
[19] Smart cards but probably we did not discuss for Tronick
[20] or the subsidiary of Delarue, ILS Lottery Systems, what
[21] the concept was,
[22] Q: So, you agree with me this statement is
[23] false?
[24] A: It is not false, it is not accurate,
[25] Q: It is kind of in a twilight zone?

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[1] objective, regardless of the accuracy of it, Secondly,
[2] this is an example of you wanting to backdate to the
[3] earliest possible moment that you can, your concept of
[4] the concept for which you wished to have protection?
[5] A: As I said earlier, we had already put
[6] the proposal to Mr. King in confidence before 1990 at
[7] the end of 1989, So, there would not be any reason for
[8] that.
[9] Q: Turn the page, please, in the letter
[10] that we have open, Page 6 is under the heading:
[11] Originality, There are points made there by you
[12] distinguishing the multi- partner concept from Air
[13] Miles, YO remember making these points?
[14] A: I do,
[15] Q: Looking down them, I think they are all
[16] points which your counsel has made on your behalf
[17] already, so I do not propose to dwell on them, We can
[18] see them in the letter there, Turning the page to page
[19] 7, you are making statements down this page, I am
[20] looking at the second paragraph on page 7, You are
[21] saying:
[22] "At least we now know why Mr Lazenby and his boss, Mr
[23] David Watson were interested in corresponding with us
[24] about the loyalty concept, It very closely resembles the
[25] interest expressed by them in the rights to 'Make Money'

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[1] A: No, it is not accurate in that I think
[2] that the discussion was probably at our offices, not at
[3] their factory
[4] Q: Well, my Lord, has got your answers and
[5] we have the transcript, The point I want to put to you
[6] on this is two- fold: Firstly, this is a reflection, is
[7] it not, of your desire to demonstrate that you were
[8] there first with the idea, that is a reflection of that
[9] proposition?
[10] A: Not really, We had already discussed
[11] this and put it before King before then, had we not? I
[12] think it was probably to boost our claim and that it is
[13] probably not accurate in what it says, I accept that,
[14] Q: You accept that and it is an example,
[15] is it not, of you being prepared to say something that
[16] suits for the purposes of your objective?
[17] A: No, I think that I did speak to John
[18] Orick about Smart cards but I do not think that I would
[19] have disclosed to him the mechanics of the scheme, We
[20] just had a discussion about the availability of Smart
[21] cards and what the costs were at that time,
[22] Q: I will just sum up my position, I am
[23] putting it to you formally that this statement that we
[24] have just been looking at together at (c) is an example
[25] of you being prepared to state what suits your end

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[1] when they were surreptitiously producing the 1994 'Make
[2] Money' promotion, The latest matter is all the more
[3] incredible in view of the injunction sought in the DM
[4] Statement of Claim issued in September, 1994, In
[5] paragraph 41 we alleged that Shell had acted in flagrant
[6] disregard of DM's rights to its concepts, Paragraph 42
[7] made plain our concern that unless restrained, Shell
[8] would seek to make wrongful use of other DM proposals,
[9] including our 'Mega Match' concept, based on the
[10] principle of a Shell led consortium of major retailers
[11] issuing and redeeming a common promotional currency,"
[12] Taking that on board and you probably remember writing
[13] it, do I understand you to be saying that this was
[14] flagging up the point in September, 1994 that you had
[15] concerns about Shell's use of proposals based on the
[16] basis of a Shell led consortium of major retailers
[17] issuing and redeeming a common promotional currency? Is
[18] that what you are saying there?
[19] A: It is referring to the statement of
[20] claim about Mega Match, is it not?
[21] Q: Let's take it slowly, Fourth line:
[22] Paragraph 42 made plain our concern that unless
[23] restrained, Shell would seek to make wrongful use of
[24] other DM proposals, including our Mega Match concept,
[25] based on the principle of a Shell led consortium of

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[1] major retailers issuing and redeeming a common
 [2] promotional currency."
 [3] You are saying there that there was a concern at the
 [4] time of that document which was September, 1994, a
 [5] concern that Shell would be making wrongful use of other
 [6] proposals including that one?
 [7] A: Yes,
 [8] Q: That is what you are saying?
 [9] A: Yes,
 [10] Q: In September, 1994?
 [11] A: Yes,
 [12] Q: There was a concern?
 [13] A: Yes,
 [14] Q: Go on to the next paragraph:
 [15] Our concern should Shell's intention to poach further
 [16] promotional concepts arose from comments made to me by
 [17] Mr Lazenby and Mr Watson, claiming that Shell was free
 [18] to use the multi- partner and 'Make Money' concepts,
 [19] even though I warned them of overwhelming evidence
 [20] supporting our claims to the concepts, Their arrogant
 [21] views are evidence from the enclosed copy letters."
 [22] Do you see in the third line there, claiming that Shell
 [23] was free to use the multi- partner and 'Make Money'
 [24] concepts? What are you referring to there?
 [25] A: It is not clear in some of those

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[1] matter of "the Mega Match option for a Shell- led
 [2] promotion consortium issuing and redeeming a common
 [3] promotion currency was also touched on in my discussions
 [4] with you in May, 1995."
 [5] Are you not?
 [6] A: I think that I probably did the Mega
 [7] Match scheme in some of the letters, maybe,
 [8] Q: May, 1995, as we know, is before the
 [9] date of the funding at tab 3?
 [10] A: Yes, it is,
 [11] Q: And you were raising your concerns in
 [12] May, 1995 because they were concerns that were running
 [13] through your mind in relation to what Shell was doing at
 [14] that time?
 [15] A: I think I probably mentioned the Mega
 [16] Match scheme, I spoke to Dr. Faye for an hour and three
 [17] quarters. So, I obviously cannot remember everything
 [18] that was said, I think I did raise or mention the Mega
 [19] Match scheme during the conversation, yes,
 [20] Q: You raised the business of Shell- led
 [21] promotion consortium issuing and redeeming a common
 [22] promotional currency in the discussions in May, 1995?
 [23] A: I think I probably did, I am not sure,
 [24] I don't know whether a copy of the notes are in the
 [25] discovery or not, I know Dr. Faye made his own notes

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[1] conversations what scheme, for example in one
 [2] conversation Mr. Lazenby said Mega Match or whatever
 [3] that scheme was, it was not clear to me which scheme he
 [4] was referring to and I was just commenting on that,
 [5] Q: What is the multi- partner reference,
 [6] what is that referring to?
 [7] A: It is referring to that exchange of
 [8] correspondence, I assume,
 [9] Q: When you wrote this letter?
 [10] A: Yes, I know, but it is some time ago,
 [11] I guess it must have been in regard to the exchange of
 [12] correspondence,
 [13] Q: Your concern related to the multi-
 [14] partner loyalty scheme, correct?
 [15] A: Yes,
 [16] Q: Go to the next paragraph:
 [17] "The Mega Match option for a Shell- led promotion
 [18] consortium issuing and redeeming a common promotional
 [19] currency was also touched on in my discussions with you
 [20] in May 1995, A copy of my notes of the meeting were
 [21] lodged with Royds Treadwell, No doubt you will be able
 [22] to check your own notes of the meeting, to which Mr,
 [23] Wiseman referred during our meeting with him and Mr,
 [24] Brown on 14 June, 1996."
 [25] You are saying there, are you not, that you raised the

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[1] about the meeting but I do not think they have ever been
 [2] put into discovery,
 [3] Q: You lodged them with your solicitors,
 [4] Royds Treadwell?
 [5] A: Correct, Are they in discovery?
 [6] Q: I have not seen them, I cannot find
 [7] them, Go to the next paragraph:
 [8] "As mentioned, we have obtained advice from specialist
 [9] Counsel."
 [10] Pausing there, keep your finger in that page and go back
 [11] to the first page in the second paragraph:
 [12] "Specialist Counsel advised us on 21st March that we
 [13] have an even stronger claim against Shell in this case
 [14] than those already settled."
 [15] I understand you to be referring back to that when you
 [16] say in the bottom paragraph on page 7:
 [17] "As mentioned, we have obtained advice from specialist
 [18] Counsel."
 [19] A: We obtained it by more than one
 [20] counsel, One was certainly on the date that is
 [21] mentioned on the first page, I cannot recall, it would
 [22] have been an earlier date in respect of the other
 [23] counsel,
 [24] Q: Let's not quibble over it, It reads
 [25] on, you say:

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[1] "We supplied an extensive briefing about the Scottish
[2] scheme including leaflets, newspaper adverts, news
[3] reports etc., plus background information on schemes
[4] such as Air Miles and Premier Points. In reaching the
[5] conclusion that this claim is even stronger than the
[6] previous ones, Counsel has taken into account the
[7] substantial similar fact evidence accumulated from the
[8] three claims already settled, all involving the same
[9] manager, Mr. Andrew Lazenby,"?

[10] A: Correct.

[11] Q: I get the impression from reading this
[12] that there was a wad of material that you forwarded to
[13] counsel to enable counsel to advise?

[14] A: Yes.

[15] Q: This will have been, will it not, a
[16] body of material referring to the Shell Smart scheme,
[17] the way it was operated, news reports, adverts,
[18] leaflets, you name it, as much material as you could
[19] collect?

[20] A: Yes.

[21] Q: And you pulled that material together
[22] because you were very interested in knowing what it was
[23] Shell was doing in terms of the Smart scheme?

[24] A: I knew what they were doing or planning
[25] to do on July 21st, 1996.

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[1] Q: When I started with you on this letter,
[2] I asked why you referred to the launch on Scotland on
[3] 14th March, 1997 which is 13 days before the date of
[4] this letter and you gave me to understand and I think
[5] correctly, that it was that event which led you to the
[6] conclusion that your concept had been taken?

[7] A: Yes.

[8] Q: Therefore, I am putting back to you the
[9] proposition that you had no reason to have been
[10] collecting material before that date?

[11] A: I had reason because I read plans that
[12] Dr. Faye was presenting with Lord Saatchi to various
[13] major companies including, if I recall, Sainsbury's, the
[14] scheme I put to Shell in confidence.

[15] Q: And you are basing this now?

[16] A: On the article in the business section
[17] of The Times on 21st July, 1996.

[18] Q: So, you thought you had a claim,
[19] materially, against Shell on 21st July, 1996?

[20] A: If they succeeded in putting together a
[21] consortium and launched it, I understood, it was my
[22] understanding that I would not have a claim or it would
[23] not be worthwhile pursuing it unless Shell actually
[24] launched the scheme.

[25] Q: You refer in this paragraph at the

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[1] Q: My position to you, I put it to you
[2] formally, is that you are forwarding here material of
[3] the kind that you would have been collecting from the
[4] moment the Shell Smart scheme rolled out?

[5] A: No, from the moment I read the article
[6] on July 21st, 1996. Then I was interested in anything
[7] to do with it.

[8] Q: Can you tell me why in those
[9] circumstances you did not think you had a claim until
[10] 14th March, 1997?

[11] A: I mentioned that earlier on, I did not
[12] view the John Menzies joining the scheme as being the
[13] scheme that I put forward to Shell which was to involve
[14] the leading brands in the country in every high street,
[15] all operating the same scheme. I saw John Menzies as
[16] being a second area brand. I did not even realise they
[17] had national representation and, therefore, it did not
[18] seem to be the same scheme.

[19] Q: So, you were not concerned about it?

[20] A: I was concerned about it. I was
[21] interested because that was my view, but when I decided
[22] to get further advice, I had to give them anything that
[23] could be salient and as I said yesterday, the John
[24] Menzies joining the scheme could have relevance to the
[25] funding so I found out what I could about it.

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[1] bottom of page 7 to similar fact evidence. This is an
[2] expression we discussed with some of the documents
[3] yesterday?

[4] A: Yes.

[5] Q: When you write 'similar fact evidence'
[6] you are referring to the earlier law suits you had had
[7] against Shell?

[8] A: Yes, that is correct.

[9] Q: Turn to page 8. You yourself say at
[10] the top of page 8:

[11] "I hope that you and your colleagues will understand my
[12] bitterness and immense anger at this development,
[13] particularly since I have twice set up a multibrand
[14] consortium for Shell based on the same common
[15] promotional currency principle."
[16] What are you referring to there?

[17] A: I am referring to the Mega Match scheme
[18] I set up in June, 1986. I had a meeting with lots of
[19] the consortium members including Shell.

[20] Q: And the proposal was to use matching
[21] cards?

[22] A: Yes, 99.9% of the proposal was Mega
[23] Match.

[24] Q: And you are calling the matching halves
[25] proposal a common proposal currency principle?

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[1] A: Yes, I am?
[2] A: If I have read and understood many of
[3] these documents correctly, the use of electronic points
[4] is regarded by you as just a variation on the use of
[5] matching halves?
[6] A: No, not a variation, it is a
[7] development. That came first and that led me to think
[8] of the loyalty scheme.
[9] Q: But you regard them both as involving a
[10] common promotional currency?
[11] A: Yes.
[12] Q: Look at the bottom paragraph on page 8:
[13] "Regarding global exploitation, we read the report in
[14] 'Marketing' on 12th December, 1996 that Mr Raul
[15] Pinnell's appointment to Shell International includes
[16] responsibility for the marketing of 'loyalty
[17] operations'. We note from the Marketing Week report on
[18] 14th March that 'Smart is meanwhile being launched in at
[19] least one other European country, and more expansion is
[20] likely'. We have also read an article in the same
[21] magazine on 21st March giving news of the launch of a
[22] Shell loyalty card scheme in France in partnership with
[23] the Casino supermarket chain."
[24] The position is that this is indicating to you which are
[25] the relevant journals at relevant times that is ever

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[1] Do you see that?
[2] A: I do.
[3] Q: You knew and you understood, did you
[4] not, that what you were envisaging here was that the
[5] writ would be endorsed with a statement of claim which
[6] would fully detail the similar fact evidence and you
[7] expected, wished and intended, if you issued such a
[8] writ, it would be as you said, in the public domain?
[9] A: Yes.
[10] Q: And the reason you wanted the statement
[11] of claim endorsed was so that you could put all those
[12] earlier pieces of litigation into the public domain?
[13] A: Whatever was permissible in law.
[14] Q: You wished and intended by putting it
[15] on the writ, you would get it into the public domain?
[16] A: I was being advised by counsel and it
[17] would be up to them to put in whatever was appropriate.
[18] Q: Do not discuss the law with me and I
[19] will not discuss the law with you. I am discussing the
[20] fact of what you envisaged. You envisaged as a fact
[21] that if a writ was issued, endorsed with a statement of
[22] claim with similar fact evidence, detailed on it, that
[23] would have the effect of putting the earlier litigation
[24] into the public domain. You envisaged that as a fact?
[25] A: Yes, in whatever degree was

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[1] since Shell rolled out its scheme in 1994?
[2] A: I did after July, 1996, we did monitor
[3] lots of publications for that, I did often read
[4] Marketing and from time to time Marketing Week.
[5] Q: You are saying you never read them
[6] before?
[7] A: No, I have read them for years.
[8] Q: Absolutely. Turn to page 9. This is
[9] your strategy, written in your own words:
[10] "Please advise within seven working days whether you
[11] wish to deal with this matter privately i.e. Strictly
[12] between DM and Shell UK Ltd with no DM contact with any
[13] other Shell company, or whether you intend to reject our
[14] claim, in which event we would take the following
[15] steps:- 1. Issue a Writ against Shell UK Ltd. Because
[16] we wish to be in a position to take action prior to
[17] Shell's AGM, Counsel has been instructed to prepare the
[18] Writ endorsed with a Statement of Claim, which will
[19] fully detail the similar fact evidence which is clearly
[20] of great relevance to this claim. In this connection,
[21] we have supplied Counsel with a copy of the document
[22] entitled 'The Don Marketing Saga' (copy enclosed), so
[23] that she is aware of all matters which reflect on the
[24] ethical conduct of Shell managers in respect of the
[25] previous claims."

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[1] permissible,
[2] Q: And that indeed is what subsequently
[3] happened, is it not?
[4] A: It is.
[5] Q: And indeed subsequently, quite soon
[6] after the writ was issued in this action, which was in
[7] fact 1998, you did take steps yourself to circulate the
[8] statement of claim and the writ, did you not?
[9] A: We wrote, I believe to D. J. Freeman
[10] saying we intended to do it and they wrote back saying
[11] we should not do so and we did not.
[12] Q: You in fact supplied a copy of the
[13] journals and they carried articles and the writ and
[14] statement of claim and they in fact included a
[15] photograph of the back of the writ, did they not?
[16] A: They obtained a copy of the writ from
[17] the court, I think both magazines did themselves.
[18] Q: At your instigation?
[19] A: I don't know, it may have been, I don't
[20] recall. They were aware of the impending litigation and
[21] they obtained the information.
[22] Q: You say it may have been, it is highly
[23] likely that you tipped them off, is it not?
[24] A: I probably did, yes.
[25] Q: You did. Let's not beat about the

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[1] bush, You did, did you not?
[2] A: I don't remember the exact
[3] circumstances, but I probably did,
[4] Q: Look at item 2 here, What you are
[5] intending to do, if you do not get your way in seven
[6] days or the response you want in seven days:
[7] "Issue a press release to the national media and the
[8] marketing and petrol retailing press. Further releases
[9] would be issued to coincide with developments in the
[10] Smart consortium scheme."
[11] What is the point you are making there? What were you
[12] hoping to achieve?
[13] A: To let the public know that we had this
[14] complaint against Shell and that they were expanding
[15] what we considered to be our scheme,
[16] Q: Item 3 you were going to write direct
[17] to potential partner companies warning them of the
[18] litigation, What was that, if not to disrupt it as much
[19] as you could?
[20] A: I certainly wanted them to know that we
[21] had a potential claim on the scheme,
[22] Q: Item 4, you were going to write to John
Jennings, Mr. Mark Moody-Stuart and Mr. Cor
[24] Herkstroter, as per the attached letter, Item 5 you
[25] were going to inform Shell International that on

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[1] A: I think that is clear from the letter,
[2] yes,
[3] Q: You were putting them in a position
[4] where you were saying you were going to make life
[5] unpleasant for them to enter further discussions with
[6] you about your claim?
[7] A: Yes,
[8] Q: You kept up your strategy in 1997,
[9] trying to get a discussion, a dialogue going with Shell?
[10] A: I did,
[11] Q: And you were throughout that period,
[12] using the stick and carrot strategy that we see
[13] exemplified in those few paragraphs?
[14] A: I think that is fair to say, yes,
[15] Q: Do you know what I mean by the G
[16] bundles in this case, G1 and G2?
[17] A: Yes,
[18] Q: Let us give you a flavor of it, I am
[19] sure it will come flooding back, Look at G1,
[20] MR JUSTICE LADDIE: Page?
[21] MR HOBBS: My Lord, page 3 really starts the
[22] whole thing going,
[23] MR JUSTICE LADDIE: Mr. Donovan, would you
[24] leave the witness box? I would like to go into camera,
[25] So, anybody who is not a party to the litigation or

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[1] counsel's advice, you were reserving your right to take
[2] legal proceedings against them,
[3] "The same applies to current partners in the Smart
[4] scheme and any company operating or associated with the
[5] scheme, 6, Write to the pressure group who have
[6] succeeded in forcing a Shell ethics related resolution
[7] and vote at the AGM, We would obviously supply them
[8] with a copy of your letter, 7, Write to all Shell
[9] service stations in England, Wales and Northern Ireland,
[10] 8, Although we have thus far refrained from taking
[11] libel action against the magazines which published the
[12] libel contained in the Shell press release dated 17
[13] March 1995, we will commence proceedings if we have to
[14] resume litigation against Shell, 9, We will raise the
[15] new claim and your letter at the AGM,?"
[16] A: Correct,
[17] Q: You are going to do all of these things
[18] if the recipient of this letter does not advise you
[19] within seven working days that he wishes to deal with
[20] the matter privately, that is one and one, between you
[21] and Shell, That is what you are going to do?
[22] A: I was hoping that Shell would agree to
[23] mediation again,
[24] Q: You were putting pressure on them to
[25] get your way?

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[1] expert should clear the court, Mr. Donovan, you are
[2] under oath, You must not discuss this with anybody
[3] outside,
[4] (Proceedings in camera- separate transcript)
[5] MR HOBBS: Mr. Donovan, bundle G1 is open in
[6] front of you and I was just going to ask you first of
[7] all to see the nature of the bundle, This is the
[8] material of similar fact?
[9] A: Yes,
[10] Q: If we look first of all at page 3,
[11] taking it at the bottom, you will see that this is a
[12] letter not signed, but your name is at the bottom to Cor
[13] Herkstroter, drawing his attention to various matters
[14] and so on and so forth, Have you at any stage seen this
[15] bundle before this trial started? It has been in the
[16] trial bundles since they were formulated,
[17] A: I have seen all of what I can see of
[18] these items but not necessarily in this form in these
[19] bundles,
[20] Q: So, you know the general nature of the
[21] material collected in these two G files, It is the
[22] campaign stuff?
[23] A: Right,
[24] Q: Have you read the skeleton of argument
[25] Mr. Robertson and I prepared for the purposes of this

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[1] trial?
 [2] A: Yes, I did,
 [3] Q: You remember the tables at the back?
 [4] A: Yes,
 [5] Q: This is what is in these two files, G1
 [6] and 2 I am coming to a particular point on those, but I
 [7] just want to be clear with you on one or two matters,
 [8] During 1997, after you had sent that letter that we were
 [9] concerned with just now at length this morning, you
 [10] maintained pressure on Shell by means of indicating that
 [11] you would go into a big PR campaign against them, Is
 [12] that a fair assessment of what you did during 1997?
 [13] A: Yes, I think it probably is, yes,
 [14] Q: It reached the point where you get to
 [15] issue a writ in 1998?
 [16] A: Can I just backtrack, I believe that I
 [17] wrote to Mr. Moody- Stuart soon after he became Chairman
 [18] of Shell Transport and Trading and I asked him to
 [19] intervenc and I think I probably at some point even,
 [20] either in that first letter of subsequent letter,
 [21] suggested mediation, arbitration, ADR and I have
 [22] suggested that since then in various letters during that
 [23] period,
 [24] Q: But, it never came to that?
 [25] A: It was not picked up,

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[1] were not prepared to accept D. J. Freeman's stance?
 [2] A: No, that the claim was doomed to
 [3] failure, no, I was not,
 [4] Q: So, we reach the point on 9th April,
 [5] 1998 the writ in the present proceedings is issued?
 [6] A: Yes,
 [7] Q: And, as you expected, nearly ten months
 [8] previous, yo know the statement of claim was endorsed on
 [9] that write, You knew that did you not?
 [10] A: Yes,
 [11] Q: What happens is I am going to try and
 [12] pick up the documents in G1, If you go towards the back
 [13] end of it and I want to show you the correspondence in
 [14] the immediate aftermath of the writ, page 189/G1, That
 [15] is a letter of 14th April, 1998 from yourself to Mark
 [16] Moody- Stuart, do you see that?
 [17] A: Yes, I do,
 [18] Q: This was after the writ has been issued
 [19] and according to my understanding of the documents also
 [20] after the point in time at which the writ has actually
 [21] been served?
 [22] A: I think so, yes,
 [23] Q: That is what I thought too, We pick
 [24] that up from later documents, On 189:
 [25] "I thought it appropriate to brief you on the comments

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[1] Q: You did not get what you wanted in that
 [2] respect and you maintained pressure on them?
 [3] A: Yes,
 [4] Q: You would not object if I called it a
 [5] blitz of material? You were writing to them I do not
 [6] know how frequently, sometimes letters are going out
 [7] like one a day or sometimes more than one a day?
 [8] A: OK, I accept that,
 [9] Q: We get to a point in time in 1998 when
 [10] a writ in this action is issued and the writ in the
 [11] present action, I will just check the date for my own
 [12] purposes --
 [13] A: Is it possible to mention something
 [14] else?
 [15] Q: If you like,
 [16] A: Because I was anxious not to get
 [17] involved in further litigation, there was a suggestion
 [18] made that D. J. Freeman would supply a report which they
 [19] did in June or July, 1997 and that we would in effect
 [20] take the case up to the discovery stage without actually
 [21] commencing litigation and in the meantime I would not
 [22] carry on with the campaign, I think I said that
 [23] voluntarily, I do not think Shell tried to impose that
 [24] on me, but that is what happened,
 [25] Q: But, that came to nothing because you

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[1] I have just made to Marketing Week, I said that I am
 [2] now in active correspondence directly with you as a
 [3] result of the faxed letter I received from you on the
 [4] day the Writ was issued, I have informed them that Mr.
 [5] Kerkstroter is being kept fully informed,"
 [6] This is confirming and it is the fact, is it not, that
 [7] you were in communication with the media and in
 [8] particular with Marketing Week?
 [9] A: Yes,
 [10] Q: If you turn the page in this document,
 [11] actually turn to page 190, you are writing to him again
 [12] on the 15th:
 [13] "The litigation against Shell is featured as the
 [14] main story in this week's edition of Marketing Week
 [15] magazine, It is also the lead story on their website,
 [16] Please be advised that I have this morning had
 [17] discussions with a national newspaper, They have a
 [18] particular interest in the Writ and associated matters,
 [19] I intend to fax across to them later today copies of my
 [20] recent letters to you, together with a copy of the
 [21] letter from Mr. Wiseman dated 14th May 1997, If you
 [22] have any objection to me supplying the letters, then
 [23] please arrange for one of your staff to contact me by
 [24] telephone before 2pm today, so that the matter can be
 [25] discussed, Damage limitation is still possible at this

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[1] stage,"
[2] If you turn the page, there is the web page?
[3] A: Yes,
[4] Q: If you turn the page, 192, there is a
[5] hard copy page, the full text. You will see from page
[6] 192 on the right-hand column:
[7] "Don Marketing is claiming multimillion pound damages,
[8] Its writ demands an injunction to prevent Shell using
[9] the scheme, an admission that the agency's confidential
[10] information was 'misused' and that all promotional
[11] material credits Don Marketing with originating the
[12] scheme. This legal case is the latest in a series of
[13] spars between Shell and Don Marketing. All have been
[14] settled out of court with the settlements remaining
[15] confidential."
[16] You see that?
[17] A: I do,
[18] Q: At that stage the press had not got
[19] hold of the details of the confidential matters?
[20] A: I assume they got this from the writ,
[21] from the statement of claim on the writ.
[22] Q: You have been in communication with
[23] them because there is a quote from you under the
[24] photographs, the third column from the left. You are
[25] actually quoted?

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[1] It goes on:
[2] "The three previous cases hinged on the same claim of
[3] infringement. Additional papers, lodged with the High
[4] Court writ, show that in 1996, Shell settled two cases
[5] brought by Don Marketing 'on terms favourable to the
[6] plaintiff'. In both cases, one a Nintendo-themed
[7] promotion, the other a Hollywood-themed promotion, the
[8] agency claimed that shell had used its ideas, given in
[9] confidence in 1992, without either crediting the agency
[10] or paying for such use. In a third case, Shell paid 'a
[11] substantial sum' to settle a legal action in April,
[12] 1994. It resulted from the re-use of the 'Make Money'
[13] promotion which Don Marketing first ran for Shell in
[14] 1981. Don Marketing is demanding a multimillion pound
[15] settlement in the Smart case. But, Shell, which has 14
[16] days after the writ's issue to respond, says, 'We are
[17] filing a defence and possible a counter claim.'
[18] And you know those appear in the similar fact portion of
[19] your statement of claim?
[20] A: Probably,
[21] Q: "News Analysis, page 21," If you turn
[22] the page you will see page 21 of Marketing Week, April
[23] 23rd and not to labour this, that item running across
[24] four columns across page 205 and down one column on 206,
[25] plus that photograph there, is all relating to what we

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[1] A: Yes,
[2] Q: And the covering letter on 189, I
[3] understood to be indicating you had been giving
[4] interviews or comments to Marketing Week?
[5] A: I think this is after they got a copy
[6] of the writ from the court and they probably telephoned
[7] me afterwards.
[8] Q: Turn on please to page 204 in this
[9] bundle. This is Marketing Week, April 23rd 1998. You
[10] see that from the bottom right-hand corner?
[11] A: Yes, I do,
[12] Q: The heading at the top is:
[13] "High Court papers unveil 'secret' Shell writ losses";
[14] You see that?
[15] A: Yes,
[16] Q: "High Court papers have revealed that
[17] Shell has already lost three copyright battles with the
[18] promotional agency that issued a High Court writ against
[19] it two weeks ago. The details of the out-of-court
[20] settlements have, until now, remained secret as part of
[21] the agreement reached by the two sides. In the latest
[22] legal action, Don Marketing is suing Shell for allegedly
[23] breaching its copyright on the concept idea used to
[24] create Shell's Smart car loyalty scheme, which is being
[25] tested in Scotland."

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[1] have been talking about, the similar fact evidence, is
[2] it not?
[3] A: I assume so, yes, I have not read it
[4] all but I assume it is the case,
[5] Q: And this is the material in respect of
[6] which you accepted in answer to my question a short
[7] while ago that you probably tipped them off about the
[8] High Court writ with a view to getting into the public
[9] domain by publications like this, the details of the
[10] similar fact evidence?
[11] A: Yes, whatever was legally permissible
[12] to do,
[13] Q: Would you now take --
[14] MR JUSTICE LADDIE: Are you going to a new
[15] subject? It is a matter for you,
[16] MR HOBBS: I will not finish it before
[17] 1,00 pm
[18] MR JUSTICE LADDIE: Let us stop now,
[19] (1,00 pm)
[20] (The Luncheon Adjournment)
[21] (2,00 pm)
[22] MR HOBBS: Could we please go to volume E10 and you can
[23] close up G1, if you have not already. In E10 would you
[24] please turn to page 4795?
[25] A: I have that,

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[1] Q: Thank you. This is headed "Shell Shareholders'
[2] Organisation". Is that the same as or different from
[3] the Shell pressure group, or is it - it has a name?
[4] A: Shell Corporate Conscience Pressure Group.
[5] Q: Is this the same or different?
[6] A: It is different.
[7] Q: Is it?
[8] A: Yes.
[9] Q: You are chairman of this one, are you chairman of the
[10] other one as well?
[11] A: I was involved in running that organisation. I cannot
[12] remember if I was chairman or not. The difference was
[13] that we had garages that were members of the first
[14] organisation. We did not with this one, with this Shell
[15] shareholders' group.
[16] Q: We can see that this is dated 20th April 1998. It is a
[17] letter from you to Mark Moody-Stuart. You are referring
[18] him to a number of display advertisements in a number of
[19] national newspapers in the run-up to AGM. You can see:
[20] "Unlovable Shell? Now showing at", and you give
[21] the website. Then:
[22] "Shell Fat Cats? Now showing at", and you give
[23] the website:
[24] "These teaser adverts", you say, "are designed to
[25] attract Shell shareholders, Shell employees and Shell

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[1] without substance,
[2] "Mr Donovan has now issued a writ against Shell UK
[3] in respect of SMART. We intend to defend his claims
[4] vigorously in court."
[5] You were aware of this press release at some stage
[6] in April, were you not?
[7] A: Yes, I was.
[8] Q: Did you take exception to it?
[9] A: Yes, I did.
[10] Q: What did you not like about it?
[11] A: Because it inferred that I had brought several claims
[12] against Shell but it does not say that in fact they were
[13] settled in my favour. So anyone reading it would think
[14] that I was just a vexatious litigant who brought claims
[15] that did not have any value.
[16] Q: Am I right in thinking that you then commenced
[17] proceedings for libel against Shell?
[18] A: That is correct.
[19] Q: And those proceedings are still pending at this present
[20] time?
[21] A: That is correct.
[22] Q: Turn to page 4798. This is headed, at the top
[23] right-hand corner, "For reactive use only". Do you see
[24] that?
[25] A: I do.

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[1] station operators to our website. Please note that the
[2] website address is not currently known to anyone other
[3] than Shell and our advisors and suppliers. The entire
[4] content will be carefully reviewed within the next few
[5] days. Any comments that DJ Freeman may wish to make
[6] will be given proper consideration."
[7] Then you enclose a survey form. That happens to
[8] be the document which follows on the next page.
[9] Let me take you on, against that background, to
[10] page 4797, two pages on into the bundle. This is a
[11] press release, headed "Mr John Donovan". Do you
[12] remember this?
[13] A: I do.
[14] Q: It is dated April 1998. It makes the statement that you
[15] see there:
[16] "Over the last four years, Mr John Donovan, who
[17] has a company called Don Marketing UK Ltd, has made
[18] various claims that he or his company own rights in
[19] respect of several Shell UK forecourt promotions. His
[20] most recent allegations have been that his company
[21] invented the SMART loyalty programme and that he or his
[22] company should be compensated for its use.
[23] "The claim has been most carefully investigated
[24] and discussed in correspondence with Mr Donovan and his
[25] solicitors and Shell UK is satisfied that it is entirely

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[1] Q: Do you see the date, 21st April 1998, at the bottom?
[2] A: I do.
[3] Q: "Mr John Donovan,
[4] "Over the last four years, Mr John Donovan, who
[5] has a company called Don Marketing UK Ltd, has made
[6] various claims", and you can see there is the
[7] reiteration of words?
[8] A: Yes.
[9] Q: In the third paragraph:
[10] "In April 1994 Shell UK paid Mr Donovan for a
[11] contribution to one forecourt promotion, after it was
[12] established that he had some rights in respect of the
[13] development of the concept. However he then proceeded
[14] to claim rights to two further promotions (called Now
[15] Showing and Nintendo).
[16] "Mr Donovan's claims were settled on terms which
[17] remain confidential. However, Shell UK can confirm that
[18] the reasons for the settlement were not related to the
[19] merits of Mr Donovan's case. Rather the settlement took
[20] place because Shell UK viewed it as a waste of resources
[21] to continue with an expensive legal dispute.
[22] "Mr Donovan has recently issued a writ against
[23] Shell UK in respect of SMART. We intend to fight his
[24] claims vigorously in court."
[25] Do you see that?

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[1] A: I do.
 [2] Q: Am I right in thinking you took exception to that?
 [3] A: I believe that I did.
 [4] Q: Am I right in thinking that this is also the subject of
 [5] the defamation action?
 [6] A: I think it is certainly involved in it, yes.
 [7] Q: Turn to page 4799, which is the next page, 23rd April,
 [8] 1998. This is a letter from DJ Freeman. Do you
 [9] remember receiving this letter?
 [10] A: Yes, I do.
 [11] Q: You can see - we can summarise it - that they have
 [12] been giving further consideration to the contents of
 [13] your two websites and they give the addresses?
 [14] A: Yes.
 [15] Q: "Our correspondence to date has focused on potential
 [16] breaches of the confidentiality provision in the
 [17] [funding] Deed. However, I must draw your attention to
 [18] other obligations undertaken by you in that deed."
 [19] They refer you to the provisions of clause 3(b),
 [20] which they quote?
 [21] A: Yes.
 [22] Q: They go on to say:
 "There is no question that the effect of the
 [24] material published on the two websites has the effect of
 [25] putting you in clear breach of that covenant. Although

[1] website. You will appreciate that the Deed of 6th July
 [2] 1995 provides that if you are in breach of any of the
 [3] terms of the Deed all monies paid under that Deed are
 [4] liable to be repaid. My clients fully intend to take
 [5] steps to enforce such repayment if breaches take place."
 [6] You remember receiving that letter, do you not?
 [7] A: I do.
 [8] Q: Your response is on the next page, 4803, a letter from
 [9] you back to Mr Joseph of DJ Freeman. You are writing on
 [10] 24th April:
 [11] "Thank you for your faxed letter.
 [12] "I confirm that, as I have said all along, the
 [13] intention of myself, my father and Don Marketing is
 [14] strictly to abide by the various agreements into which
 [15] we have entered over time. We have taken legal advice
 [16] to ensure that we fully understand the true ambit of all
 [17] those observations."
 [18] You go on to say that wherever possible, you will
 [19] inform Shell in advance of any proposed course of action
 [20] "to permit you the opportunity of raising objection";
 [21] All right?
 [22] A: Yes.
 [23] Q: You remember writing this letter back. So on 24th April
 [24] you are confirming an intention to abide by the
 [25] agreement; that is the purpose of your letter primarily,

[1] you claim to seek favourable as well as unfavourable
 [2] comment, the whole tenor of the contents of the sites
 [3] can leave the reader in no doubt that the primary object
 [4] is to seek material for the purpose of denigrating
 [5] Shell.
 [6] "You have indicated in specific terms your wish
 [7] to abide by the confidentiality provisions ... I should
 [8] now be grateful to receive your specific assurance that
 [9] you also intend to honour the terms of the other
 [10] provisions of that Deed, including clause 3(b), and in
 [11] consequence that all offending material on the website
 [12] will be removed immediately."
 [13] All right?
 [14] A: Yes.
 [15] Q: You respond on page 4801, 23rd April, the next page:
 [16] "Thank you for yours ... We will carefully
 [17] consider your comments as always and will be in contact
 [18] as soon as possible.
 [19] "In the meantime, I attach a copy of a letter
 [20] faxed across to Mr Moody-Stuart."
 [21] I do not know what that was.
 [22] Page 4802, next page, 24th April, DJ Freeman go
 [23] back to you. They are saying to you, in the second
 [24] sentence:
 [25] "I await with interest your changes to the

[1] is it not?
 [2] A: Yes.
 [3] Q: Turn the page now, 4804, 24th April. Royds Treadwell
 [4] are writing to DJ Freeman. They enclose, in the first
 [5] paragraph, for information a copy of a writ, which they
 [6] have been instructed to issue against Shell. They
 [7] enclose a copy of a press release, upon which the writ
 [8] is placed. They go on about service and proceedings.
 [9] Would you look at the penultimate paragraph there? It
 [10] says:
 [11] "Would you please note that both press statements
 [12] but particularly the second are considered to be
 [13] flagrant breaches of clause 2 of the Funding Deed dated
 [14] 6th July 1995, which expressly prohibits any comment on
 [15] or disclosure to the media of anything concerning the
 [16] previous litigation between our clients, except in the
 [17] form of a joint press statement, to be agreed between
 [18] the parties. No attempt to agree the statement with our
 [19] clients was made."
 [20] Was this letter written on your instructions?
 [21] A: It must have been.
 [22] Q: Next paragraph:
 [23] "Our clients' rights in regard to these
 [24] fundamental breaches of the Funding Deed and in
 [25] particular their option to accept those breaches as

[1] having repudiated the agreement is expressly reserved
 [2] and they are considering their position as a matter of
 [3] urgency;"

[4] Is that your recollection of what was happening at
 [5] that time?

[6] A: Yes.

[7] Q: Right. Go to page 4809. This is your solicitors, Royds
 [8] Treadwell, writing to DJ Freeman. They are writing on
 [9] 28th April. Taking the substantive third paragraph, it
 [10] says:

[11] "As to your final paragraph the fact is that the
 [12] press releases are self-evidently in breach of the
 [13] Funding Deed and there is no room to argue to the
 [14] contrary. We should add that the press releases are
 [15] also in breach of the Letter of Agreement and the
 [16] Mediation Agreement.

[17] "Please take this letter as confirmation of our
 [18] client's acceptance of your clients' repudiation of the
 [19] agreements referred to above. The continuing
 [20] obligations provided for thereunder have therefore now
 [21] fallen away.

[22] "Although our clients are no longer constrained
 [23] as to what they may say about their previous dealings
 [24] with your clients, at present they have no intention of
 [25] saying anymore than is necessary to set the record

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[1] up in a diary. I am told it is a Tuesday. Does that
 [2] help?

[3] A: Not really, no, to be honest.

[4] Q: It does not help me either.

[5] A: I know it was a Saturday when we were making a lot of
 [6] changes.

[7] Q: My point is this: this letter says what you have just
 [8] seen, looking at it on 4809. I am right, am I not, in
 [9] taking the position that from 28th April 1998 onwards,
 [10] you felt free to carry on and to act in the way you
 [11] subsequently did because you no longer felt constrained
 [12] by the settlement agreements we have mentioned in this
 [13] letter?

[14] MR JUSTICE LADDIE: He has already answered that question
 [15] once. He said "Yes". Getting him to say it twice will
 [16] make it no better or worse than him saying it once.

[17] MR HOBBS: Your Lordship is absolutely correct, with
 [18] respect.

[19] The consequence of that we can see, and all I am
 [20] going to ask you to do is to look in a general way at
 [21] volume G2. Would you reach for volume G2? Actually,
 [22] what I think I can do is ask you to look at the index.

[23] A: I do not have that one yet.

[24] Q: Sorry. At the front of the bundle there ought to be an
 [25] index?

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[1] straight."

[2] Right? Do you remember this particular watershed
 [3] of 28th April, 1998?

[4] A: I remember the letter, yes.

[5] Q: It is right, is it not, that from that date onwards you
 [6] have felt free not to honour the obligations which are
 [7] set out in the Funding Deed and the subsequent
 [8] settlement agreement?

[9] A: Because I understood that Shell were in breach of it.

[10] Q: That is your evidence as to your understanding?

[11] A: Yes.

[12] Q: You are, I believe, accepting my point, which is that
 [13] from this date onwards you have felt free of the
 [14] restrictions in those settlement agreements?

[15] A: It would be helpful to know what day was the 28th
 [16] April.

[17] Q: Do you mean day of the week?

[18] A: Yes.

[19] Q: I honestly could not tell you. Does it matter?

[20] A: Only I am trying to recall what happened because I know
 [21] that on the weekend, on the Saturday, we were still
 [22] making changes to the websites, the text that was
 [23] actually going to appear, and it would be interesting to
 [24] know the date.

[25] Q: All right. I cannot help you on that. We can look it

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[1] A: There is.

[2] Q: How is yours written? Could you hold it up, so that
 [3] I can see from here? Okay. If you look down the kind
 [4] of things which are mentioned there, you will see
 [5] extracts from website, letter to Mark Moody-Stuart,
 [6] letter to Advertising Standards. You can probably read
 [7] it quicker than I can. You can see the general nature
 [8] of the stuff that is there?

[9] A: Yes.

[10] Q: The actual contents of these documents are not in
 [11] dispute, are they, between you and me?

[12] A: I would not have thought so.

[13] Q: Your position would be the same as mine, that they speak
 [14] for themselves, do they not?

[15] A: Yes.

[16] Q: All right. This material is what we have described as
 [17] the "campaigning material" and you would accept, would
 [18] you not, that this does demonstrate campaigning on your
 [19] part?

[20] A: In general terms, yes. Without reading all the ... In
 [21] general terms, yes.

[22] Q: The documents speak for themselves. I will not take up
 [23] time with you in the witness-box on them now. Could you
 [24] put G2 away, please?

[25] Now, do you remember that before you issued the

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[1] writ in the present proceedings, that is your writ
[2] against my clients, you took an assignment of rights
[3] from the company, Don Marketing Limited?
[4] A: Yes.
[5] Q: It was the purpose of that assignment, was it not, to
[6] avoid the possibility of a security for costs
[7] application against you?
[8] A: Yes, it was.
[9] Q: Because that had happened to you previously?
[10] A: Correct.
[11] Q: Was it also the purpose of that assignment to enable
[12] you, as an individual, to make an application for Legal
[13] Aid?
[14] A: No, it was not.
[15] Q: All right. The assignment itself, within the past few
[16] days, your solicitors have supplied us with a copy of a
[17] resolution, I am not sure it is in the bundles so
[18] I will hand it up to you, if I may. (Handed) Is that a
[19] document you are familiar with?
[20] A: Yes, it is.
[21] Q: Do you remember executing that document?
[22] A: Yes.
[23] Q: You said "yes". Did you add anything?
[24] A: I just wanted to check to make sure it is the one that
[25] I think it is. Yes.

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[1] A: This says "Core documents B". It does not seem to have
[2] a 6 in it.
[3] Q: Does it not?
[4] A: No.
[5] Q: That is a shame! We can hand up a document, just to
[6] confirm that what you have been handed has the
[7] page number 31 on the bottom at the front?
[8] A: Yes, it has.
[9] Q: This is the assignment that was executed by your
[10] yourself and your father, correct?
[11] A: Correct.
[12] Q: Do you see the first paragraph numbered on the first
[13] page: "The assignor has no significant assets." Do you
[14] see that?
[15] A: Yes, I do.
[16] Q: That is true, is it not?
[17] A: Yes.
[18] Q: That was true at the date of the assignment. You
[19] know - I think you do know - that the company's
[20] accounts covering this period, or very close to it, have
[21] been put in recently; you know that, do you not?
[22] A: I do.
[23] Q: It is right, is it not, that the company was insolvent
[24] at the end of its accounting year for 1998 and its
[25] accounting year for 1997?

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[1] Q: All right. Was it executed on 4th April 1998 at about
[2] 1 pm?
[3] A: Yes. It says that on there, yes.
[4] Q: Is that your recollection as well?
[5] A: Yes.
[6] Q: It is your father's signature, is it not, AE Donovan?
[7] A: Yes, it is.
[8] Q: Then it is your signature, John Donovan, at the bottom?
[9] A: It is.
[10] Q: It refers to an assignment, you see the second
[11] paragraph there?
[12] A: Yes.
[13] Q: Did you execute the assignment at the same time?
[14] A: Yes, we did, as far as I can recall, yes.
[15] Q: Where was this executed? Is this your office or your
[16] house?
[17] A: It is one and the same.
[18] Q: Is it? So you and your father executed these documents
[19] at St Andrew's Castle on that date, did you?
[20] A: I certainly did. I feel my father might have been
[21] abroad at the time and it might have been done by fax,
[22] if I have the right date.
[23] Q: Right, okay. Now, let us look at the assignment, which
[24] is in volume B at tab 6. Volume B, tab 6 you should be
[25] looking for now.

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[1] A: Probably, yes, I am not an accountant's person. You
[2] are possibly probably right, yes.
[3] Q: It had an excess of liabilities over its debts by well
[4] over 150,000 in each year, did it not?
[5] A: Right.
[6] Q: That is your recollection?
[7] A: Yes.
[8] Q: You certified - I am just confirming for the sake of
[9] the record certain matters - in here that the
[10] certificate of value, on page 35, stamped page 35, that
[11] the consideration for it does not exceed in the
[12] aggregate the figure of £60,000; you remember that?
[13] A: Yes.
[14] Q: You have always taken the view, have you not, and you
[15] have said so publicly, that your claim against Shell is
[16] worth millions?
[17] A: Potentially.
[18] Q: That is the basis -
[19] A: For publicity purposes, yes.
[20] Q: You mean you do not believe it in your heart of hearts?
[21] A: I really do not know the answer to that one.
[22] Q: Right. Now, the contents of the document are
[23] self-explanatory. I will not spend more time on that
[24] with you. Can I just ask you this: Mr Sotherton
[25] I understand is to be a witness in these proceedings?

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[1] A: Yes,
[2] Q: Do you remember that he became a party to the Letter of
[3] Settlement Agreement which is in this same volume, which
[4] you should have open at tab 4?
[5] A: I do,
[6] Q: Let us have a look at that, tab 4,
[7] A: Yes, I have that,
[8] Q: Right, Do you see that in the heading to that letter of
[9] agreement which is immediately behind the tab, there is
[10] a list of people between whom the agreement is made: Don
[11] Marketing, Shell, John Donovan, Alfred Donovan, Roger
[12] Sotherton, Do you remember why he became a party?
[13] A: Yes, I do,
[14] Q: That reason, in brief, was because he was claiming that
[15] he had an agreement with you to share part of the
[16] proceeds of that litigation?
[17] A: Correct,
[18] Q: It is the fact, is it not, that he has an agreement
[19] which would extend also to the proceeds of this
[20] litigation?
[21] A: No,
[22] Q: Can you just look at a letter which I now wish to hand
[23] to you? (Handed) Is this the letter you have seen
[24] before?
[25] A: If I could just read it for a second, (Pause)

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[1] this litigation?
[2] A: No, It goes on to mention the specific promotions that
[3] he was talking about, Of course, you would have to ask
[4] him, My understanding is that he accepts that this was
[5] my idea from way back when and that I claim the rights
[6] to it, I do not think that he is making any claim on
[7] that at all, You would have to ask him that,
[8] Q: You say I would have to ask him, Do you mean that you
[9] have had no discussions with Mr Sotherton about his
[10] position in this action?
[11] A: It has always been my understanding that he has no claim
[12] at all in regard to this action,
[13] Q: Have you discussed the matter?
[14] A: No, I do not think we have,
[15] Q: You have ignored it?
[16] A: He has never raised it because I expect, or I am sure he
[17] knows that it was my concept, it was my idea that came
[18] off the Megamatch version,
[19] Q: The position is, is it not, that you were a little
[20] irritated, not to put too fine a point on it, in 1996 in
[21] March, he had solicitors coming against you for
[22] 17,65 per cent, because, apart from anything else, this
[23] held up the settlement, did it not?
[24] A: Yes, it was a very awkward situation; true,
[25] Q: Is it your evidence to my Lord that even though he is a

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[1] That was in relation to the promotions that are
[2] named in here,
[3] Q: Named in where?
[4] A: In this letter,
[5] Q: Just hold on, Look at the second paragraph on the first
[6] page: "We are instructed", do you have that?
[7] A: Yes,
[8] Q: "... that an independent witness was present when our
[9] client agreed terms with Mr John Donovan, a director of
[10] Don Marketing, that our client would provide on a
[11] speculative basis his time and expertise in the
[12] preparation and presentation and promotion of proposals
[13] to Shell, In return, our client would be entitled to an
[14] agency commission of 17,65 per cent on any concept fee,
[15] commission and any other fees received by Don Marketing
[16] from Shell arising from the presentations that John
[17] Donovan and our client might make to Shell's National
[18] Promotions Manager, Such presentations were made at
[19] Shell-Mex House in 1992 on 12th May, 4th June and 24th
[20] November,"
[21] Do you see the significant of those dates, 12th
[22] May 1992 and 24th November 1992?
[23] A: I do, yes,
[24] Q: It is the case, is it not, that Mr Sotherton wants, if
[25] I can put it in the vernacular, a piece of the action in

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[1] witness for you in these proceedings and even though you
[2] must, I think, have prepared your letter before action
[3] with some degree of discussion with him, that you have
[4] never discussed this topic?
[5] A: I do not think we have, no,
[6] Q: You say "you do not think"?
[7] A: I do not think we have, I have no recollection that
[8] that has been discussed because I think that he knows
[9] that it was my idea, right from the beginning,
[10] Q: When you did you last see Mr Sotherton?
[11] A: I would guess a couple of weeks ago,
[12] Q: How frequently have you seen him in the last two years?
[13] A: I would say probably on something like a two-monthly
[14] basis, or three-monthly basis,
[15] Q: Did you sit down together to prepare your respective
[16] witness statements?
[17] A: We certainly discussed the presentations that had been
[18] made to Shell and it helped me to remember what had
[19] happened and vice, versa I am sure,
[20] Q: How long did that exercise take, in fact, when you were
[21] sitting down together? Was it over several days,
[22] several weeks; how long?
[23] A: No, it would be a day at a time,
[24] Q: Spread over how long a period?
[25] A: Spread over a couple of hours, I would guess,

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[1] Q: The letter that we just looked at, which you still have
[2] in front of you -

[3] A: I have,

[4] Q: - refers to concepts put in, put forward in 1992 on
[5] 12th May, 4th June and 24th November; do you see that?

[6] A: Yes, I do.

[7] Q: Is it not part of your case that the multibrand loyalty
[8] scheme was in fact put forward on 12th May and 24th
[9] November?

[10] A: It is, but this letter goes on to specify the promotions
[11] that he was talking about.

[12] Q: It does, because that was the subject-matter of your
[13] impending settlement with Shell at that time, in respect
[14] of which he was seeking money. That is why it refers to
[15] those specific things because that is what was then
[16] pending?

[17] A: As I say, my understanding is he has no claim in respect
[18] of this concept but you would have to ask him that.

[19] Q: Would it come as a surprise to you then if he does make
[20] a claim?

[21] A: Yes, it would.

[22] Q: I want to discuss one small general matter with you
[23] before going back to documents. Can we just confirm, so
[24] that the position is clear, that - do you remember the
[25] discovery stages of this procedure, in this litigation,

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[1] obtain his agreement to act as a witness.

[2] Q: There is more to it than that, is there not? Did you
[3] not have a long discussion with him and did you not in
[4] fact share your grievance with him?

[5] A: Yes, I probably did.

[6] Q: Did you not in fact try to see whether he would support
[7] you with evidence which you could use against
[8] Mr Lazenby?

[9] A: I asked him whether he would be prepared to be a
[10] witness. He was very upset with the documents that he
[11] had seen that involved his situation with Shell and

[12] Mr Lazenby, and I asked him whether he would be prepared
[13] to be a witness and he prepared a witness statement
[14] following that.

[15] Q: Did you sit down with him and prepare that statement
[16] with him?

[17] A: No, I did not.

[18] Q: Did you discuss the contents of that statement with him?

[19] A: No, I did not.

[20] Q: I rather understood from his statement that in fact what
[21] he put into it reflects what you may have said to him in
[22] relation to some of the documents you were giving to
[23] him?

[24] A: It would reflect certainly the documents that I sent to
[25] him, yes.

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[1] where each side produces its documents?

[2] A: Yes.

[3] Q: It is right, is it not, that you were the only person on
[4] behalf of the plaintiff, in other words, you yourself
[5] came to DJ Freeman's offices and inspected the files?

[6] A: That is correct.

[7] Q: And that nobody else did?

[8] A: As far as I know.

[9] Q: And that, in fact, there was a large number of files
[10] there on discovery and you did not actually succeed in
[11] inspecting all of them, did you?

[12] A: I inspected every page.

[13] Q: Did you?

[14] A: I certainly thought that I did. There was a huge volume
[15] of documents, tens of thousands of pages, I would guess.

[16] Q: You made your selection from those documents and your
[17] selection, to a greater or lesser extent, appears in
[18] some of the trial bundles here?

[19] A: Yes.

[20] Q: You did two things that I know of: you took certain
[21] discovery documents to Mr McMahon, did you not?

[22] A: I sent them to him via fax or mail. I think I faxed
[23] most of it to him.

[24] Q: What was the purpose of doing that?

[25] A: So that he could see what had happened and hopefully to

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[1] Q: How did you liaise with him, entirely in writing?

[2] A: By telephone and by sending him documents by fax. I may
[3] have sent some stuff by mail.

[4] Q: How much did you send him in terms of documents?

[5] A: All of the documents that were relevant to Concept
[6] Systems. I may have sent him a copy of the proposal
[7] that I put to Shell; I am not sure about that.

[8] Q: Did you speak to him face-to-face at any stage?

[9] A: Yes, I went on Saturday to collect the statement from
[10] him at his restaurant in Twickenham, I think it was.

[11] Q: Is it the same story with Armstrong-Holmes?

[12] A: No, Mr Armstrong-Holmes, I have not met him, I have
[13] only spoken to him by telephone. I did supply documents
[14] to him by fax, which were relevant to his situation with
[15] Mr Lazenby.

[16] Q: It did not happen out of the blue, of course; you must
[17] have made contact with him?

[18] A: No, this happened because I found documents in discovery
[19] that were of interest to me because it suggested that
[20] other people had similar problems and I tried to trace
[21] the people, unsuccessfully, and eventually I instructed
[22] an enquiry agent, first of all, for Mr Armstrong-Holmes,
[23] because I did not know whether that would be successful
[24] or not, and after he tracked down Mr Armstrong-Holmes
[25] I then, about a week later I think it was, asked him

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[1] whether he could trace Mr McMahon.
[2] Q: Were there other people beyond Mr McMahon and
[3] Mr Armstrong-Holmes that you sought to get support from
[4] in a similar way?
[5] A: No, I did speak to Mr Peter Jones of Powerpoints at some
[6] stage, from the documents.
[7] Q: I did not quite understand that.
[8] A: I think his name is Mr Peter Jones. I think he was a
[9] managing director of Geoff Howe & Associates and I think
[10] they put the Powerpoints' proposal to Shell.
[11] Q: Right. Your interest in speaking to those people was
[12] because you thought that they may have a sense of
[13] grievance against Mr Andrew Lazenby, correct?
[14] A: I thought that they could be a provider of similar fact
[15] evidence involving Mr Lazenby and Shell.
[16] Q: Right. I want to move to another matter now, so if you
[17] would like to clear your desk and have volume E1 in
[18] front of you for the moment, please.
[19] A: Right.
[20] Q: Page 12, please.
[21] A: This is E1?
[22] Q: E1, page 12.
[23] A: I have that.
[24] Q: Do you recognise this document?
[25] A: I do.

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[1] Q: Your proposal was that the idea should be run again but
[2] you had got a way of indicating - no, you had a
[3] proposal to put forward that it required no skill of any
[4] kind to be involved in the game?
[5] A: Correct, yes.
[6] Q: That was to do with Lotteries Act considerations,
[7] I think?
[8] A: Yes, it was.
[9] Q: As part of the proposal, I would like you just, please,
[10] to look at page 19. Do you see that is headed "Joint
[11] promotion"?
[12] A: Yes.
[13] Q: "Shell may also wish to consider joining together with
[14] other non-competing brands/outlets for an initial or
[15] subsequent promotion in respect of a blockbuster Make
[16] Money game, where all half notes issued would be
[17] interchangeable.
[18] "In other words, a half note issued at a Shell
[19] site might match up with a half note of the same value
[20] issued by a grocery outlet. We might even be able to
[21] involve a daily newspaper in the promotion."
[22] That is Megamatch, actually, is it not?
[23] A: Yes, it is what is termed as Megamatch, yes.
[24] Q: It is a loyalty village - of course you were in
[25] court - in which there are interchangeable

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[1] Q: This is a 1981 proposal. Was it actually the first you
[2] put forward, "you" meaning your company, that you put
[3] forward to Shell; was this the first ever?
[4] A: I think that I corresponded with someone there
[5] previously, I think back as far as 1979.
[6] Q: You can see you have what I have come to recognise as a
[7] familiar front page on page 13, do you see that, dated
[8] 29th May 1981?
[9] A: Right.
[10] Q: Turning in, glance at 15 and go on to 16.
[11] A: Right.
[12] Q: Look at the bottom paragraph on 16. It says:
[13] "Consequently we believe the time is right for
[14] Shell to introduce a new Make Money promotion."
[15] Do you see that, page 16, the last part of the
[16] text?
[17] A: Yes, I can.
[18] Q: What is happening here is that there is a proposal by
[19] you for a re-run of Make Money. Make Money was a very
[20] successful game from the 1960s, which involved matching
[21] halves?
[22] A: Yes.
[23] Q: And you had to answer a question correctly as well to
[24] win a prize?
[25] A: Correct.

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[1] opportunities for winning prizes based on matching
[2] halves?
[3] A: Correct.
[4] Q: This document goes on and on page 21 there are
[5] manuscript notes at the bottom?
[6] A: Right.
[7] Q: Those manuscript notes say:
[8] "Paul insists we give joint rights if they are to
[9] contribute" - that is Paul King, is it not?
[10] A: That would be.
[11] Q: "... to contribute to development. Shell will not run
[12] MM without us and Don not to offer to other companies.
[13] Paul to confirm in writing for formal reply."
[14] A: Correct, yes.
[15] Q: Turn the page to page 22. Paul King writes to you?
[16] A: Yes.
[17] Q: Really it is the second paragraph:
[18] "I agree to pay you a figure of up to £500 to
[19] cover your artwork costs on the understanding that this
[20] promotional idea remains the sole right of Don
[21] Marketing/Shell UK Oil until we agree mutually to differ
[22] on this arrangement."
[23] Yes?
[24] A: Yes.
[25] Q: That is your recollection?

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[1] A: Yes.
 [2] Q: In fact, the next letter here, on page 23, which
 [3] immediately follows, says in the first main
 [4] paragraph that you are confirming that position -
 [5] A: Yes.
 [6] Q: - just to refresh your memory on that?
 [7] A: Yes.
 [8] Q: There are other papers in here, perhaps I will just show
 [9] you page 35.
 [10] A: Right.
 [11] Q: What happened here, we are into 1983, as you see from
 [12] the top of the page?
 [13] A: Yes.
 [14] Q: Let us see if we agree on this and let us see if I have
 [15] understood it correctly. Although your proposal was put
 [16] forward in 1981, you came to an understanding.
 [17] A: Yes.
 [18] Q: Nothing happened with it, in any way, shape or form,
 [19] until 1983 or 1984, getting into that period?
 [20] A: I think there was a long interval. I think you saw that
 [21] we supplied a counsel's opinion.
 [22] Q: You did. Mr Jarworth Finney(?).
 [23] A: That was soon after the presentation, I think.
 [24] Q: Anyway, events did not get moving at ground level -
 [25] A: No.

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[1] core bundle B. Does that make any sense at all? Every
 [2] time you hand another one of these documents up it is
 [3] referred to on the transcript as "Here is another
 [4] document"; there is no reference then to where it is
 [5] going to be found. No doubt when this reaches the
 [6] European Court of Human Rights, they would like to know
 [7] what the hell is going on.
 [8] MR HOBBS: I am terribly sorry, my Lord.
 [9] MR JUSTICE LADDIE: Why can we not have a bundle for
 [10] hand-ups and some way of actually cross-referring the
 [11] documents you are handing up to the transcript?
 [12] MR HOBBS: There is no reason why we cannot have a
 [13] bundle X. We, as the defendants, are not responsible
 [14] for the bundling. It is just that Core B became the
 [15] most convenient one.
 [16] MR JUSTICE LADDIE: The only person so far who is handing up
 [17] documents is you. Why should Mr Cox be preparing for
 [18] that? You are handing up documents. Right, have a
 [19] bundle X. May I suggest that over the adjournment a
 [20] bundle X is prepared with dividers in and somebody had
 [21] better produce an index so we know what is what.
 [22] MR HOBBS: Yes. We actually asked for these documents to be
 [23] in the bundles and we were refused the opportunity to
 [24] have them.
 [25] MR JUSTICE LADDIE: I do not want to get involved in a

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[1] Q: - until, let us say into 1984?
 [2] A: About this time, yes, November 1983. Paul King
 [3] contacted me about that time. It might have been
 [4] October.
 [5] Q: All right. I would like you to look at the footnote on
 [6] the next page, page 36.
 [7] A: Right.
 [8] Q: There is a confirmation of proprietary rights. It is as
 [9] per Shell letter and their reply and those are the two
 [10] letters we just looked at?
 [11] A: Yes.
 [12] Q: Then there are two invoices - possibly two. 37 and 38
 [13] are the invoices reflecting money up-front for the
 [14] running of the scheme?
 [15] A: Right.
 [16] Q: We have just agreed that this was, insofar as it was
 [17] described in joint terms as a joint promotion,
 [18] essentially Megamatch. You know, do you not, that there
 [19] was a dispute between yourself and Shell in 1984
 [20] relating to the Make Money concept?
 [21] A: Yes.
 [22] Q: I am going to hand you now a letter of 18th March 1994
 [23] from your solicitors in that connection.
 [24] MR JUSTICE LADDIE: Mr Hobbs, so far I have just been
 [25] slipping all of these indiscriminately in the back of

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[1] bitching campaign between the solicitors. I just want
 [2] the papers to be in an order where they can be
 [3] considered by the Court of Appeal, or wherever else it
 [4] goes. Right.
 [5] MR HOBBS: There should be in front of you a letter from
 [6] Royds Treadwell, your solicitors, dated 18th March 1994?
 [7] A: I have that.
 [8] Q: Do you remember this letter?
 [9] A: Yes, I do.
 [10] Q: This is your claim - I say "your claim", it is Don
 [11] Marketing UK Limited's claim, re Make Money?
 [12] A: Yes.
 [13] Q: There has been some correspondence. This letter says:
 [14] "Dealing with the points you have raised regarding
 [15] the Make Money promotion we have the following
 [16] observations.
 [17] "The penultimate paragraph on the first page of
 [18] your letter is plainly wrong. We enclose for your
 [19] information copies of the following."
 [20] There is A to F. Those are the documents that
 [21] I just mentioned and took you to in the transcript.
 [22] Those are the documents.
 [23] A: Yes.
 [24] Q: It goes on in paragraph 2 to say:
 [25] "As to the outline sent at 1A above you will

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[1] note:
 [2] (a) the notice on the title page to the effect
 [3] that DM 'retain full intellectual proprietary rights' to
 [4] the proposal contained in the document."
 [5] So that is the outline at 1A?
 [6] A: Yes.
 [7] Q: "(b) that our clients' standard terms and conditions
 [8] were expressly incorporated."
 [9] A: Yes.
 [10] Q: There is a reference to a new Make Money promotion and
 [11] there is a reference to a novel Make Money game. There
 [12] are handwritten notes and then (f) says:
 [13] "At page 4 DM suggests running the Make Money
 [14] promotion on a joint basis, possibly involving a daily
 [15] newspaper."
 [16] (g) is a reference to our new Make Money game, and
 [17] so on.
 [18] A: Yes.
 [19] Q: There is a row going on between the parties and between
 [20] the solicitors about the concept and it is a row which
 [21] is going on around about that outline, which we looked
 [22] at first of all from 29th May 1981. Do you remember
 [23] that?
 [24] A: Yes.
 [25] Q: Do you remember that a writ was issued in these

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[1] Q: It is the fact that the compromise agreement released to
 [2] Shell UK all rights in the concept described in that
 [3] 1981 document, did it not?
 [4] A: I can see what you are getting at now and I regret that
 [5] earlier on when you said that it was the same as
 [6] Megamatch, that it was Megamatch. It released the Make
 [7] Money game, in my understanding, where it was a
 [8] Shell-only scheme.
 [9] Q: The 1981 document, on the joint portion of it, referred
 [10] to what was indeed Megamatch. That is the Megamatch
 [11] concept, is it not?
 [12] A: No, it was not. It was the Make Money concept involving
 [13] Shell only. There was a mention of that. I would have
 [14] to go back to it, as a possible option or alternative to
 [15] that scheme.
 [16] Q: Do you want to see the 1981 document again?
 [17] A: Please.
 [18] Q: You do. E1.
 [19] A: I have it.
 [20] MR COX: My Lord, I should just mention that this takes the
 [21] claimant somewhat by surprise because it has never been
 [22] adverted to in any pleadings, as far as I can recall, or
 [23] in any other shape or form until today. It may be that
 [24] I can discuss that be Mr Hobbs.
 [25] MR HOBBS: Would you look at E1, page 19?

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[1] proceedings on 6th April 1994?
 [2] A: That sounds correct, yes.
 [3] Q: I did not make up the date.
 [4] A: I accept that.
 [5] Q: Do you remember that the proceedings were then settled?
 [6] A: Yes, I do.
 [7] Q: Could you take volume E9A? If you would not mind please
 [8] turning to page 3988 in E9A.
 [9] A: I have that.
 [10] Q: This is Shell's then solicitors, Mackrell Turner
 [11] Garrett, 8th April 1994:
 [12] "We confirm settlement in the following terms:
 [13] "Our clients will pay to yours the sum of £60,000
 [14] plus VAT in settlement of all causes of action that your
 [15] client may have against ours in connection with the
 [16] concept known as 'Make Money' or in relation to the
 [17] subject-matter of the proceedings issued out of the High
 [18] Court on 6th April, action number 1927.
 [19] "Your client releases the rights to the concept
 [20] known as 'Make Money' to our client in perpetuity."
 [21] A: Correct, yes.
 [22] Q: VAT receipt in respect of £60,000 and then if you turn
 [23] the page, there is the VAT invoice that was raised by
 [24] Don Marketing?
 [25] A: Yes.

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[1] A: I have that.
 [2] Q: "Shell may also wish to consider joining together with
 [3] other non-competing brands/outlets for an initial or
 [4] subsequent promotion in respect of a blockbuster Make
 [5] Money game, where all half notes issued would be
 [6] interchangeable."
 [7] A: Yes.
 [8] Q: That is a common promotional currency, is it not?
 [9] A: Yes.
 [10] Q: "Blockbuster" actually translates, jargon-wise, into
 [11] "mega", does it not?
 [12] A: It could do, yes.
 [13] Q: It did do, did it not?
 [14] A: Yes.
 [15] Q: You are not really in any doubt about this, that
 [16] Megamatch is essentially what is described here, are
 [17] you? You are not really in any doubt about it?
 [18] A: I would have to read all of this but what we were
 [19] putting forward was the new Make Money game, as just a
 [20] matching half Shell-alone game. Then we put this in as
 [21] one possible option on it. I am not a lawyer and it
 [22] certainly was not my intention for the rights to
 [23] Megamatch to go along with Make Money.
 [24] Q: Could you just keep open that page 19 that we have
 [25] there, please?

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[1] A: Yes.
[2] Q: I am sorry to ask you to do this, but would you reach
[3] for another file, which is E3?
[4] A: Yes. I have it.
[5] Q: Would you mind, in that volume, turning to page 997? Do
[6] you recognise this document at 997?
[7] A: I do.
[8] Q: This is a proposal, F83, of 27th May 1992. You are
[9] presenting it to Woolworths; right?
[10] A: Yes.
[11] Q: This is a Megamatch proposal. Would you turn to
[12] page 999?
[13] A: I have that.
[14] Q: There is an introduction:
[15] "Genuine big ideas for promotional activity are a
[16] rare occurrence. Don Marketing is therefore pleased to
[17] present an exciting game promotion concept for 1993
[18] which can truly be described as a big idea, the largest
[19] scale game ever seen in the UK.
[20] "The game would involve several major retailers
[21] operating in complementary but non-competitive retail
[22] trade, each with national representation, participating
[23] at the same time in the same epic traffic building
[24] promotion, Megamatch.
[25] "The game format would basically be the same as

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[1] promotion basis in that letter. Do you remember? Do
[2] you want to see it again, 18th March 1994? It is the
[3] one I handed up to you.
[4] A: Right.
[5] Q: We went through this.
[6] A: We did.
[7] Q: Just refresh your memory. Item 1 on the first
[8] page lists documents A to F. The first one is the
[9] outline proposal that you probably still have open. The
[10] second one, paragraph 2, goes running through several
[11] subparagraphs (a) to (g) and they specifically refer,
[12] (f), to the Make Money promotion on a joint basis
[13] involving a daily newspaper?
[14] A: Yes.
[15] Q: That is the contours of the dispute between yourself and
[16] Shell at that stage and it was compromised on the basis
[17] of the document that we looked at; correct?
[18] A: As far as I was concerned, and I am not a lawyer,
[19] I thought we were settling the Make Money game, not
[20] Megamatch. I think that is fairly obvious from the
[21] subsequent correspondence that there has been about
[22] Megamatch in the proposals that I put up. I had no idea
[23] that it could be construed that we had also settled
[24] Megamatch as well as Make Money.
[25] Q: You did raise that invoice. Perhaps we should look at

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[1] was adopted for the two most successful games ever
[2] conducted in the UK, Shell Make Money in 1967 and Shell
[3] Make Money again in 1984. It would use the same
[4] matching halves technique with game pieces issued on a
[5] no purchase necessary, one per visit basis. However, in
[6] Megamatch the half notes would be universally
[7] interchangeable between the outlets of all partners in
[8] the promotion, thus forming a common game currency.
[9] This would stimulate cross-fertilisation as a half note
[10] collected from a petrol station might match up with a
[11] half note of the same prize denomination collected from
[12] a participating store or restaurant."
[13] Yes?
[14] A: Yes, correct.
[15] Q: There is no difference, is there, between what is on 999
[16] and what is on page 19?
[17] A: No. I certainly mentioned what was to become Megamatch
[18] in this proposal but, as far as I was concerned, Make
[19] Money was just the matching halves game running on its
[20] own and Megamatch was involving lots of different
[21] retailers.
[22] Q: That was why, you see, I took you to that letter of 18th
[23] March that I handed up because your solicitors, relative
[24] to the writ that was issued against my clients, referred
[25] to that proposal and referred specifically to the joint

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[1] it again. It is E9A, 3988.
[2] A: 3988.
[3] Q: That is the first of the two documents I showed you.
[4] A: Yes.
[5] Q: "We confirm settlement in the following terms."
[6] Look at 1:
[7] "Our clients will pay to yours the sum of £60,000
[8] plus VAT in settlement of all causes of action that your
[9] client may have against ours in connection with the
[10] concept known as 'Make Money' or in relation to the
[11] subject-matter of the proceedings ...
[12] "Your client releases the rights to the concept
[13] known as 'Make Money' to our client in perpetuity."
[14] Then there is the invoice which your company
[15] raised for £60,000 plus VAT?
[16] A: Yes.
[17] Q: There we are. I have shown you those documents now.
[18] Could you close your files up and put them back on the
[19] rack? Actually, keep E1. I beg your pardon, I need E2;
[20] I am sorry.
[21] MR JUSTICE LADDIE: Do you not need E1, Mr Hobbs? Is it E1,
[22] E2 or both?
[23] MR HOBBS: Could your Lordship give me a second? I am all
[24] over the place at the moment. E2, please. In E2, if
[25] you could turn to page 952.

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[1] A: I have that.
[2] Q: Do you remember this letter?
[3] A: I do.
[4] Q: This was an approach by you to Mr Lazenby in his
[5] capacity as National Promotions Manager?
[6] A: Yes, correct.
[7] Q: This led to the meeting of 12th May 1992 -
[8] A: It did.
[9] Q: - 13th May 1992, yes? That meeting, which subsequently
[10] takes place in May, is the first meeting between
[11] yourself and Andrew Lazenby at Shell?
[12] A: That is correct, yes.
[13] Q: In this letter, you are basically pitching for the
[14] opportunity to meet him and to discuss some proposals
[15] for marketing and game opportunities in 1993 and 1994?
[16] A: Correct, yes.
[17] Q: Would you go on in the same bundle to page 973?
[18] (3.00 pm)
[19] Do you see that this document is a proposal which
[20] is dated 12th May 1992?
[21] A: I do.
[22] Q: This was a proposal which you put forward to Andrew
[23] Lazenby and which you subsequently discussed with him at
[24] a meeting on 13th May?
[25] A: 12th May, is it not?

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[1] A: Reasonably well.
[2] Q: All right. How long did it last?
[3] A: I would guess about an hour.
[4] Q: Where did it take place?
[5] A: At Shell-Mex House.
[6] Q: Do you remember whether it was a meeting room or an
[7] office that you met him in?
[8] A: I guess it was a meeting room. I think it was a meeting
[9] room, yes.
[10] Q: You say that on your side there was Roger Sotherton and
[11] yourself?
[12] A: That is correct.
[13] Q: Did you, before you went there, discuss with
[14] Roger Sotherton any matters of multibrand loyalty
[15] schemes?
[16] A: No.
[17] Q: How did the subject of multibrand loyalty schemes,
[18] according to you, come up in the conversation?
[19] A: It came up after we had been discussing the Megamatch
[20] game and that Andrew Lazenby said that his management
[21] were concerned about competitions, what he called games
[22] competitions. Roger Sotherton then raised the subject
[23] of the loyalty scheme.
[24] Q: What do you say that Roger Sotherton said?
[25] A: He pointed out that there was an alternative execution

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[1] Q: I beg your pardon. You discussed it the same day?
[2] A: Yes, we did. We took the proposals with us.
[3] Q: Thank you. You did not send it to him in advance?
[4] A: No.
[5] Q: I see. Let us just look at the contents of the
[6] document, ignoring for the moment the manuscript.
[7] Page 974, your introduction makes it clear, in the first
[8] paragraph, that you are presenting two alternative
[9] promotional game formats for consideration by Shell?
[10] A: Yes.
[11] Q: Turn to page 975, the first game option, it says, and
[12] that is Megamatch, yes?
[13] A: Yes.
[14] Q: We were just discussing the match, that is what that is?
[15] A: Yes.
[16] Q: You have a graphic on page 976?
[17] A: Yes.
[18] Q: That is a kind of Megamatch graphic, showing a brewery
[19] brand, a petrol brand and a store brand?
[20] A: Correct.
[21] Q: Your second proposal is on 977 for Shell Treble Chance,
[22] and you have a graphic for that on 978?
[23] A: Yes.
[24] Q: Those were your two proposals. How well do you remember
[25] the meeting of 12th May 1992?

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[1] of this multibrand principle, a consortium of retailers
[2] led by Shell, and we went into discussing the history of
[3] it, the fact that we had done some research on the
[4] Collect and Select scheme, that we had then put up a
[5] proposal to Shell, that Shell had taken an option on it
[6] after we had had discussions with Sainsbury's.
[7] Q: Are you saying you mentioned an option at that meeting?
[8] A: I think we did, yes.
[9] Q: Are you saying you mentioned Sainsbury's at that
[10] meeting?
[11] A: I think we did. I would have to check my statement but
[12] I think that is the case.
[13] Q: I would like you to do it from memory. How long then
[14] out of the one hour do you think was devoted to the
[15] subject of the multibrand loyalty proposal?
[16] A: I guess about ten minutes or so.
[17] Q: Ten minutes out of an hour?
[18] A: Yes. Most of the time was spent focused on the other
[19] two proposals.
[20] Q: Was this ten minutes at the back end of the one hour,
[21] the front end or -
[22] A: No, it was mid-way because it was after - I think we
[23] discussed Megamatch first and then this came in as a
[24] result of that discussion.
[25] Q: So you are saying that Mr Lazenby was told by Roger

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[1] Sotherton that Shell already held an option on this?
[2] A: Yes.
[3] Q: Did you discuss the circumstances in which the option
[4] was supposed to have been given?
[5] A: No, I do not think we did.
[6] Q: You did not?
[7] A: I do not think so, no.
[8] Q: How did Sainsbury's name come into this then?
[9] A: Because we explained that Sainsbury's had responded to a
[10] letter that we had sent to them on another subject and
[11] that we had then sent them details of that particular
[12] game, which I think was a Disneytime promotion, and that
[13] we had also asked Stuart Carson whether it was okay to
[14] discuss Megamatch with Sainsbury's because Sainsbury's
[15] previously had never been interested at all in any
[16] promotional activity that we had ever put up to them.
[17] Q: Did you mention that there was a letter to Paul King?
[18] A: I cannot remember the detail. I remember that we
[19] mentioned the option. I cannot remember the detail of
[20] that. We certainly mentioned Sainsbury's.
[21] Q: Who did the talking on this topic: yourself or Sotherton
[22] or both?
[23] A: I think mainly Roger Sotherton did.
[24] Q: Did you sit silently by?
[25] A: No, I probably made some comment into it.

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[1] years where people had to collect up stamps and we did
[2] some research on it a couple of times and it showed that
[3] people were fed up with the amount of time it took even
[4] to collect enough stamps for a small item. Therefore,
[5] that was a weakness in all of the schemes that were
[6] running at the time. We pointed this out to Paul King.
[7] I said that we were not a research company and that
[8] Shell should carry out its own research, and they did.
[9] Their findings duplicated ours and, therefore, this is
[10] how we started looking at how we could get over this
[11] basic failing with previous loyalty schemes; the time it
[12] took to save up, collect enough stamps or tokens to get
[13] a particular item.
[14] Q: I need an indication from you, please, as to how
[15] interested you perceived Mr Lazenby to be in this
[16] concept; very interested, scarcely interested, what
[17] degree of interest do you attribute to him, based on
[18] your observation?
[19] A: The interest was not as much as he had shown in - the
[20] Megamatch game was the most interesting to him.
[21] Q: How little, relatively speaking, was his interest in
[22] this proposal, according to you?
[23] A: He was interested but not to the degree of saying, "Can
[24] we have another meeting about it and can you put up a
[25] proposal to me?". He said that he would - I told him

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[1] Q: What are you saying Mr Lazenby's contribution to these
[2] exchanges was?
[3] A: That he was interested but he said that at that time
[4] they were thinking about short-term activity.
[5] Q: Did he express interest or surprise at the fact that
[6] Shell was supposed to have an option on it already?
[7] A: No. No.
[8] Q: Did he ask you for further information about the
[9] Sainsbury's communication on the option?
[10] A: He did not, no.
[11] Q: Did he show any interest in what you say you told him?
[12] A: Yes, he showed some interest, but the timing was not
[13] right for that.
[14] Q: What do you mean by "some interest"?
[15] A: Some interest in that he did not say, "Can we move on
[16] because I do not really need to know about that?". He
[17] was interested in what we were saying.
[18] Q: How did he manifest his interest to you?
[19] A: With the questions that he asked.
[20] Q: What questions did he ask?
[21] A: About the research that we had carried out.
[22] Q: What research was that?
[23] A: That was in respect of the Collect and Select scheme.
[24] Q: What relevance does that have -
[25] A: Because it was a loyalty scheme run by Shell for some

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[1] that we had already given the proposal to Paul King. He
[2] said he would get a copy from him.
[3] Q: A copy of what?
[4] A: Of the proposal.
[5] Q: What proposal?
[6] A: The proposal that we put to Paul King back in 1989.
[7] Q: Concept Four?
[8] A: Concept Four.
[9] Q: Was there any discussion about those two letters of 24th
[10] July 1990?
[11] A: I do not think so. I think we discussed Sainsbury's.
[12] We said that Shell had taken an option on the scheme but
[13] I do not think it went any further, or into any detail
[14] at all about the letters.
[15] Q: Even on your own view of this meeting, you did not
[16] expect this topic to arise, did you?
[17] A: I was a bit annoyed at it.
[18] Q: Pardon?
[19] A: I was a bit annoyed that it had been raised.
[20] Q: Why were you annoyed?
[21] A: Because I do not consider that it is professional to
[22] start talking about other schemes you put into
[23] proposals.
[24] Q: From the perspective of annoyance, you would have wanted
[25] Roger Sotherton to not say too much about this?

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[1] A: Once he had started, there was not much I could do but
[2] to support him. I was not particularly pleased about it
[3] because, as I say, if we are going to make a proposal
[4] I like to be prepared to do it properly.
[5] Q: Which you were not at all prepared to do it properly in
[6] relation to that?
[7] A: No, we were not.
[8] Q: Was your perception of Mr Lazenby's position that he was
[9] not particularly interested in pursuing this concept?
[10] A: Not to the extent of - no, he did not say, "Can we
[11] arrange a meeting and concentrate on this proposal? Can
[12] you supply us with a worked-up proposal?" No.
[13] Q: He was not interested in knowing all about it?
[14] A: He was interested but the degree of interest was not as
[15] great as it was in the Megamatch scheme. That was his
[16] prime interest. He wanted to know how soon it could be
[17] done.
[18] Q: Do you have the bundle open in front of you, page 980?
[19] A: Yes, I have.
[20] Q: Whose handwriting is that?
[21] A: Roger Sotherton's handwriting.
[22] Q: Whose handwriting is it on the preceding page?
[23] A: That is Roger Sotherton's handwriting, I think.
[24] Q: Page 975, whose handwriting is that, top and bottom?
[25] A: That is Roger Sotherton's handwriting.

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[1] that follows the page we were last looking at.
[2] A: 980/A?
[3] Q: Yes, it comes after 980.
[4] A: I see that.
[5] Q: Have you read this document?
[6] A: I have.
[7] Q: Do you accept that the topics which he identifies, or
[8] which you can see are discussed in this document, were
[9] discussed between you at that meeting?
[10] (3.15 pm)
[11] A: Yes.
[12] Q: Did you see Andrew Lazenby taking notes at that meeting?
[13] A: No, I do not recall that.
[14] Q: You do not deny that he took them?
[15] A: I do not deny it. I cannot recall him taking any notes.
[16] Q: Is that because you do not actually have a good
[17] recollection of the meeting?
[18] A: I think I have a reasonable recollection of the meeting,
[19] but I just do not remember him taking notes, no.
[20] Q: Look on page 980/C. He has written three actions points
[21] at the bottom on 980/C:
[22] "Reconvened week commencing 1st of the 6th."
[23] Does that tally with your recollection?
[24] A: Yes, it sounds reasonable.
[25] Q: "They to develop Megamatch to named partners", I think

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[1] Q: You made no notes yourself of that meeting?
[2] A: No, I did not, no.
[3] Q: Do you normally make notes of meetings?
[4] A: No, I do not, no.
[5] MR JUSTICE LADDIE: Just a second.
[6] MR HOBBS: Did you yourself observe Roger Sotherton's hand
[7] moving the pen that wrote those words on page 980?
[8] A: I do not think so. I cannot remember that, no.
[9] Q: You cannot say when those words were written on that?
[10] A: All I know is that when I found the documents, when they
[11] were needed in connection with this litigation, then
[12] those were the notes that were written on there. I do
[13] not recall them before that.
[14] Q: That was the first you knew yourself that these
[15] manuscript notes were on there?
[16] A: Yes.
[17] Q: Right.
[18] A: I think they would just have been taken back and put in
[19] the file at that stage.
[20] Q: Which file did you find this document in? Was it in an
[21] obvious place or in a non-obvious place?
[22] A: I had lots of different files, I cannot remember. It
[23] may have been in a Megamatch file; it probably was in a
[24] box file.
[25] Q: Turn to page 980/A, which is the manuscript document

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[1] that says.
[2] A: Yes.
[3] Q: Does that tally with your recollection?
[4] A: Yes, it does.
[5] Q: "AJL [Andrew Lazenby] to approve competitions". "To
[6] 'apro' competition."
[7] Do you see that?
[8] A: Yes, I do. I do not know what it means but, yes, I see
[9] it.
[10] Q: You know that Mr Lazenby says that he made this note and
[11] that, if there had been any significant discussion on
[12] the point that you have mentioned, he would have made a
[13] note of it?
[14] A: Yes.
[15] Q: Are you able to accept that you may be wrong in the
[16] evidence you are giving about that meeting?
[17] A: No. I know that we did discuss - as you can see, it
[18] mentions about Megamatch, it mentions about Sainsburys
[19] and it was during that discussion that we went into
[20] the - or Roger raised the subject of the loyalty brand
[21] scheme. I accept that there was not a significant
[22] discussion. It was discussed, but the main purpose of
[23] the meeting was Megamatch and the other proposal that we
[24] presented.
[25] Q: If it was discussed - and you know I do not accept

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[1] that - but, if it was discussed, it was hardly
[2] discussed at all. That would be correct, would it not?
[3] A: No. I think it was discussed - I said ten minutes. It
[4] may have been shorter than that. It might have been
[5] five minutes. There was not a long discussion about it.
[6] There was a discussion.
[7] Q: It might have been two minutes?
[8] A: No, it was longer than two minutes.
[9] Q: You can remember that much, can you?
[10] A: Yes, I can.
[11] Q: Turn to page 981. Here is your letter of
[12] 14th May 1992. Do you remember sending that?
[13] A: Yes, I do.
[14] Q: You are writing to him:
[15] "Dear Andrew, Roger Sotherton and I would like to
[16] thank you for the time you gave to our presentation.
[17] With you authority, I will now be contacting the various
[18] potential partners we discussed in regard to the
[19] multibrand proposal. I will supply them with outline
[20] proposals, plus invitations to attend exploratory
[21] discussions at Shell-Mex House in June as per
[22] instructions."
[23] With that in mind, look at the bullet points. The
[24] second of his bullet points on the preceding page."
[25] "They to develop Megamatch to named partners."

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[1] A: No.
[2] Q: It does not say:
[3] "Further to our discussions, we confirm that your
[4] company is already holding an option, that we have had
[5] correspondence with Paul King, that we have had
[6] correspondence with Sainsburys and here are the copies
[7] of the letters."
[8] It does not say any of that, does it?
[9] A: No.
[10] Q: Can you explain that?
[11] A: Because, as I explained, the main focus of the meeting
[12] was on the other subjects, one of which I was getting on
[13] with. As far as I was concerned, I was just tidying
[14] up - because Roger had raised the subject, I decided it
[15] was right to send Mr Lazenby a copy of the proposal. He
[16] had said that the timing was not right for it, and he
[17] might be interested at a later date and he would put it
[18] on file. So I thought that was the right thing to do.
[19] Q: It is clear from this letter - and I do not think you
[20] suggest otherwise - that the only thing you sent was
[21] Concept Four, the document in which Concept Four
[22] appeared?
[23] A: Yes.
[24] Q: You do not claim to have sent him anything else?
[25] A: No.

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[1] Do you see that?
[2] A: Yes, I do.
[3] Q: So that is at least one thing you have in common?
[4] A: Yes.
[5] Q: Then you see it says in your first paragraph:
[6] "I will supply them with outline proposals, plus
[7] invitations to attend exploratory discussions at
[8] Shell-Mex House in June as per instructions."
[9] That tallies with the first bullet point on 980/C:
[10] "Reconvene week commencing the 1st of the 6th."
[11] Right?
[12] A: Yes.
[13] Q: Then you go on to say:
[14] "We also noted your interest in the related
[15] multibrand loyalty card proposal to Paul King dated
[16] 23rd October 1989 and I enclose a copy of the proposal
[17] for your further information. Please read Concept
[18] Four. I am glad you agreed that the idea has sufficient
[19] merit to be retained on file for Shell's future
[20] consideration at an appropriate time in the future."
[21] Right?
[22] A: Yes.
[23] Q: There is absolutely nothing in this letter about
[24] anything said to Sainsburys, the existence of an option,
[25] is there?

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[1] Q: He cannot have known about the contents of the letter to
[2] Sainsburys of 24th July from you or this letter, can he?
[3] A: No, all he knew was what we had said to him verbally.
[4] Q: And you had not gone into any detail about what you had
[5] said to Sainsburys?
[6] A: No, we had not, no.
[7] Q: You had not gone into any detail about what you had said
[8] to Paul King, had you?
[9] A: I do not think we went into any great detail, no.
[10] Q: You did not go into detail?
[11] A: We talked about the history of it, the connection with
[12] Megamatch, the research, why it came about, the fact
[13] that Shell took an option on it. Mr Lazenby said that
[14] the timing was not right and that he would just - he
[15] would get a copy from Paul King and he would hold it on
[16] file.
[17] Q: What I want to put to you is this: in fact you got the
[18] impression at that meeting, did you not, that he was
[19] relatively luke warm about the concepts you had convened
[20] the meeting to discuss? He was relatively luke warm
[21] about them?
[22] A: No, not at all. I was excited by his response to
[23] Megamatch and I think we talked about Make Money as
[24] well. He actually started asking questions about
[25] lead-in times for producing the game pieces and I did

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[1] not know that Shell, at that stage in the promotion
[2] cycle, were seriously thinking about a promotional game
[3] again. So I was very excited by what I heard.
[4] Q: Would you in fact have known where to find on your files
[5] the two letters of 24th July 1990 at that stage?
[6] A: I do not - as I say, one of those letters had got into
[7] a different file to do with a different project.
[8] Q: So the answer is: you would not have known where to lay
[9] your hands on at least one of those two letters at that
[10] point in time?
[11] A: I think the degree of interest that was shown only led
[12] me to send him - not to make a big thing of it. Only
[13] to send a copy of that proposal.
[14] Q: You see, Concept Four is, on any view of it, an
[15] incomplete version of the Multibrand Loyalty Scheme that
[16] you claim to have put forward?
[17] A: Well, it speaks for itself, does it not? The actual
[18] pages that I put forward.
[19] Q: You mean Concept Four?
[20] A: Concept Four.
[21] Q: Concept Four suggests that, instead of using tokens or
[22] vouchers, you can use points recorded on a card?
[23] A: Yes.
[24] Q: Otherwise it is the same as Megamatch: pure and simple?
[25] A: A lot of the elements are the same: Shell-led consortium

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[1] A: We discussed some of the information that would have
[2] been in those letters. We probably discussed Smart Card
[3] technology. I cannot remember the precise details.
[4] I would have to check the witness statement. Obviously
[5] you have to sit down -
[6] Q: Why can you sit there and give evidence on your oath
[7] that you did discuss Smart Card technology? How are you
[8] able to say that as you sit there?
[9] A: Because I believe that we did.
[10] Q: The basis for your belief is what?
[11] A: My memory.
[12] Q: You are telling my Lord, are you not, that you have a
[13] recollection in your memory, as you sit there now, of
[14] something happening?
[15] A: I remember the loyalty scheme being discussed. We
[16] covered a lot of the related topics, but not in detail.
[17] So what I am saying is some of the things in those
[18] letters may have been discussed during the meeting. But
[19] not in detail.
[20] Q: Well, you say "they may have been discussed". Which
[21] aspects of those two letters may have been discussed,
[22] according to the recollection you have as you sit
[23] there?
[24] A: We discussed the option, we discussed the background,
[25] history, the research, how it came about. We

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[1] of major retailers, common promotional currency.
[2] Q: So it is the same thing as Megamatch, except you are
[3] using a card with electronic points on it?
[4] A: Well, that turns it into an entirely different
[5] promotion, does it not? One is a short-term game, the
[6] other is a long-term loyalty-building scheme.
[7] Q: Why, then, did you send it to him at all on
[8] 14th May 1992?
[9] A: For the reason I explained: we had had a discussion, the
[10] proposal had been discussed, Mr Lazenby said he would
[11] get a copy from Paul King but I thought the professional
[12] thing to do was to send him a copy of it.
[13] Q: Was there a response to this letter of 14th May 1992?
[14] You wrote to him and I am not aware that there was any
[15] reply back.
[16] A: No, there was not. He did not write back to say
[17] that "We never discussed this, I do not know what you
[18] are talking about". No, there was no response at all.
[19] Q: There was just no response?
[20] A: There was no response at all.
[21] Q: So we can at least agree on this, can we not: the
[22] details of the contents of the two letters of
[23] 24th July 1990 were not known to or revealed to
[24] Mr Lazenby at this meeting or in the immediate aftermath
[25] of it?

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[1] probably - we may have discussed other schemes that
[2] were around at that time. The loyalty schemes.
[3] Q: What other schemes might there have been: Premier
[4] Points, Mobil, Argos? All that stuff?
[5] A: The third party schemes, yes. We may have done.
[6] I would have to check my witness statement on that.
[7] Q: Why do you say, as you sit there now, you may have
[8] done? What recollection are you calling to mind?
[9] A: Because it is difficult sitting here under pressure, as
[10] opposed to sitting on your own quietly and writing down
[11] your recollection. They are two different things.
[12] Q: Mr Donovan, I am putting it to you now you are making
[13] this up as you go along and that you have no clear
[14] recollection of that meeting at all?
[15] A: I have a recollection of the meeting, as I have said.
[16] Q: And that you certainly have no clear recollection of
[17] making any communications to Mr Lazenby about the
[18] contents of 24th July 1990 letters, either of them? You
[19] have no clear recollection of that, do you?
[20] A: We did discuss some of the details that would have been
[21] in those letters, but not in great detail.
[22] Q: You cannot say what details you would have discussed?
[23] A: I would want to check my witness statement first to see
[24] what recollection I put into writing.
[25] MR JUSTICE LADDIE: Mr Donovan, can you help me on this:

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[1] I understand very well the difficulty, because you have
 [2] been in the witness box all day. I understand that must
 [3] be tiring. It is not something I have been subjected
 [4] to, but I understand it cannot be fun. Your witness
 [5] statement was drafted by you a few months ago; correct?
 [6] **A:** I was.
 [7] **MR JUSTICE LADDIE:** And, for the purpose of producing your
 [8] witness statement, you tried to recall what happened,
 [9] sometimes years before?
 [10] **A:** Yes.
 [11] **MR JUSTICE LADDIE:** Now, on a number of occasions you have
 [12] said to Mr Hobbs in response to a question "I prefer to
 [13] see what is in my witness statement". Your witness
 [14] statement itself is merely your recollection - recent
 [15] recollection - of what happened, in many cases, years
 [16] ago. Why do you think your witness statement is going
 [17] to have a more accurate record of your memory than being
 [18] here?
 [19] **A:** Because I sat down and thought about it at length and
 [20] wrote it down and, of course, I am under pressure in the
 [21] witness box trying to make sure that I say the right
 [22] things and do not say things that are not in there. So
 [23] it is a different situation.
 [24] **MR JUSTICE LADDIE:** For what it is worth, do not worry about
 [25] whether you say things that are or are not in your

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[1] detail because of the response that Roger got to what he
 [2] said.
 [3] **Q:** It was an unreceptive response?
 [4] **A:** It was of mild interest in that "the timing is not
 [5] right".
 [6] **Q:** What, for a long-term concept?
 [7] **A:** For a long-term loyalty scheme. We were focussing on
 [8] the possibility of short-term promotions and that he was
 [9] very interested in the Megamatch scheme.
 [10] **Q:** So you were talking about long-term concepts to a man
 [11] who did not have an interest in long-term concepts?
 [12] **A:** Well, Roger Sotherton did not know what the response
 [13] would be until he raised it. Which, as I said, came as
 [14] a surprise to me and, when he started talking, then
 [15] obviously I backed up what he was saying.
 [16] **Q:** Let me turn it round: are you surprised that Mr Lazenby
 [17] has no recollection of this matter being discussed?
 [18] Does it surprise you?
 [19] **A:** That is a difficult question. At times Mr Lazenby has
 [20] not had a very good memory on other subjects. So, from
 [21] that point of view, no, it does not surprise me. Except
 [22] for the fact that I, of course, wrote sending a copy of
 [23] that proposal a couple of days later. But it does not
 [24] surprise me that he might not recall the detail of what
 [25] was discussed.

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[1] witness statement. Insofar as it is possible - it may
 [2] not be terribly easily - just relax and answer the
 [3] questions as to what your recollection is now. You may
 [4] have got things wrong in your witness statement. It is
 [5] always possible. You may get things wrong now, but, if
 [6] you spend your time looking over your shoulder and
 [7] worrying about whether you are inconsistent with your
 [8] witness statement, it may end up doing worse. Try your
 [9] best just to relax. If you get terribly tired, tell me
 [10] and we will have a break.
 [11] **A:** Thank you.
 [12] **MR JUSTICE LADDIE:** When Mr Hobbs asks you a question, do
 [13] your best to recall now what happened at the time.
 [14] **A:** Right.
 [15] **MR HOBBS:** Mr Donovan, I was putting it to you that, in
 [16] fact, as you sit there now, you do not have any real
 [17] recollection of the matters that you have been
 [18] discussing?
 [19] **A:** I have the recollection of the matters that
 [20] I have mentioned already, which is the background,
 [21] history, how it came about, the research and the fact
 [22] that we had put a proposal to Paul King. We may have
 [23] mentioned about the article in Promotions and
 [24] Incentives. I think - I believe we did mention about
 [25] Smart Cards, but we did not discuss any of it in huge

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[1] **Q:** The reason it does not surprise you is because it was
 [2] not, even on your own view of it, a significant matter,
 [3] a significant aspect of that meeting, was it?
 [4] **A:** As I said earlier, the main focus of the meeting were
 [5] the two proposals that we had prepared to present and
 [6] took along, two proposals for him to consider.
 [7] **Q:** Will you agree with me that the matters you have been
 [8] discussing were not a significant proportion of that
 [9] meeting, even on your own view of it?
 [10] **A:** Yes, they were not the main subject. They were brought
 [11] up - because we were discussing Megamatch, then it is
 [12] almost inevitable, I suppose, that Roger would think of
 [13] the loyalty scheme. He brought up the subject and we
 [14] discussed it for five to ten minutes. Then we moved on
 [15] to the other proposal.
 [16] **MR JUSTICE LADDIE:** Mr Hobbs, we have flogged this to
 [17] death. Mr Donovan must have said at least 15 times that
 [18] it was only five minutes, that it was not the major
 [19] subject, that it was not the thing that Mr Lazenby was
 [20] most interested in. Do we have to do it over and over
 [21] again? I will then have to decide whether or not
 [22] Mr Lazenby had any recollection of it at all or so on
 [23] and so forth.
 [24] **MR HOBBS:** I am sorry your Lordship thinks I am overdoing
 [25] it. I was just about to move on, in any event.

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[1] MR JUSTICE LADDIE: Good.
[2] (3.30 pm)
[3] MR HOBBS: Mr Donovan, what I did want to ask was this: it
[4] is, I think, your evidence to my Lord that you did at
[5] this stage have a recollection that there was an option
[6] in place in favour of Shell?
[7] A: Yes, we did mention that.
[8] Q: Right. There came a later point in time in 1992 when
[9] you came into a meeting with Andrew Lazenby? I am
[10] referring to the meeting on 24th November 1992.
[11] A: Yes.
[12] Q: Would you close up the file we are in and you will need
[13] to look at volume E3. In E3, would you turn, please, to
[14] page 1328.
[15] A: I have that.
[16] Q: This was the proposal which Don Marketing put forward to
[17] Shell UK for discussion on 24th November 1992, was it
[18] not?
[19] A: Correct.
[20] Q: There is nothing in the contents of that document, is
[21] there - I am talking about the typescript - relating
[22] to anything other than short-term promotions, is there?
[23] A: No, that is correct. Yes, one of them was the loyalty
[24] scheme, but it was short-term.
[25] Q: There is nothing in here about what we know in this

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[1] Q: How long was this telephone conversation?
[2] A: Short.
[3] Q: Do you have a clear recollection of it, as you sit
[4] there?
[5] A: Reasonably so. But it was only for a few minutes. We
[6] set the date and I found the letter and we took it along
[7] with us.
[8] Q: What did he actually say to you about that letter?
[9] A: He said that - it may have been that he was discussing
[10] something with Sainsburys, that there was some interest
[11] with Sainsburys and he would be interested in seeing the
[12] letter that we had sent to them about the loyalty
[13] scheme. So it seemed that there was some interest in
[14] it.
[15] Q: What did he actually say to you in terms of the request
[16] for the letter? What did he actually ask you for?
[17] A: He said about the letter that we had sent to Sainsburys
[18] regarding the Multibrand Scheme and that it would be
[19] helpful if he could see a copy of it.
[20] Q: Was it your understanding, according to your evidence,
[21] that he had not seen a copy of it before?
[22] A: Yes.
[23] Q: Was it your understanding, according to your evidence,
[24] that he knew nothing of its contents?
[25] A: I do not think - only whatever it was that we had

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[1] proceeding now as the Multibrand Loyalty Concept, is
[2] there? There is nothing in the text?
[3] A: No, there is not, no.
[4] Q: There is no reference to Concept Four, is there?
[5] A: No, there is not.
[6] Q: Your evidence, as I understand it, is that, in the
[7] run-up to this meeting, you were contacted by
[8] Andrew Lazenby?
[9] A: I think it is probably the other way round: I probably
[10] phoned him to set up the meeting. Early in
[11] November, I think it probably was.
[12] Q: Is it your evidence that you took some documents with
[13] you to this meeting?
[14] A: Yes. Because, during the telephone call, the multibrand
[15] scheme was discussed by Mr Lazenby. He brought up the
[16] subject and said that - commented on the Sainsburys
[17] correspondence and asked me if I could take in a copy of
[18] the letter we sent to Sainsburys.
[19] Q: What do you recollect of this telephone conversation?
[20] A: That we discussed the proposals that we were going to
[21] make to him and, as I say, he mentioned the loyalty
[22] scheme and said that it would be helpful if he could see
[23] a copy of the letter from Sainsburys.
[24] Q: He raised it with you, you say?
[25] A: Yes.

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[1] discussed during that first meeting.
[2] Q: So you are saying this is a sort of delayed reaction
[3] from him to the meeting in May?
[4] A: I did not know what had prompted that. I can now see
[5] from discovery why the interest was there. But, at the
[6] time, no, I did not know what had prompted the interest.
[7] Q: What did you say in response to his request?
[8] A: That I was happy to take the letter along.
[9] Q: Did you ask him why he was asking for it?
[10] A: I cannot remember going into any detail at all. Since
[11] we were going to meet with him and since he had asked us
[12] to take a copy, I thought that would be covered when we
[13] met with him.
[14] Q: So you went to a meeting on 24th November -
[15] MR JUSTICE LADDIE: Can I just ask a question: this
[16] telephone conversation - it does not matter who phoned
[17] who - are you saying Mr Lazenby asked you for a copy of
[18] the letter?
[19] A: Yes.
[20] MR JUSTICE LADDIE: Out of the blue? You did not remind him
[21] about the letter. Out of the blue he said to you ...
[22] A: Yes, he asked me for a copy.
[23] MR HOBBS: And you simply listened to the request and said,
[24] "Okay, I will produce this letter"?
[25] A: Yes. I said I would bring it along.

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[1] Q: The letter you are talking about is the letter of
[2] 24th July 1990?
[3] A: Correct.
[4] Q: Did he identify it to you by its date?
[5] A: No, I do not think he did.
[6] Q: How did he describe it to you?
[7] A: He just said "the letter to Sainsburys".
[8] Q: And you said "Which letter to Sainsburys?"?
[9] A: No, because we had mentioned it during the meeting with
[10] him in May.
[11] Q: You just said, "Fine, I will get a copy and bring it
[12] along"?
[13] A: Yes.
[14] Q: So the meeting takes place on 24th November 1992?
[15] A: Yes.
[16] Q: You and Sotherton?
[17] A: Correct.
[18] Q: And Andrew Lazenby?
[19] A: Correct.
[20] Q: Where does it take place?
[21] A: Shell-Mex House.
[22] Q: Was this a meeting room or office?
A: I think it was a meeting room.
[24] Q: How long did this meeting last, according to your
[25] recollection of it?

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[1] according to you?
[2] A: We went over a lot of the same ground. I cannot
[3] remember who was prompting the various topics, but we
[4] went over a lot of the same ground about how it had come
[5] about, the research et cetera.
[6] Q: Did you ask him why he was interested in it?
[7] A: Yes. He said that he could be interested in the scheme
[8] at a later date. The timing still was not right. The
[9] management were about to make a fundamental decision on
[10] what they were going to do. He was still interested in
[11] short-term activity. Which was the reason for the other
[12] two proposals, of course.
[13] Q: How did that part of the conversation end then? Can you
[14] recollect?
[15] A: Well, we made it clear that it was our idea, which he
[16] accepted, and we mentioned that we had run some
[17] promotions with Shell overseas: Make Money and Bruce's
[18] Lucky Deal. We discussed how, if we were ever to get
[19] involved, on what basis it would be. About licensing
[20] terms et cetera.
[21] Q: You discussed terms, did you?
[22] A: Yes, we did.
[23] Q: What sort of terms did you discuss?
[24] A: We discussed whether it would be a licencing arrangement
[25] on it, how we would get paid, whether we would be

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[1] A: I would guess between an hour and an hour and a quarter.
[2] Q: At what point in the meeting, do you say, you tabled the
[3] letter to Sainsburys?
[4] A: We were talking about two proposals. I think probably
[5] midway between the two.
[6] Q: Do you actually remember doing it?
[7] A: I remember the discussion. I do not remember exactly
[8] the sequence.
[9] Q: Who handed the letter to him, you or Sotherton?
[10] A: I think I did.
[11] Q: You do not remember?
[12] A: I think it was me. I believe it was me.
[13] Q: What did Lazenby say to you?
[14] A: We read through the letter.
[15] Q: You actually stopped there and then and read through the
[16] letter?
[17] A: Yes.
[18] Q: For what purpose?
[19] A: Because Mr Lazenby was interested to see what the
[20] content was and we had another discussion about the
[21] loyalty scheme.
[22] Q: How long did that discussion go on for, according to
[23] you?
[24] A: I would say about another ten minutes.
[25] Q: With you responding to questions from Mr Lazenby,

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[1] involved as an agency.
[2] Q: What did you agree, according to you?
[3] A: What we agreed was that it would be discussed and
[4] negotiated if Shell decided to go forward with it.
[5] Because they were still undecided about their plans and
[6] he mentioned that, if they did run a loyalty scheme, it
[7] would be on a Shell-only basis.
[8] Q: In what detail did you discuss royalty payments or other
[9] payments?
[10] A: Not in any detail, no.
[11] Q: Are you saying that he committed Shell to pay you for
[12] exploitation of that concept?
[13] A: He said that, if Shell decided to take it up, then he
[14] would contact me, or contact us, and then that would be
[15] the time to discuss matters like that.
[16] Q: Are you saying that he agreed in principle - if not in
[17] detail - to commit Shell to paying you for the use of
[18] that concept?
[19] A: That was my understanding, yes.
[20] Q: What words did he use that gave you that understanding?
[21] Can you remember?
[22] A: The discussion left me with the clear impression that
[23] Mr Lazenby recognised that it was our concept and that,
[24] if Shell took it up at some stage, although it seemed to
[25] be at some distant point, that he would contact me and

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[1] we would then discuss terms on it.
[2] Q: You are saying, are you, you actually said to him, as
[3] you handed the letter over or shortly afterwards, "This
[4] is our concept. Will you acknowledge that this is our
[5] concept?"
[6] A: I do not think I said that precise - what I did say
[7] made it plain that it was our concept -
[8] Q: What did you say?
[9] A: - and Mr Lazenby seemed to accept that and, when we
[10] discussed how we might be paid for it, he said the
[11] timing was not right to get into detail on that, but, if
[12] Shell took it up, then he would contact me and we would
[13] discuss it. But I was left with the impression that, if
[14] they did do the loyalty scheme, it would be with Shell
[15] alone. I did not know what other arrangements they had
[16] for that.
[17] Q: Just a moment: are you saying there that you discussed
[18] the concept and his response was "On behalf of Shell, if
[19] we do it, we will only do it as a Shell-alone concept?"
[20] A: No.
[21] Q: What are you saying?
[22] A: No. What I am saying is that Mr Lazenby said that the
[23] timing still was not right for the multiparty loyalty
[24] scheme because it was too complicated to set up, it
[25] would take too much time to set up and that, if they did

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[1] expensive, take too much time to set up and, if they did
[2] run a loyalty scheme, then it would be Shell on its
[3] own. Therefore, that was not my proposal.
[4] Q: Did you understand him to be talking about a Smart Card
[5] Scheme?
[6] A: We did discuss Smart Cards. So I was not surprised
[7] later on to see that it was a Smart Card Scheme.
[8] Q: What discussions did you have with him about Smart
[9] Cards?
[10] (3.45 pm)
[11] A: About the cost was still dropping and it made it a more
[12] practical, feasible possibility.
[13] Q: Are you saying that he told you what Shell's proposals
[14] were with regard to Smart Cards?
[15] A: He told me that they were considering a long-term
[16] loyalty scheme. Whatever it was that he said to me,
[17] I got the impression that Shell were making contingency
[18] plans, at least for their own loyalty scheme.
[19] Q: Do you really have any recollection of this at all?
[20] A: Yes, I do. I thought I had just conveyed that.
[21] Q: Are you sitting there replaying a mental image of the
[22] meeting and discussions to yourself?
[23] A: Yes.
[24] Q: So you can see and hear this in your inner mind and your
[25] inner ear taking place, can you?

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[1] go ahead - also I think he said it would be too
[2] expensive. He was worried about the cost. If they did
[3] go ahead with the loyalty scheme, which I got the
[4] impression was a likely prospect, it would be with Shell
[5] alone. A Shell scheme.
[6] Q: The loyalty scheme -
[7] A: Yes.
[8] Q: - is here what became the Smart Scheme. That is what
[9] we are talking about?
[10] A: Yes, it must be the same.
[11] Q: It must be the same? Why do you say it must be the
[12] same?
[13] A: Because I was talking to him at the end of November 1992
[14] and, of course, I see from discovery that, during that
[15] same period, he was talking to his colleagues about a
[16] multiparty scheme and that, in January the next year, he
[17] gave a brief to Option One for a similar scheme.
[18] Q: So you are saying you handed the document over and you
[19] anticipated that Shell would, in the not-too-distant
[20] future, use it, but on a mono basis?
[21] A: No.
[22] Q: Then I am not understanding you.
[23] A: No. My proposal was for a multiparty Shell-led
[24] consortium of major retailers. What Mr Lazenby was
[25] saying to me is that that was too complex, too

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[1] A: Yes, I can.
[2] Q: Was Sotherton participating in any of this?
[3] A: Yes, he was.
[4] Q: What was he saying?
[5] A: I cannot remember which of us was saying what, but we
[6] were discussing the various subjects. Again, the
[7] background to it, the research, the contact with
[8] Sainsburys and the fact that we had arranged an option
[9] on it.
[10] Q: That means you discussed the letter to King, did you?
[11] A: I do not know whether we did.
[12] Q: You just said, I think, that you discussed the option
[13] arrangement?
[14] A: We said that we had arranged an option with Shell.
[15] Q: Yes?
[16] A: I do not think it went much further than that.
[17] Q: You did not tell him with whom you claimed to have
[18] arranged the option and when?
[19] A: He would have been aware that it was Paul King we were
[20] dealing with, that we presented it to.
[21] Q: How would Andrew Lazenby have been aware of that?
[22] A: Because we told him that.
[23] Q: When did you tell him that?
[24] A: During both meetings he was aware we had originally put
[25] the proposal up to Paul King.

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[1] Q: I think I understood you to say that you did not have
[2] the letter to Paul King in a convenient place on your
[3] files -
[4] MR COX: I wonder if my learned friend would look at
[5] page 981 of file 2, the letter of 14th May 1992.
[6] MR HOBBS: File 2, page 981. Since we have this open,
[7] page 981 in this volume - do you have that, Mr Donovan?
[8] A: Yes, I do.
[9] Q: Do you see the second paragraph? I think I am being
[10] asked to direct my attention to the proposition that:
[11] "We noted your interest in the related multibrand
[12] loyalty card proposal to Paul King dated
[13] 23rd October 1989."
[14] That was Concept Four, was it not?
[15] A: Correct, yes.
[16] Q: The option letter to Paul King was supposed to have been
[17] dated 24th July the following year?
[18] A: That is correct.
[19] Q: Right. I do not understand you to have said that you
[20] communicated the text of the letter of 24th July 1990 to
[21] Mr Lazenby?
[22] A: Not at that date, no. 12th May 1992.
[23] Q: In fact I do not understand you to say that you have
[24] ever communicated the text of the letter to Paul King to
[25] Mr Lazenby?

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[1] A: He never asked for any further information on it.
[2] I thought he had an interest in Sainsburys in connection
[3] with something else he was doing and that was the reason
[4] to ask to see that letter.
[5] Q: Would you, in E3, please, turn to page 1345.
[6] A: I have that.
[7] Q: Do you recognise that letter?
[8] A: I do.
[9] Q: This is the letter that you wrote following up on the
[10] meeting of the 24th; correct?
[11] A: That is correct.
[12] Q: There is nothing in here, is there, about multibrand
[13] loyalty schemes?
[14] A: No, nothing at all.
[15] Q: Nothing at all. There is nothing in here about
[16] recognition of proprietary rights, is there?
[17] A: No.
[18] Q: There is nothing in here about confirming handing over
[19] any letter pursuant to an apparent request?
[20] A: No.
[21] Q: No. In fact, all the things we have just been
[22] discussing - at possibly too much length - not one of
[23] them is mentioned in this letter?
[24] A: No.
[25] Q: Why not?

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[1] A: No, no.
[2] Q: You have not, have you?
[3] A: No. It was the other letter to Sainsburys.
[4] Q: It was. That is right.
[5] A: Mr Lazenby's interest was something to do with
[6] Sainsburys.
[7] Q: Right. You mentioned - before I got that
[8] intervention - that you had discussed the option?
[9] A: Yes.
[10] Q: I am asking you whether you yourself had to hand or on
[11] your files or in your recollection the letter of
[12] 24th July 1990 to Paul King?
[13] A: No, because it had been misfiled in a file to do with
[14] the research for the Fundraisers project.
[15] Q: In fact you had forgotten all about this supposed option
[16] by this stage?
[17] A: I had forgotten the details of it. I knew that we had
[18] arranged an option on it. But I did not remember what
[19] the exact details of it were.
[20] Q: So, if you did not remember what the exact details of it
[21] were, you could not possibly be expected to tell them to
[22] Mr Lazenby, could you?
[23] A: No, only that Shell had an option on the scheme.
[24] Q: You say that you made that statement, as it were, in the
[25] abstract, without any further detail or documentary -

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[1] A: Because the main focus of that meeting on
[2] 24th November were the two proposals mentioned in this
[3] letter.
[4] Q: But, according to your version of events, you had just
[5] extracted from him a recognition of proprietary rights
[6] over something you had handed to him and you had got an
[7] agreement in principle for a remuneration or a fee?
[8] A: The interest was still very mild and years hence, as far
[9] as we were concerned, Mr Andrew (sic) was interested in
[10] short-term promotions at that time.
[11] Q: What could be more important than than having a
[12] contemporaneous documentary confirmation of what you had
[13] agreed in principle, according to your view of it?
[14] A: I only based what I did send on - and the fact that
[15] I never mentioned the Multibrand Scheme at all or the
[16] discussions, because I was told that it was not going to
[17] happen for some time. If they did run a scheme, it
[18] would be Shell-only. So it was years away.
[19] Q: Surely all the more reason, from your point of view, to
[20] want to get the record straight in writing at the time?
[21] A: At that time I was interested in securing some business
[22] in the short-term, which was very important to me. That
[23] was why I mentioned about the two promotions that we had
[24] put to him and, in February, I sent him another fax
[25] about two of those schemes, the short-term schemes that

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[1] I put to him in May - in June and November 1992.
[2] Q: I do not think you have actually confronted the point
[3] I put to you. My point that I am putting to you is that
[4] it would have been very important from your perspective
[5] to have a written record confirming what you say took
[6] place in terms, firstly, of proprietorship of the
[7] concept and, secondly, in terms of remuneration for the
[8] use of it?
[9] A: From this perspective now, I wish I would have sat down
[10] and wrote a long letter about it. But I did not know
[11] this was going to happen. I only based my response on
[12] the impression I got from Mr Lazenby at the meeting in
[13] regard to the two short-term concepts and the more brief
[14] discussion on the multibrand scheme when it was clear
[15] that there was no prospects with that for a long time.
[16] Rightly or wrongly, I never mentioned it in the letter.
[17] Q: In the bundle which you have open - E3 - page 1343A;
[18] have you read this before?
[19] A: Within the last few days, yes.
[20] Q: It is Mr Lazenby's manuscript -
[21] A: I am sorry, I seem to be looking at the wrong thing.
[22] Q: 1343/A.
[23] A: I have a copy, yes.
[24] Q: That is a document you have looked at?
[25] A: Yes.

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[1] quarter.
[2] MR HOBBS: Would you take up volume E1 and, in that
[3] volume, would you turn to page 450/A.
[4] A: Yes, I have that.
[5] Q: Whose handwriting is that at the top of 450/A?
[6] A: That is Roger Sotherton's handwriting.
[7] Q: Is that his handwriting at the bottom of 450/B?
[8] A: It is.
[9] Q: Did you see him write that wording on 450/B?
[10] A: No.
[11] Q: When did you first see a copy of this document with that
[12] writing on it?
[13] A: When I searched for the documents at the start of this
[14] claim.
[15] Q: Where did you find this one?
[16] A: In a file, probably with Megamatch.
[17] Q: Is it your understanding that he is maintaining that he
[18] wrote this at the time? Is that your understanding?
[19] A: Yes, it is my understanding.
[20] Q: But you have no recollection of seeing him write it?
[21] A: I do not recollect Mr Sotherton writing notes, I do not
[22] recollect Mr Lazenby writing notes. They may and
[23] probably did do so. But, if you are asking me: did
[24] I see them do it? No, I cannot recollect that.
[25] Q: Let us look at that note on 450/B:

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[1] Q: That is Mr Lazenby's manuscript note of the meeting on
[2] 24th of the 11th. You can just see "24/11" in the top
[3] right-hand corner?
[4] A: Yes.
[5] Q: You did discuss, did you not, those matters which are
[6] noted in that document?
[7] A: Yes, we did.
[8] Q: There is nothing in that document about any of the
[9] matters you have been discussing with me in these recent
[10] exchanges, is there?
[11] A: No, there is not.
[12] Q: Are you surprised that there is nothing in there about
[13] that?
[14] A: Yes.
[15] Q: Tell me why you are surprised.
[16] A: Because we did discuss it. I thought that he might put
[17] some mention down of it. But it is true that what he
[18] has put down was the main focus and purpose of the
[19] meeting.
[20] (4.00 pm)
[21] Q: Did you see Sotherton make any notes at that meeting?
[22] A: No, I never saw anyone making notes at the meeting. Not
[23] that I can recollect.
[24] MR JUSTICE LADDIE: How long did this meeting last for?
[25] A: I think it lasted for between an hour and an hour and a

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[1] "Shell will negotiate royalty arrangements
[2] et cetera with us if they progress scheme at a future
[3] date."
[4] A: Yes.
[5] Q: "Don could work with Shell International to exploit
[6] overseas. Copy of this letter left with AL
[7] [Andrew Lazenby]."
[8] A: Yes.
[9] Q: Are you saying that that is an accurate note of what
[10] happened at that meeting?
[11] A: Yes, I remember those matters being discussed, as I have
[12] already said.
[13] Q: So we come to this, do we: Andrew Lazenby is working on
[14] what is about to become Project Hercules, he knows he is
[15] doing it and he knows that it is going to be a
[16] Multibrand Loyalty Scheme?
[17] A: Yes.
[18] Q: Yes. Yet, knowing that - knowing that - he commits
[19] Shell to negotiate a royalty arrangement with you, your
[20] company, in respect of what he knows he is doing?
[21] A: One of the things that we discussed was to put that on
[22] the shelf. It was on hold, and the background to that
[23] is that we would not put the scheme to any other oil
[24] company.
[25] Q: That is part of this too, is it?

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[1] A: Well, that was the general understanding. Once we put a
[2] proposal up to Shell, especially if they took an option
[3] on it, as they did on a few occasions, then that would
[4] stop us going to another oil company, because we dealt
[5] with Shell as a preference.

[6] Q: What I am asking you to do is just look at it from his
[7] perspective, which is the perspective I am standing here
[8] addressing you upon at the moment. From
[9] Andrew Lazenby's perspective, he is working on a project
[10] which, from the beginning of 1993 becomes
[11] Project Hercules; right?

[12] A: Yes.

[13] Q: In your letter before action that we looked at at
[14] considerable length this morning, you yourself stated at
[15] the top of the second page that it was a scheme which
[16] was intended and designed from the beginning to be a
[17] Multibrand Loyalty Scheme?

[18] A: Yes.

[19] Q: Right. So here is Andrew Lazenby, at the back end of
[20] 1992, doing work of that kind, working on a concept of
[21] that kind?

[22] A: Yes.

[23] Q: And you are saying that he committed Shell to Don to
[24] recognise their proprietary rights over that concept and
[25] to negotiate royalty arrangements with you if they

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[1] progressed the very idea he was working on?

[2] A: That was my understanding, yes.

[3] Q: I am sorry, but I must put it to you that this is a
[4] complete fabrication on your part, that your evidence in
[5] relation to the May meeting and your evidence in
[6] relation to the November meeting in 1992 has been
[7] embroidered to bring in these matters that we have been
[8] discussing between you and I just now.

[9] A: You said "a complete fabrication"?

[10] Q: Yes. You are inventing the story about the Sainsburys
[11] letter, relative to the November 1992 meeting. Do you
[12] wish to comment on that?

[13] A: I wish that I had sent a letter after the meeting on
[14] 22nd November. If I had known what was going on in the
[15] background, then of course I would have done so. But
[16] I did not know. And of course you are saying it is a
[17] complete fabrication. You are forgetting about the
[18] letter that I sent to Mr Lazenby on 14th May that
[19] specifically mentioned this scheme and that Mr Lazenby,
[20] as I understand it, has admitted receiving. So how
[21] could that be correct?

[22] Q: The letter of 14th May refers to Concept Four; we agree
[23] that, do we not?

[24] A: Yes.

[25] Q: And, insofar as there are other matters which are

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[1] covered by the Sainsburys letter of 24th July 1990 and
[2] the letter to King of 24th July 1990, I am putting it to
[3] you that your evidence as to those matters is a
[4] fabrication?

[5] A: It is not.

[6] MR COX: I would like to be clear, if I may, because my
[7] learned friend did indeed suggest that all of the
[8] matters that the claimant has said, both on 12th May and
[9] 24th November, were a complete fabrication. Indeed,
[10] that would be consistent with his pleading, which denies
[11] both incidents. So may I know - may we know - may
[12] your Lordship know - whether that is still the case.

[13] MR HOBBS: There is no denial of a meeting on each of those
[14] occasions. The extent of my admissions could not be
[15] clearer from my skeleton argument, my Lord.

[16] MR JUSTICE LADDIE: I understood your admissions to be that
[17] the meeting took place, but there was no discussion of
[18] the Sainsburys letter, there was no discussion of an
[19] option, there was no discussion of long-term multiparty
[20] loyalty scheme. To make it clear, you had better put
[21] all of those, one by one, to Mr Donovan, to make it
[22] clear that he understands that you are challenging his
[23] account in respect of all those. I thought it was
[24] clear, but there we are.

[25] MR HOBBS: Frankly, I think the transcript is clear, to be

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[1] honest with you.

[2] MR JUSTICE LADDIE: Please do it again. This is me wasting
[3] time, not you.

[4] MR HOBBS: I am sorry, my Lord.

[5] Mr Donovan, you heard those exchanges?

[6] A: Yes.

[7] Q: Let us tick them off one by one. I am putting it to you
[8] that, at the May meeting, there was no discussion of
[9] what I am calling "the Sainsburys proposal" set out in
[10] that letter of 24th July 1990? I am putting that to
[11] you?

[12] A: No, it was discussed.

[13] Q: And I am putting to you that your evidence, contrary to
[14] my proposition to you, is in fact a fabrication?

[15] A: I say it is not. I have given you an accurate account,
[16] to the best of my recollection.

[17] Q: I put it to you that there was no discussion at the
[18] May meeting in 1992 of any option arrangement relating
[19] to what I have just called the Sainsburys proposal?

[20] A: No, it was discussed in both meetings.

[21] Q: I am putting it to you that your evidence, contrary to
[22] my proposition to you, is in fact fabricated?

[23] A: You have taken away the word "complete" now, have you?

[24] Q: You do not accept that any of that evidence is
[25] fabricated, do you?

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[1] A: I certainly do not.
 [2] Q: I have that clear. Then we come to the November meeting
 [3] in 1992 -
 [4] MR COX: I am sorry, now I am going to get a clobbering,
 [5] I can feel it coming from your Lordship. But I am going
 [6] to be a little pernickety, if I may. I have not often,
 [7] so far in this case. Is my learned friend saying that
 [8] Concept Four was not discussed, as he has pleaded in his
 [9] pleading, on 12th May? Because, so far, the Sainsburys
 [10] proposal strays dangerously close to the suggestion that
 [11] it was only the Sainsburys letter that was not
 [12] discussed. I would like to know if he could put to the
 [13] witness that Concept Four was not discussed on 12th May,
 [14] just so that I can be clear. That is how it is
 [15] pleaded. I would like to know whether it is still the
 [16] case.
 [17] MR HOBBS: Mr Lazenby's position is that he has no
 [18] recollection of Concept Four being discussed.
 [19] Mr Lazenby cannot recollect any discussion of Concept
 [20] Four at that meeting. Do you understand?
 [21] A: I do understand.
 [22] Q: His position is that, if there was any discussion with
 [23] any materiality about it, he would have remembered it.
 [24] Do you understand that?
 [25] A: I do.

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[1] Q: I am putting it to you that, on 24th November meeting,
 [2] which nobody disputes took place, during the course of
 [3] that meeting, there was no discussion of multibrand
 [4] loyalty concepts, as you have been telling my Lord that
 [5] there were discussions?
 [6] A: It was discussed, on the lines I have already said.
 [7] Q: And, in particular, my position is that there was
 [8] absolutely no question of any royalty agreement or
 [9] understanding of that kind in relation to multibrand
 [10] loyalty schemes?
 [11] A: There was a discussion about royalties, on how
 [12] Don Marketing would be paid, but that there was no point
 [13] in getting into it at that time because there was no
 [14] prospect of it being run for some time.
 [15] Q: Now, if I can draw that together: the point that I will
 [16] be submitting to my Lord in due course is that the
 [17] reason why you want to give this evidence that I have
 [18] just been discussing and challenging with you is because
 [19] you perceive that there is a need on your part to fix
 [20] Andrew Lazenby with knowledge of those proposals which
 [21] are to be found in those documents from 24th July 1990.
 [22] You perceive a need to fix him with that knowledge and
 [23] that is why you have given this evidence?
 [24] A: No, I am just saying what happened. That is all, and,
 [25] unfortunately, I never sent a letter after the second

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[1] Q: Therefore his position is that there was no discussion
 [2] of any materiality about Concept Four.
 [3] A: Well, then I would be puzzled as to why he did not take
 [4] issue with the letter that I sent him two days later,
 [5] enclosing a copy of the proposal and saying that it had
 [6] been discussed.
 [7] Q: That is your position?
 [8] A: Yes.
 [9] Q: You understand my contrary position?
 [10] A: I do.
 [11] Q: Right.
 [12] A: I cannot understand it in view of the fact that it is
 [13] accepted that he received that letter two days later.
 [14] No, I cannot understand that.
 [15] Q: I understand that you cannot understand.
 [16] Now, the November meeting: Mr Lazenby does not
 [17] accept that he had a telephone conversation with you in
 [18] advance of that meeting relating to the Sainsburys
 [19] letter of 24th July 1990. He has no recollection of any
 [20] such conversation, and I am putting it to you that your
 [21] suggestion that there was such a conversation is
 [22] fabricated?
 [23] A: And I am telling you that there was such a conversation,
 [24] that he did make that request and that I did take the
 [25] letter with me to the meeting.

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[1] meeting. Very fortunately for me, I did after the first
 [2] meeting, which it is accepted he received.
 [3] MR HOBBS: My Lord, I have put those points about three
 [4] times to this witness. I have a little bit more left.
 [5] I am willing to go on -
 [6] MR JUSTICE LADDIE: Not now. How much longer?
 [7] MR HOBBS: Not much longer, my Lord. The end is very
 [8] clearly in sight.
 [9] MR JUSTICE LADDIE: Who is the next witness?
 [10] MR HOBBS: Mr Sotherton, I am told.
 [11] MR JUSTICE LADDIE: First of all, Mr Cox, re-examination.
 [12] How long do you expect to be in re-examination?
 [13] MR COX: Twenty minutes.
 [14] MR JUSTICE LADDIE: Mr Sotherton; may I anticipate you are
 [15] going to have a little battle with him as well?
 [16] MR HOBBS: I will have a battle with him, but it will not be
 [17] as long as the battle I am having now with Mr Donovan.
 [18] The witness after that, I am told, is Mr McMahon; is
 [19] that correct.
 [20] MR COX: Yes.
 [21] MR HOBBS: I would expect to get to him tomorrow and after
 [22] Mr McMahon ...
 [23] MR COX: Mr Armstrong-Holmes.
 [24] MR HOBBS: It is possible we might get through them.
 [25] MR JUSTICE LADDIE: All of them?

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[1] MR HOBBS: It is possible.
[2] MR JUSTICE LADDIE: Thank you very much, Mr Hobbs. We will
[3] leave it like that until 10.30 tomorrow morning.
[4] (4.15 pm)
[5] (The court adjourned until 10.30 am
[6] on Friday, 18th June 1999)
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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1998 D No. 2149.

Court No. 58
The Royal Courts of Justice
The Strand
LONDON EC4

18th June 1999

Before:

MR JUSTICE LADDIE

JOHN ALFRED DONOVAN (Plaintiff)

-v-

SHELL UK LTD (Defendant)
(by Original Action)

AND BETWEEN

SHELL UK LTD
(Plaintiff by Counterclaim)
-and-

- (1) JOHN ALFRED DONOVAN
(2) DON MARKETING UK LIMITED
(3) ALFRED ERNEST DONOVAN
(Defendants to Counterclaim)
(by Counterclaim)

MR G COX, assisted by **MS L LANE**, instructed by Royds Treadwell, appeared on behalf of the Plaintiffs.

MR G HOBBS, assisted by **MR P ROBERTS**, instructed by DJ Freeman, appeared on behalf of the Defendant.



SMITH BERNAL
INTERNATIONAL

A LEGALINK COMPANY

[1] Friday, 18th June, 1999
 [2] (10.30 am)
 [3] MR JOHN DONOVAN (continued)
 [4] Cross-examination by MR HOBBS (continued)
 [5] MR HOBBS: My Lord, could I just mention a matter before
 [6] I go on? I have asked my learned friend whether he
 [7] would be willing for Mr Sotherton to be out of court
 [8] while I do this next part of cross-examination. He
 [9] declines that. Therefore, since your Lordship has no
 [10] power to compel it in civil proceedings, I am bound to
 [11] go on.
 [12] MR JUSTICE LADDIE: I could compel it; I could go into
 [13] camera.
 [14] MR HOBBS: I would wish to be in a position whereby
 [15] Mr Sotherton was not present in court.
 [16] MR JUSTICE LADDIE: Mr Cox, I take it that you are not
 [17] prepared to ask Mr Sotherton to leave? A simple "yes"
 [18] or "no" will do.
 [19] MR COX: He is not here, actually.
 [20] MR JUSTICE LADDIE: Fine.
 [21] MR HOBBS: I thought you told me he was.
 [22] MR JUSTICE LADDIE: Let us not worry about it -
 [23] MR COX: However, he will be coming, I expect, in the next
 [24] 15 or 30 minutes. I have to say that Mr Lazenby's
 [25] presence throughout the trial might give the appearance,

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[1] impression, looking from the documents and the witness
 [2] statements, is that there came a time when Mr Paul King
 [3] ceased to be the National Promotions Co-ordinator and
 [4] Stuart Carson became National Promotions Co-ordinator.
 [5] Do you remember that?
 [6] A: Yes, I do.
 [7] Q: Looking at page 417, I identify that point in time as
 [8] about 30th May, which you see as the date on that
 [9] letter. This is Stuart Carson writing back to you:
 [10] "Dear Mr Donovan, thank you for your letter of
 [11] 14th passed to myself by Paul King."
 [12] It is about a Sherlock Holmes' game proposal?
 [13] A: Yes.
 [14] Q: Am I right in thinking that, at about May 1990, Stuart
 [15] Carson effectively became the man doing the job
 [16] previously done by Paul King?
 [17] A: Certainly at that time he was. I do not know when the
 [18] changeover occurred.
 [19] Q: Can we agree that it was by this point in time?
 [20] A: Yes.
 [21] Q: Without going into too much detail on this, you know, do
 [22] you not, or you accept that Paul King had been somewhat
 [23] unwell for some time?
 [24] A: I know that now. I did not know it at the time.
 [25] Q: What was happening was that from about May 1990 onwards

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[1] if Mr Sotherton were removed, of a certain inequality.
 [2] MR JUSTICE LADDIE: Fair enough. Carry on.
 [3] MR HOBBS: Right, Mr Donovan, we go into the final furlong.
 [4] Would you take volume E1, please? In that volume -
 [5] MR JUSTICE LADDIE: Just before you start, Mr Cox, two
 [6] things. First of all, do you remember that I asked you
 [7] for a chronology with an extra column. Has that been
 [8] done?
 [9] MR COX: It is coming.
 [10] MR JUSTICE LADDIE: So is Christmas.
 [11] MR COX: Not as long as Christmas, Monday.
 [12] MR JUSTICE LADDIE: Good. The other thing is I have
 [13] everybody's material on -
 [14] MR COX: Monday, on one disc.
 [15] MR JUSTICE LADDIE: Your skeleton, that is the only thing
 [16] I am missing.
 [17] MR COX: Yes. We discovered a problem with a disc we had
 [18] prepared. It had certain extra amendments and notes.
 [19] MR JUSTICE LADDIE: The expletives!
 [20] MR COX: It was cross-referenced to my learned friend's.
 [21] MR HOBBS: Page 418, Mr Donovan, if you would not mind.
 [22] Actually 417, if you would not mind.
 [23] A: I have that.
 [24] Q: What I am trying to do is to get my bearings with you
 [25] for what was happening within Shell in 1990. My

Page 2

[1] he had been sidelined within the department; would that
 [2] be a fair way of putting it?
 [3] A: Something had happened and he had apparently been
 [4] demoted.
 [5] Q: Yes. Do you mind me calling it "sidelined"?
 [6] A: Okay.
 [7] Q: All right. Now, page 420, if you would. Here is a
 [8] letter from Sainsbury's, dated 20th June 1990, and it is
 [9] addressed to you. Are you familiar with this letter?
 [10] A: I am indeed.
 [11] Q: You can see the contents of the letter. I do not think
 [12] any of us have retained copies of the letter of 31st May
 [13] that you may have sent to Mr Sturrock?
 [14] A: It was a mail shop letter that went to a lot of
 [15] companies.
 [16] Q: It was a sort of pitch for business?
 [17] A: Yes, it was.
 [18] Q: Are you able to say what it was a pitch for business
 [19] for?
 [20] A: Yes, it was the Disneytime promotion.
 [21] Q: It was a game concept?
 [22] A: It was a game with a detachable loyalty card as well.
 [23] Q: Right. As I understand your evidence in relation to
 [24] this document, this was regarded as significant from
 [25] your perspective to receive a reply from Sainsbury's

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[1] because they had never responded to a mail shop before?
 [2] **A:** That is correct, yes.
 [3] **Q:** If we turn the page then to page 421, this is you
 [4] writing on 25th June 1990 to Stuart Carson?
 [5] **A:** Correct.
 [6] **Q:** By now, Stuart Carson is firmly in the driving seat at
 [7] Shell on these matters, is he not?
 [8] **A:** Yes.
 [9] **Q:** You are writing:
 [10] "Dear Stuart, re J Sainsbury's.
 [11] "Sainsbury's have never before expressed the
 [12] slightest interest in promotional games. I was
 [13] therefore very surprised to receive a letter this
 [14] morning from Brian Horley, their advertising and
 [15] marketing manager, taking us up on an offer to make a
 [16] presentation.
 [17] "I therefore thought it might be worthwhile taking
 [18] advantage of the opportunity to mention the multibrand
 [19] game concept to them - hence my call to you this morning
 [20] requesting permission to do so. I will make it clear to
 [21] Sainsbury's that the approach in regard to the
 [22] multibrand game is at our instigation and purely to
 [23] explore the possibility of joint promotional activity
 [24] between Shell and Sainsbury's, without any commitment
 [25] from either party."

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[1] **A:** It would just be a computer reference.
 [2] **Q:** It was not at random, was it?
 [3] **A:** I would not have thought so.
 [4] **Q:** I have seen many of your documents and I have looked at
 [5] the references on the top of them. As I understand it,
 [6] you have a proposal file reference number for proposals
 [7] that you make to people and for related correspondence;
 [8] am I right?
 [9] **A:** With all correspondence that went out.
 [10] **Q:** And proposals in the form of three, four, five
 [11] page documents, and so on, that you present to your
 [12] clients, you use a proposal file reference number, do
 [13] you not?
 [14] **A:** Right.
 [15] **Q:** That is correct, is it not?
 [16] **A:** I will check, yes. I think that would be the case.
 [17] **Q:** I hope we do not get hung up on this. I could point to
 [18] quite a few documents where you have actually said on
 [19] the front of it --
 [20] **A:** Yes, I am sure that is the case, so that we can find it
 [21] quickly if we wanted to.
 [22] **Q:** That is the whole purpose of it, is it not?
 [23] **A:** Yes.
 [24] **Q:** If I have understood your file numbering system
 [25] correctly, you went up alphabetically from one file to

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[1] **A:** Correct.
 [2] **Q:** Now, I infer from this, and I believe you will confirm,
 [3] that you had never met Brian Horley yourself before?
 [4] **A:** No, I had not.
 [5] **Q:** I think you had probably never spoken to him?
 [6] **A:** Never spoken to him; no contact at all.
 [7] **Q:** This was a step into the unknown, from your point of
 [8] view?
 [9] **A:** Yes, it was.
 [10] **Q:** Okay. Stuart Carson gives you permission to mention the
 [11] multibrand game concept to them?
 [12] **A:** Correct.
 [13] **Q:** Just to be clear on this, the multibrand game concept,
 [14] that would be Megamatch, would it not?
 [15] **A:** Yes, it would.
 [16] **Q:** This would, therefore, be matching halves used as a
 [17] universal promotional currency?
 [18] **A:** That is correct, yes.
 [19] **Q:** Just help me on one thing: do you see the reference at
 [20] the top of the letter, JAD/RGS/SB85? I would like to
 [21] know whether I have correctly decoded this. JAD is you?
 [22] **A:** Correct.
 [23] **Q:** RGS is Sotherton?
 [24] **A:** Correct.
 [25] **Q:** AB85 is your promotional proposal file reference?

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[1] the next file. So you start with A, you go AB, then you
 [2] go B, then you go C, D, E, F, G. That was how you went
 [3] up on these files?
 [4] **A:** Yes.
 [5] **Q:** So we are into the file references which carry the AB
 [6] number here, and this one has a file reference number
 [7] AB85 at the top. Turn the page then, please, to
 [8] page 422?
 [9] **A:** Right.
 [10] **Q:** This is a letter which you sent out to Horley, so far as
 [11] I can tell; yes?
 [12] **A:** Yes, correct.
 [13] **Q:** Look at the reference at the top: JAD, that is you.
 [14] SDP, that is Mrs or Miss Peacock, is it not?
 [15] **A:** Sharon Peacock, yes.
 [16] **Q:** What was she in your organisation?
 [17] **A:** She was the office manager.
 [18] **Q:** Right. When did she leave your employment?
 [19] **A:** I would guess at the end of 1991, although she did do
 [20] some part-time work for me after that, in through 1992
 [21] and since then.
 [22] **Q:** I think I established with you that she lived in
 [23] Stowmarket?
 [24] **A:** Yes, Stowmarket.
 [25] **Q:** And she is alive and well, is she not?

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[1] A: As far as I know, I have not spoken to her for some
 [2] time.
 [3] Q: Here is your letter of 10th July 1990 to Brian Horley,
 [4] marked "Strictly confidential". You see the reference,
 [5] "It's called Disneytime ..."
 [6] A: Yes.
 [7] Q: You introduce Disneytime down those three following
 [8] paragraphs, yes?
 [9] A: Yes.
 [10] Q: In the bottom paragraph, you say:
 [11] "I would also like to take this opportunity to ask
 [12] if Sainsbury's might be interested in entering into
 [13] exploratory discussions regarding a joint commercial
 [14] game next year with Shell UK Oil. As you may be aware,
 [15] we have supplied Shell with all of their promotional
 [16] games during the last decade and this approach is made
 [17] with their knowledge and approval."
 [18] Then you talk about the basic idea, and it is the
 [19] one we have just discussed?
 [20] A: Yes.
 [21] Q: The matching halves, common currency, and so on?
 [22] A: Yes.
 [23] Q: You say:
 [24] "The actual game format and theming would
 [25] obviously be subject to agreement by both parties", and

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[1] A: Right.
 [2] Q: Page 429.
 [3] A: I have that.
 [4] Q: Thank you. This is AB108, the reference at the top. It
 [5] is yourself writing to Stuart Carson. The point I want
 [6] to make here is that you are communicating now with
 [7] Carson on 17th July, 1990. He is the person that your
 [8] company is dealing with within Shell at this point in
 [9] time, is it not?
 [10] A: We were talking to Stuart Carson and to Paul King during
 [11] that period.
 [12] Q: Yes. Why were you speaking to Paul King, do you say?
 [13] A: Because we were working on another project, I think it
 [14] was a Select Shop game, if my memory serves me
 [15] correctly. We were doing that with Paul exclusively.
 [16] Q: That was his remit, was it, within Shell at that point
 [17] in time?
 [18] A: Yes.
 [19] Q: So far as National Promotions were concerned, you would
 [20] be speaking to the National Promotions Co-ordinator,
 [21] would you not?
 [22] A: I spoke to Stuart and Paul about the National
 [23] Promotions.
 [24] Q: Paul King was not the National Promotions Co-ordinator
 [25] anymore?

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[1] so on.
 [2] The last paragraph, let us just notice that, on
 [3] page 423:
 [4] "To be frank, I was surprised to receive your
 [5] response to my letter because Sainsbury's have not been
 [6] receptive in the past to even considering promotional
 [7] games. However, I hope the concepts mentioned above do
 [8] demonstrate that it is possible for Sainsbury's to
 [9] benefit from the proven appeal of promotional games,
 [10] without using a theming (i.e. Bingo) which would
 [11] obviously be totally incompatible with Sainsbury's
 [12] image."
 [13] All right?
 [14] A: Yes.
 [15] Q: You had not, I think, spoken to Brian Horley at that
 [16] stage. This was a letter, you were responding, and this
 [17] was the way you chose to communicate with him?
 [18] A: I think that is correct, yes.
 [19] Q: Here we are in July 1990 and as far as you can recollect
 [20] now, you had not actually spoken to Horley, this is the
 [21] only communication you had with him?
 [22] A: I think that is correct, yes.
 [23] Q: Okay. I just want to show you one or two letters in
 [24] passing, that were passing between yourself and Stuart
 [25] Carson at this time?

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[1] A: No, but he had been and Stuart was green in the job and
 [2] he relied on Paul to quite a degree.
 [3] Q: How do you know that?
 [4] A: From just the contact that I had with them at the time.
 [5] Q: Here are the contacts you are having with them. Here we
 [6] are in July, you are writing letters to Stuart Carson.
 [7] We have one on page 429. I do not think the precise
 [8] details of the contents of this letter matter very much
 [9] but, as far as I can see, it is a game promotion concept
 [10] you are discussing with him?
 [11] A: Yes.
 [12] Q: Would that be right?
 [13] A: That is correct.
 [14] Q: That is 17th July you are writing to him. Turn the
 [15] page to page 431. This is you, again, 18th July, in
 [16] contact with Stuart Carson, are you not?
 [17] A: Yes.
 [18] Q: This is what?
 [19] A: This is Star Trek.
 [20] Q: Okay. The position on Star Trek is a little complicated
 [21] because there were questions over clearances and rights
 [22] and when they were going to go public, and so on. The
 [23] point I am putting to you is that you are communicating
 [24] with Stuart Carson on this potential national promotion
 [25] on 18th July?

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[1] A: I was communicating with Stuart. I also spoke to Paul
 [2] about it as well.
 [3] Q: You spoke to Paul about Star Trek, did you?
 [4] A: Yes.
 [5] Q: You did not write to him?
 [6] A: No, I spoke to him on the telephone.
 [7] Q: What was Paul's involvement in that?
 [8] A: Because Stuart was speaking to him about it, they had
 [9] the proposal and they were discussing it. I phoned and
 [10] got Paul King instead of Stuart and he said that they
 [11] were excited about it, and so on, and that Stuart would
 [12] be talking to me further about it.
 [13] Q: You remember that very clearly, do you?
 [14] A: I remember I was pretty excited about it myself at the
 [15] time. It was very important to me.
 [16] Q: As far as I can tell, with one exception, you were not
 [17] in correspondence with King at all in July 1990?
 [18] A: Was that the Select Shop game?
 [19] Q: As far as I can tell, based on documents I have seen.
 [20] A: I certainly spoke to him a number of times during that
 [21] period on the Select Shop theme. I would need to check
 [22] the documents to be certain of this but that is my
 [23] recollection sitting here. I also spoke to him about
 [24] Star Trek.
 [25] Q: Star Trek was a national promotion, potentially?

[1] Q: You would not want two documents carrying the same
 [2] reference number, would you?
 [3] A: Unfortunately, that does happen, yes. Sometimes I have
 [4] got involved myself and, to save typing in the name and
 [5] address again, I would take a letter that someone else
 [6] had got with a reference number and use the address from
 [7] there and just type in the letter myself.
 [8] Q: You would use the same reference number?
 [9] A: Not on purpose but that could happen, yes. Sometimes
 [10] I would put "/B" on it.
 [11] Q: Tell me why you put "/B" on it?
 [12] A: To denote that I was using the same letter that had been
 [13] used before but I was involved in that.
 [14] Q: The "/B" would tell you what, when you went back to your
 [15] files?
 [16] A: It would only tell me that I had re-used the letter that
 [17] had been typed before, I had used the top details again.
 [18] Q: I do not see -- I know what you are talking about
 [19] because there is a document that has a "B" on it, but
 [20] I do not see too much of that happening in these files?
 [21] A: I am just saying that did happen. I think Shell would
 [22] know by now from my correspondence that, as far as
 [23] references are concerned and dates, I am not always
 [24] accurate.
 [25] Q: Come on now. You are using these proposal file

Handwritten: Honey 449 w. 'B'
 RGS/SDP/118 - King

[1] A: Yes. Remember, the Disneytime project that I had
 [2] written to Sainsbury's about, I had worked on that with
 [3] Paul King, not with Stuart Carson.
 [4] Q: Let us turn on. Page 434, just showing you another
 [5] letter here. Here you are on 18th July, corresponding
 [6] with Stuart Carson.
 [7] A: Right.
 [8] Q: This is Star Trek?
 [9] A: Right.
 [10] Q: All right?
 [11] A: Yes.
 [12] Q: I do not see any passing references in here to Paul
 [13] King's name at all.
 [14] A: No, the main contact was with Stuart Carson on Star
 [15] Trek. At the beginning, Paul was involved when they
 [16] were thinking about it. After that, it was Stuart.
 [17] Q: All right. You are still using your AB reference
 [18] numbers and the numbers are rising. This is AB110.
 [19] That was the way it went, was it not, on promotional
 [20] proposals' correspondence, the number rose? It was AB
 [21] for the volume you filed it in and the numbers went up
 [22] sequentially.
 [23] A: Generally, yes. There were two different terminals
 [24] churning out this correspondence and they were picking
 [25] off numbers to put on the references.

[1] reference numbers -- AB110, AB114 -- for a reason
 [2] because you need to know, when you go back to a given
 [3] customer, what you had previously said to them, do you
 [4] not?
 [5] A: Yes. In general terms, yes, the people in the office
 [6] were using the system and they usually generated the
 [7] documents.
 [8] Q: Can I just have your position clear on this? What do
 [9] you say the significance is of there being a "B"
 [10] reference on the file number?
 [11] A: It would normally mean that I had become involved in it
 [12] and had re-used the address and put new content
 [13] underneath it.
 [14] Q: When you say you had become involved in it, of course
 [15] your reference, your initials JAD, appears on quite a
 [16] few of these letters and there is no "B" after the --
 [17] A: What I mean is I had become physically involved in the
 [18] typing side of it.
 [19] Q: So a letter that carries the designation "B" is one that
 [20] you had a hand in actually physically typing?
 [21] A: Yes. Maybe I edited it or something but normally it
 [22] would mean that I would have typed it in.
 [23] Q: Thank you for that assistance. Now turn to page 439.
 [24] Here is a letter, I am showing it to you not for its
 [25] content but because here we are on 20th July, you are

[1] writing to Stuart Carson, JAD/SDP/AB114, and this is
 [2] about Star Trek, the game; all right?
 [3] **A:** Right.
 [4] **Q:** This is demonstrating, in this correspondence that we
 [5] are looking at here, a pattern, is it not, whereby you
 [6] are communicating with Stuart Carson during July?
 [7] **A:** That is correct, yes.
 [8] **Q:** On anything that was of any real importance in terms of
 [9] National Promotions, you would have to speak to Stuart
 [10] Carson or write a letter to him, would you not, at this
 [11] point in time?
 [12] **A:** They were still working as a team but Stuart was dealing
 [13] primarily with the Star Trek game and Paul was still
 [14] advising him on matters and Paul was primarily
 [15] responsible for the Select Shop game.
 [16] **Q:** Yes, but who is in charge?
 [17] **A:** I guess that it must be Stuart Carson who had got that
 [18] title.
 [19] **Q:** Put it this way: on any matter of particular importance,
 [20] you would have to make sure that Stuart Carson was,
 [21] shall we say "in the loop"?
 [22] **A:** Yes.
 [23] **Q:** That is because Paul King had been, as I think you were
 [24] prepared to agree a little while ago, sidelined within
 [25] the department and that the manager in charge was

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[1] **A:** I would say that I did.
 [2] **Q:** The reference as a matter of fact, AB100, I think it
 [3] cross-correlates with the letter to Sainsbury's --
 [4] I will just look that up so I am not wrong on this. Is
 [5] it 431? That has AB100 on it.
 [6] **A:** Yes.
 [7] **Q:** Anyway, here we are on page 449. This is a letter that
 [8] you had written to Mr Horley. You had a hand in this;
 [9] yes?
 [10] **A:** Yes.
 [11] **Q:** It goes out under the signature or above the name of
 [12] Roger Sotherton; right?
 [13] **A:** Yes.
 [14] **Q:** The fact that Roger Sotherton is the signatory to this
 [15] letter indicates simply that you were working together
 [16] on the communications you were having, or you say you
 [17] were having, with Sainsbury's; correct?
 [18] **A:** Yes. He had now become more involved in that because
 [19] I was so involved in Star Trek, with Stuart Carson.
 [20] **Q:** You knew what was going on here, did you not?
 [21] **A:** Yes, I did.
 [22] **MR JUSTICE LADDIE:** Just a moment. Mr Hobbs, are you going
 [23] to ask anything about those numbers that appear in 431
 [24] and 449? I just want to know if you are going to or
 [25] not.

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[1] Stuart --
 [2] **MR JUSTICE LADDIE:** Carson.
 [3] **MR HOBBS:** Carson, I am sorry.
 [4] **A:** I did not know what had happened. I guessed that --
 [5] I did not raise the subject because I thought it could
 [6] be embarrassing.
 [7] **Q:** Why did you think it would be embarrassing?
 [8] **A:** Because he was National Promotions Manager and now he
 [9] was not, someone else had that function. But he also
 [10] had more experience than anyone else in the Promotions
 [11] Department because he had been there such a long time
 [12] and I think that he was seen as a valuable asset to give
 [13] advice to the people that succeeded him.
 [14] **Q:** Right.
 [15] **A:** I think I have seen that in Shell's witness statements.
 [16] **Q:** You have seen that in what?
 [17] **A:** I think I have seen something along those lines in
 [18] Shell's witness statements.
 [19] **Q:** Turn to page 449 in this bundle, please. Do you
 [20] recognise this letter? I would be very surprised if you
 [21] say you do not.
 [22] **A:** I do recognise it, certainly.
 [23] **Q:** You see the reference at the top, AB100b?
 [24] **A:** Yes.
 [25] **Q:** You had a hand in typing this letter?

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[1] **MR HOBBS:** Okay, I will, and I will do it this way.
 [2] I jumped off it because I could hear 431 being suggested
 [3] to me.
 [4] Could you just put a finger, please, in 449 and
 [5] could you please go back to 422?
 [6] **A:** Right. Yes, I have that.
 [7] **Q:** Right. Now, the reference JAD/SDP/AB100 is on 422;
 [8] right?
 [9] **A:** Yes.
 [10] **Q:** Although for a reason which I cannot explain, but
 [11] I rather came to the view that it was a typing error on
 [12] 431, there is AB100 again, but I may be wrong on that.
 [13] Anyway, turn to 449. You have AB100b.
 [14] **A:** Right.
 [15] **Q:** Remembering what you do about your numbering system
 [16] and
 [17] the way in which something acquires a "B" number, do you
 [18] think it likely that the 449 reference to AB100b is
 [19] linked back to the 422 reference to AB100?
 [20] **A:** Yes.
 [21] **Q:** Right.
 [22] **MR JUSTICE LADDIE:** Is that all you were going to ask?
 [23] **MR HOBBS:** That was all I was going to ask.
 [24] **MR JUSTICE LADDIE:** I do not understand for the moment,
 [25] Mr Donovan. I understood you to say, "It rang a very
 familiar bell with me because sometimes, when I want to

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[1] use a letter again, I put it up on the screen, blank out
 [2] all the text that I do not want and type the new text
 [3] and sometimes I find I send off letters with the old
 [4] date on it by mistake, as a result". I think lots of
 [5] people who are not professional secretaries do that.
 [6] I thought that that was the sort of thing that you were
 [7] saying you did, that you pull up an existing letter,
 [8] blank out the bits you do not want and retype?
 [9] **A:** Yes, I did do that, yes.
 [10] **Q:** Is that what you are saying has happened here?
 [11] **A:** I guess that is what happened here. Of course, it is a
 [12] long time ago but I would think that was what had
 [13] happened.
 [14] **Q:** Mr Donovan, it is not possible. If you look at 449?
 [15] **A:** Mmm.
 [16] **Q:** And you look at the code at the top, RGS/SDP/AB100b?
 [17] **A:** Yes.
 [18] **Q:** If you had taken an existing letter and blanked out the
 [19] text, you would have ended up with the same code, the
 [20] same address at the top, but the only thing that has
 [21] been retained is AB100. For example, at 449, RGS/SDP;
 [22] 431 is JAD/SDP and so is 422. If you just blank out the
 [23] text, you should have had JAD/SDP?
 [24] **A:** Yes, but I may have changed the reference at the top as
 [25] well.

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[1] **A:** No.
 [2] **Q:** So that is the file that this would have got into and it
 [3] is a letter you had a hand in writing on 24th July,
 [4] 1990. Let us look at the first portion of the text:
 [5] "I am writing to confirm the main points of the
 [6] telephone discussions which John Donovan and I have had
 [7] with you."
 [8] Okay?
 [9] **A:** Yes.
 [10] **Q:** How many conversations were there?
 [11] **A:** I had one conversation. I think Roger may have had one
 [12] or two.
 [13] **Q:** Would Roger have had the telephone conversation in your
 [14] presence?
 [15] **A:** No, I do not think so.
 [16] **Q:** Would you have tape recorded it or made notes about it?
 [17] **A:** No.
 [18] **Q:** Surely you would have made notes about it, would you
 [19] not?
 [20] **A:** I would not have done, no, because he had calls with
 [21] him.
 [22] **Q:** Would he have made notes; was it his practice to make
 [23] notes?
 [24] **A:** No, it was not his practice, unless we were making a
 [25] proposal to someone, then notes would be made.

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[1] **Q:** If you changed the reference at the top, why did you
 [2] leave AB100? It goes a bit further than that. You then
 [3] change the date, do you?
 [4] **A:** Change the date.
 [5] **Q:** You change three-quarters of the code, change the date
 [6] and just leave in the ..
 [7] **A:** I think it was to save typing in the address.
 [8] **Q:** I see.
 [9] (11.00 am)
 [10] **MR HOBBS:** In fact, this is a fresh letter, is it not, to
 [11] which you have given the code number AB100b?
 [12] **A:** Yes.
 [13] **Q:** Right. This is a fresh letter which you had a hand in
 [14] typing; correct?
 [15] **A:** Yes.
 [16] **Q:** Like all these letters in sequence, it would have been
 [17] filed when written on the AB file, would it not, because
 [18] of the way these files run in sequence?
 [19] **A:** I would have thought so, yes.
 [20] **Q:** It is the obvious place for it, is it not?
 [21] **A:** Yes, it is.
 [22] **Q:** There is no point in using a numbering system of the
 [23] kind you are using unless you, in fact, put the letters
 [24] in the relevant file, alphabetical file, in the correct
 [25] sequence of numbers. There is no point, is there?

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[1] **Q:** All right. You have pitched .. and we have established
 [2] this by the letters .. on 10th July 1990, that was the
 [3] letter at 422, you have pitched for a game?
 [4] **A:** That is correct.
 [5] **Q:** What you are saying, or what you wish my Lord to
 [6] understand is that by the time we get to 24th July you
 [7] have revealed more than a game, you are talking about a
 [8] long-term multibrand loyalty scheme, are you not?
 [9] **A:** Yes.
 [10] **Q:** At what point in time between 10th July game proposal
 [11] and 24th July multibrand loyalty proposal do you say
 [12] that you discussed with Horley the latter, the
 [13] multibrand loyalty ..
 [14] **A:** I had a phone call with him probably within a few days
 [15] of when we sent the first letter.
 [16] **Q:** Right.
 [17] **A:** Then Roger took that over, I asked him to. Mr Horley,
 [18] if I recollect correctly, did not have time to talk
 [19] about it and I asked Roger to phone him back. That
 [20] happened in the intervening period.
 [21] **Q:** All right. So is it your recollection and your evidence
 [22] that you, yourself, discussed with Horley the multibrand
 [23] loyalty programme, as we call it?
 [24] **A:** I do not think that I did, no. I phoned him about the
 [25] letter that I had sent, which was about Megamatch, and

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[1] asked whether he had time to discuss it or whether we
 [2] could set up a meeting. He said that he was busy and he
 [3] had not had time to look at it and could we call him
 [4] back in a few days? I handed it over to Roger Sotherton
 [5] to do that.
 [6] **Q:** We are what, four, five, six days after 10th July, that
 [7] you are making that follow-up conversation?
 [8] **A:** I would have thought within a few days.
 [9] **Q:** Four, five, six days?
 [10] **A:** It is very difficult for me to say now. I would say
 [11] within a few days. I would say about three days after
 [12] the first call.
 [13] **Q:** So you, in fact, do not get anywhere with him on the
 [14] follow-up call because he is not able to respond to your
 [15] letter of 10th July?
 [16] **A:** Yes.
 [17] **Q:** You then pass it over to Sotherton?
 [18] **A:** Correct.
 [19] **Q:** How long do you understand Sotherton to have waited
 [20] before Sotherton made contact?
 [21] **A:** I cannot recall that now. I just do not know.
 [22] **Q:** Sotherton would have made contact from your offices,
 [23] would he not?
 [24] **A:** Yes, he would have done.
 [25] **Q:** The number of personnel in your offices was never more

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[1] have thought it would have been within a few days. That
 [2] would be my guess.
 [3] **Q:** So it is a few days added to a few days. Let us say six
 [4] or seven days then after 10th July. You hear from
 [5] Sotherton. What does Sotherton say to you about his
 [6] conversation with Horley?
 [7] **A:** He said that he had spoken to him about the Megamatch
 [8] game and that it was clear that Sainsbury's were not
 [9] really interested in a promotional game and he decided
 [10] from what Mr Horley was saying that he may as well -- as
 [11] always, when we talk about Megamatch, he thought of the
 [12] loyalty version of it and he thought that could be the
 [13] right thing for Sainsbury's and he discussed it with
 [14] him.
 [15] **Q:** You are saying, are you, that Sotherton reports back to
 [16] you saying, "I tried to get him interested in the
 [17] Megamatch game, he was not very interested so I tried to
 [18] lure him with discussions about the multibrand loyalty
 [19] programme"?
 [20] **A:** Yes.
 [21] **Q:** Right. What was your understanding of what Roger
 [22] Sotherton had told him about the multibrand loyalty
 [23] programme? Were you given to understand what
 [24] information had been passed on?
 [25] **A:** In general terms, he told me that he had described the

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[1] than about six, was it, at this point in time?
 [2] **A:** That would be about correct.
 [3] **Q:** In those circumstances, you would have got to here,
 [4] would you not? Sotherton would have reported back to
 [5] you?
 [6] **A:** Yes, he would have done.
 [7] **Q:** Do you remember him reporting back to you on the
 [8] discussion?
 [9] **A:** I do, but I do not remember the exact date of when that
 [10] happened. The other side of it is that I was very busy
 [11] trying to find the concept to put up to Shell instead of
 [12] the Disneytime and I thought of Star Trek and got
 [13] totally engrossed with that, which is why I handed this
 [14] over to Roger Sotherton.
 [15] **Q:** So you give Sotherton the task of following up 10th July
 [16] letter, and that letter is about a game, a Megamatch
 [17] game?
 [18] **A:** Correct, yes.
 [19] **Q:** You must have wanted to know or you must have heard at
 [20] some stage that he had made contact with Horley again?
 [21] **A:** Yes.
 [22] **Q:** What shall we say, five or six days after 10th July?
 [23] Seven or eight days? How many days do you reckon?
 [24] **A:** I cannot recall now. I would have thought it would have
 [25] been within a matter of days rather than weeks. I would

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[1] scheme to him, that Mr Horley had agreed to treat the
 [2] information as being confidential and he had just
 [3] described how it was different to Megamatch because a
 [4] lot of the features, of course, are similar, or the
 [5] same.
 [6] **Q:** You are saying, I think, that you were not party to
 [7] those discussions between Sotherton and Horley?
 [8] **A:** I do not think so, no.
 [9] **Q:** Did there come a time subsequently when you were a party
 [10] to discussions on the loyalty brand programme point with
 [11] Horley? Did you become a party to such discussions?
 [12] **A:** It is possible that I did. I do not have a
 [13] recollection. It is possible that I did.
 [14] **Q:** Look at the letter on 449;
 [15] "I am writing to confirm the main points of the
 [16] telephone discussions which John Donovan and I have had
 [17] with you."
 [18] Does that jog your recollection?
 [19] **A:** Yes, because I certainly had the first conversation with
 [20] him when we discussed the Megamatch game.
 [21] **Q:** And you typing out this letter, are you not?
 [22] **A:** Yes, well, I was certainly involved in that.
 [23] **Q:** Here you are, drafting or typing it, in some way
 [24] producing this letter, and you are referring to
 [25] telephone discussions which you are attributing to

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[1] yourself as well as Sotherton?
 [2] **A:** Yes.
 [3] **Q:** Would I be right in thinking that you did in fact at
 [4] some stage prior to this letter yourself speak to Horley
 [5] about the multibrand loyalty programme?
 [6] **A:** I would not rule out the possibility, but I do not
 [7] recollect it.
 [8] **Q:** Surely this was a rather important event, was it not?
 [9] **A:** As far as I can recall, Roger dealt with that part of it
 [10] with Mr Horley.
 [11] **Q:** Not entirely alone surely?
 [12] **A:** Entirely alone, because I was getting absolutely wrapped
 [13] up in the Star Trek project.
 [14] **Q:** Are you trying to distance yourself from any
 [15] communications between yourself and Horley over the
 [16] telephone?
 [17] **A:** I am trying to give you my best recollection of what
 [18] happened.
 [19] **MR JUSTICE LADDIE:** You have to be fair. This letter says,
 [20] "discussions that John Donovan and I had with you" and
 [21] if you look straight below, the first thing that is
 [22] there is the Megamatch.
 [23] **MR HOBBS:** I understand that, my Lord.
 [24] **MR JUSTICE LADDIE:** You put it to him that he was distancing
 [25] himself from all the conversations.

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[1] a derivative of the Megamatch idea of a Shell-led
 [2] consortium. You have to remember that at the time I was
 [3] extremely busy with Stuart on the Star Trek project
 [4] which was just starting and if perhaps that had not been
 [5] the case, then maybe we would have discussed it with
 [6] him. I might have done but I cannot recall that.
 [7] **Q:** I just want to follow up with something that I think
 [8] I heard you say there. Were you for a moment suggesting
 [9] there that the permission referred to on 421 extended to
 [10] what you are calling the multibrand loyalty programme?
 [11] **A:** I am saying that Megamatch, in my mind, that was where
 [12] the multibrand loyalty scheme came from and, as I have
 [13] said many times, whenever we got into conversation with
 [14] anyone about Megamatch, we often then went to the
 [15] loyalty version of it. As I also said yesterday, one
 [16] was a short-term game and the other was a long-term
 [17] loyalty scheme.
 [18] **Q:** I am not sure you actually answered my question there.
 [19] Are you suggesting in your evidence now that the
 [20] permission that you refer to in this letter on 421 would
 [21] have extended to the multibrand loyalty programme?
 [22] **A:** I am not sure that that would be fair to say that.
 [23] **Q:** No. In fact, the position would be that if you were
 [24] going to disclose the multibrand loyalty programme to
 [25] Sainsbury's, that is something that you would have had

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[1] **MR HOBBS:** No, my Lord, with great respect, I did put that
 [2] point but I was conscious of what I was saying and
 [3] I believe I have a proper basis of putting it the way
 [4] I did.
 [5] Can I just be clear on this? Is your best
 [6] recollection now that in discussions you had yourself
 [7] with Horley, you, yourself, did not discuss the
 [8] multibrand loyalty programme?
 [9] **A:** I do not think that I did, to the best of my
 [10] recollection. It is possible that I might have spoken
 [11] to him subsequently but I cannot -- I have not got a
 [12] recollection of that. I would not rule it out.
 [13] **Q:** Keep a finger in 449 and turn back to 421, please. On
 [14] 421, you make a point of asking Stuart Carson for
 [15] permission to discuss with Sainsbury's the multibrand
 [16] game, Megamatch?
 [17] **A:** Yes.
 [18] **Q:** Right. Did you make a point of seeking permission from
 [19] Stuart Carson to discuss this multibrand loyalty
 [20] programme with Horley of Sainsbury's?
 [21] **A:** I have not got a recollection that I did. I may have
 [22] done, but I cannot recall that I did.
 [23] **Q:** You would certainly agree, would you not, that you ought
 [24] to have done?
 [25] **A:** I am not sure that that would be the case because it was

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[1] to revert to Stuart Carson on, is it not?
 [2] **A:** I am not sure about that. I think that our relationship
 [3] with Shell was good enough that I had the consent from
 [4] him to talk to Sainsbury's about the Shell-led
 [5] consortium and what I was then -- what we were going to
 [6] suggest to Sainsbury's was not a mile away from that.
 [7] It was a Shell-led consortium.
 [8] As I said earlier, if we had not been very busy on
 [9] the other project, maybe I would have specifically
 [10] raised the subject with him.
 [11] **Q:** Let us press on in the letter on 449. Was it your
 [12] understanding when you wrote this letter that Sotherton
 [13] may have had more than one discussion with Horley on the
 [14] subject of the multibrand loyalty programme?
 [15] **A:** It is very difficult to put my mind back to 1990, unless
 [16] there is something that says it in the letter. I knew
 [17] certainly that he had spoken at least once to Mr Horley
 [18] and maybe I knew that he had spoken to him more than
 [19] once. It is possible that I also spoke to Mr Horley
 [20] again, I just do not have a recollection about it.
 [21] **Q:** When Sotherton informed you of his discussion with
 [22] Horley, did Sotherton go on to tell you anything about
 [23] how interested or otherwise he thought Horley was in
 [24] what had been discussed with him?
 [25] **A:** I think he must have done for this letter to be

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[1] written. He must have given me the basics of it, yes.
 [2] **Q:** But you do not have any recollection, as you give
 [3] evidence now, as to whether you picked up any idea as to
 [4] the degree of enthusiasm that Horley may have had for
 [5] this concept?
 [6] **A:** I remember that it was not something that Sainsbury's
 [7] were going to do immediately. It was something they
 [8] might be interested in at a later date.
 [9] **Q:** So ...
 [10] **A:** If the timing was right with Shell, then we should get
 [11] back to them. They were aware that Shell were not ready
 [12] for a long-term scheme, they were concentrating on
 [13] short-term activity, which was the reason we went with
 [14] Megamatch, but that at a later stage, if Shell decided
 [15] to go with it, then we could go back to Sainsbury. I do
 [16] not think that there was anything more than that to it.
 [17] There was not any guarantee that Sainsbury's had a
 [18] strong interest in it. They had an interest in it.
 [19] **Q:** They were kind of going to wait, were they, to see
 [20] whether Shell came back to them on the proposal; is that
 [21] what you are saying?
 [22] **A:** Yes, and they would consider it at that time.
 [23] **Q:** At what time?
 [24] **A:** Whenever Shell were ready to look at it seriously, then
 [25] Sainsbury's would consider the proposal again.

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[1] consortium-based customer loyalty promotion which (with
 [2] Shell's approval) we disclosed to you in strictest
 [3] confidence."
 [4] **A:** Yes, I see that.
 [5] **Q:** My Lord, I wonder if the window could be shut. I am
 [6] finding it very difficult to hear what the witness is
 [7] saying. We seem to have World War 3 started out there?
 [8] **MR JUSTICE LADDIE:** The people who are trying to disrupt
 [9] central London at the moment do not have helicopters.
 [10] They disapprove of helicopters and everything else.
 [11] **MR HOBBS:** I am sorry. I am finding it so difficult to hear
 [12] what is going on. Thank you.
 [13] You got that first sentence, did you?
 [14] **A:** I did.
 [15] **Q:** "With Shell's approval"?
 [16] **A:** Yes.
 [17] **Q:** When did you get that approval?
 [18] **A:** I would guess that I am referring to the letter that was
 [19] actually relating to Megamatch.
 [20] **Q:** Let us just look at what you have actually written;
 [21] "... willing to consider the consortium-based
 [22] customer loyalty promotion which (with Shell's approval)
 [23] we disclosed to you in strictest confidence."
 [24] That is implying that the disclosure was with
 [25] Shell's approval?

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[1] **Q:** No matter how long it was before Shell came back to
 [2] them?
 [3] **A:** I do not suppose there was any date put on it.
 [4] **Q:** Why was there no date put on it?
 [5] **A:** Because the petrol promotions run in cycles, you have
 [6] several years of loyalty schemes and then they change
 [7] over to short-term activity, and then they swap back.
 [8] It has been going on since the 1960s, that I know of.
 [9] **Q:** On 449 we deal under the heading, first of all, with
 [10] Disneytime and Megamatch proposals. This letter records
 [11] that you have decided that the timing would not be right
 [12] for Sainsbury's to move into promotional game activity
 [13] in 1991. You are willing to reconsider the opportunity
 [14] at a later date?
 [15] **A:** That is correct, yes.
 [16] **Q:** That was effectively, "Do not call us, we will call
 [17] you", was it not?
 [18] **A:** You could interpret it that way. They were not in the
 [19] market at that time for a promotional game.
 [20] **Q:** Right. Now the next heading you have in this letter is
 [21] "A multibrand loyalty programme"; right?
 [22] **A:** Right.
 [23] **Q:** You are writing here;
 [24] "When the timing is suitable for Shell,
 [25] Sainsbury's will be willing to consider the

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[1] **A:** In the intervening period we had, of course, then
 [2] discussed this with Shell. That was around 20th, was it
 [3] not? We discussed this with Shell and we did get their
 [4] approval to send the letter to Sainsbury's.
 [5] **Q:** I am not talking about the letter; I am talking about
 [6] the discussions. This letter that we are looking at
 [7] here is recording the discussions.
 [8] **A:** Well, this happened after we had got Shell's approval to
 [9] write to Sainsbury's and I guess I was talking about
 [10] that.
 [11] **Q:** You are talking about getting Shell's approval to write
 [12] to Sainsbury's. Your letter is saying "Sainsbury's will
 [13] be willing to consider the consortium-based customer
 [14] loyalty promotion which (with Shell's approval) we
 [15] disclosed to you in strictest confidence."
 [16] We are talking about events which have already
 [17] happened before this letter?
 [18] **A:** Yes.
 [19] **Q:** First of all, do you say that that is true, that you got
 [20] Shell's approval to make the disclosure to Horley of
 [21] Sainsbury's?
 [22] **A:** Roger Sotherton spoke to Paul King about it and we sent
 [23] a letter across to them. They changed it slightly and
 [24] we sent that to Sainsbury's, with their approval, yes.
 [25] **Q:** You are talking about letters. I am asking you about

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[1] discussions. I have built up a picture from your
 [2] answers that there was one, or maybe more, telephone
 [3] conversations between Sotherton and Horley and I have
 [4] understood you to say that in one, or possibly more
 [5] discussions between Sotherton and Horley, Sotherton
 [6] reveals the multibrand loyalty programme concept?

[7] **A:** That is correct.

[8] **Q:** I am asking you whether that disclosure in that
 [9] telephone conversation, or there may have been more than
 [10] one, whether you say that that disclosure took place
 [11] with Shell's approval; the actual telephone disclosure?

[12] **A:** It is very difficult for me to say under the
 [13] circumstances that I was extremely wrapped up in a £4.5
 [14] million project for Shell, Star Trek, trying to arrange
 [15] licencing, the print, et cetera, for that. This was of
 [16] secondary importance because I knew that Shell - the
 [17] timing was not right for them. They were going with
 [18] Star Trek and were looking at other short-term
 [19] activity. This was of secondary importance and
 [20] I therefore decided to ask Roger to deal with it, and he
 [21] dealt with Paul King at Shell. As far as the exact
 [22] timing is concerned, it is difficult for me to recall
 [23] that now.

[24] **Q:** At all events, you are in some way involved in the
 [25] drafting of this letter we have on 449?

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[1] the multibrand loyalty programme took place without
 [2] Shell's approval?

[3] **A:** It is possible that the first discussion that Roger had
 [4] with Mr Horley, that he did that without Shell's
 [5] approval. Yes, I think that is possible.

[6] **Q:** You think it is possible. Are you able to give my Lord
 [7] an indication as to just how likely you think it is that
 [8] Sotherton did that?

[9] **A:** I would have thought that it was quite likely because my
 [10] impression was that when he had the conversation he was
 [11] not intending to raise that subject. It was only in
 [12] response to what Mr Horley had said in regard to the
 [13] Megamatch project.

[14] **Q:** Reading on, on page 449, in the fourth line of the
 [15] paragraph we are in:

[16] "Copies of pages 12, 13 and 14 of Concept Four, a
 [17] section of a multiconcept proposal we presented to
 [18] Shell, are attached for your information."

[19] Yes?

[20] **A:** Yes.

[21] **Q:** Right. Are you saying that you sent that document to
 [22] Sainsbury's, Horley of Sainsbury's, with Shell's
 [23] approval?

[24] **A:** Yes.

[25] **Q:** Whose approval within Shell do you say you had to do

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[1] **A:** Yes.

[2] **Q:** You are writing, you will agree with me, in terms which
 [3] indicate that the disclosure was with Shell's approval?

[4] **A:** Yes.

[5] **Q:** That is the disclosure between Sotherton and Horley over
 [6] the telephone, is it not?

[7] **A:** I cannot really say that. It may have been, because in
 [8] the intervening period we had had, or Roger had had
 [9] discussions with Paul King about that. Exactly when
 [10] that happened I do not know.

[11] **Q:** You were, during July, and in particular between 10th
 [12] July and 24th July, in fairly regular contact with
 [13] Stuart Carson, were you not?

[14] **A:** I was.

[15] **Q:** Did you, yourself, ever seek Stuart Carson's approval
 [16] for disclosure of what we are calling in this letter the
 [17] multibrand loyalty programme?

[18] **A:** Not that I can recall, no.

[19] **Q:** No. So you did not seek it off Carson. Do you have any
 [20] reason to believe that Sotherton sought it off Carson?

[21] **A:** He was speaking to Paul King. As I understood it,
 [22] Stuart Carson had asked Paul King to deal with this, the
 [23] Sainsbury's connection, because he was very busy with me
 [24] on Star Trek.

[25] **Q:** Is it possible, in fact, that this alleged disclosure of

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[1] that?

[2] **A:** Roger had been dealing with Paul King on it. It is
 [3] possible that Stuart Carson was involved in that. But
 [4] certainly it was Paul King that he was dealing with
 [5] primarily.

[6] **Q:** This is not something that you could have done without
 [7] the express approval of Stuart Carson, is it?

[8] **A:** We had been used to doing all sorts of things on the
 [9] instruction of Paul King, not only when he was National
 [10] Promotions Manager but from way back to the early 1980s
 [11] when he was an individual in the Marketing Promotions
 [12] Department.

[13] **Q:** Paul King?

[14] **A:** Paul King.

[15] **Q:** But Paul King has been sidelined by the date of this
 [16] letter, has he not?

[17] **A:** He had been sidelined but he was still a very important
 [18] person, because he had more experience than all of the
 [19] others put together.

[20] **Q:** Are you unable to accept my proposition that you needed
 [21] Stuart Carson's permission to do any such thing, as you
 [22] are purporting to do here?

[23] **A:** If we had instructions from Paul King, we would have
 [24] assumed that he had arranged that with Stuart Carson,
 [25] naturally because they worked together, very closely.

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[1] **Q:** In the period that you were in communication with Stuart
 [2] Carson, you yourself did not double-check as to whether
 [3] you had permission from him?
 [4] **A:** We are talking nine years ago. I cannot recall that.
 [5] I may have done, I may not have done. As I say, I was
 [6] very excited at the time of getting an order from Shell
 [7] for a £4.5 million promotion.
 [8] **Q:** Going on with the paragraph I have just taken you to,
 [9] you go on to say:
 [10] "We foresee a wide variety of redemption options,
 [11] perhaps including Air Miles."
 [12] Do you see that?
 [13] **A:** Yes, I do.
 [14] **Q:** What prompted you to write that; can you recollect?
 [15] **A:** Because it seemed that it would be -- it would enhance
 [16] the promotion for a loyalty scheme if you had Air Miles
 [17] plus, because that was not a mass appeal scheme at the
 [18] time.
 [19] **Q:** In 1990?
 [20] **A:** In 1990, Air Miles -- it certainly was not a mass appeal
 [21] scheme in 1992. It took --
 [22] **Q:** Are you actually saying that Air Miles was not a mass
 [23] appeal scheme in 1990?
 [24] **A:** Certainly. Mr Lazenby, sitting in front of you, if you
 [25] check the Shell discovery, you will see that he

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[1] you what Sainsbury's' long-term commercial plans were?
 [2] **A:** I am certainly not saying that. I am only saying what
 [3] we were told at the time.
 [4] **Q:** You know, in fact, that Sainsbury's at some point, I do
 [5] not know specifically when, brought out their own reward
 [6] cards scheme, did they not?
 [7] **A:** In 1997, I think it was.
 [8] **Q:** Anyway, as far as you are concerned in relation to this
 [9] letter, Sainsbury's had no immediate interest in
 [10] pursuing the matter; correct?
 [11] **A:** Correct --
 [12] **Q:** If you could --
 [13] **MR JUSTICE LADDIE:** I know you are getting excited,
 [14] Mr Hobbs. Let him finish.
 [15] **A:** I was only going to say that, of course, Sainsbury's did
 [16] become involved as a partner in the Shell consortium in
 [17] 1996. As I understand it, they invested at least
 [18] £50,000 and probably £100,000 in the project for
 [19] research, et cetera. That was Project Rainbow.
 [20] **MR JUSTICE LADDIE:** Your go.
 [21] **MR HOBBS:** Right. Let us see if we can agree that I have
 [22] correctly understood your position. Sainsbury's, at the
 [23] date of this letter, according to you, had no immediate
 [24] interest in pursuing the matter of a long-term
 [25] multibrand loyalty programme?

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[1] originated a document about Air Miles when he said that,
 [2] that it was not a mass appeal promotion and I absolutely
 [3] agree with him. It used to take the average person
 [4] forever to save up Air Miles and they never had enough
 [5] for a free flight. There was lots of publicity about
 [6] it. I mean, it is a very successful scheme but they had
 [7] a hard time getting it off the ground.
 [8] **Q:** You are saying, if I understand the position correctly,
 [9] that Sainsbury's were not interested in their own right,
 [10] they were simply going to stand there waiting for
 [11] however long it might be before Shell reverted to them;
 [12] yes?
 [13] **A:** Yes. They quite clearly had no plans themselves to
 [14] launch anything nationally and, therefore, they were
 [15] quite happy to wait until Shell went back. That does
 [16] not mean to say that if someone else came along with
 [17] another project, that they would not look and that and
 [18] might do it. As far as we were concerned, that was the
 [19] response they gave to us.
 [20] **Q:** You had no idea what Sainsbury's internal cogitations
 [21] were on the subject of long-term promotional concepts,
 [22] did you?
 [23] **A:** We only knew what we were told. We had no other means
 [24] of knowing.
 [25] **Q:** You are not telling my Lord, are you, that Horley told

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[1] **A:** That is correct. That was my understanding, yes.
 [2] **Q:** Right. If I have also understood the position, neither
 [3] did Shell?
 [4] **A:** That is correct. But Shell was interested in the
 [5] Sainsbury's connection and therefore wanted us to hold
 [6] the promotion for them.
 [7] **Q:** Shell, at this point in time, had no immediate interest
 [8] in going forward with Sainsbury's on a multibrand
 [9] loyalty programme?
 [10] **A:** That is correct.
 [11] **Q:** So this letter, according to your own version of events,
 [12] is being written at a time when neither of the two
 [13] parties have any immediate interest in pursuing the
 [14] matter with each other?
 [15] **A:** Not at that point, no.
 [16] **Q:** You are agreeing with me?
 [17] **A:** I am agreeing with you.
 [18] **Q:** What I cannot understand is why you say, if you do say,
 [19] you felt it necessary in those circumstances to write a
 [20] letter of this kind?
 [21] **A:** Because Shell were very interested, as they always have
 [22] been, in the Sainsbury's connection. The idea of a
 [23] long-term partnership with Sainsbury's was very
 [24] important to them.
 [25] **Q:** Where do you get that information from?

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[1] **A:** From Shell's discovery. It is all the way through the
 [2] discovery.
 [3] **Q:** You did not know it at the time?
 [4] **A:** I did not know it at the time, no.
 [5] **Q:** That is just --
 [6] **A:** I am only telling you the impression that I got at the
 [7] time from the discussions that Roger had with Paul King,
 [8] that they were very interested in Sainsbury's. I also
 [9] had discussions myself with Paul about Megamatch, if you
 [10] remember with Tescos, and we also discussed
 [11] Sainsbury's. I knew that Sainsbury's were an important
 [12] potential partner for Shell.
 [13] **Q:** All right, let me take you back to where I thought we
 [14] were a few moments ago. At the date of this letter we
 [15] are looking at here on 449 there is no immediate
 [16] interest in pursuing the matter either on Sainsbury's
 [17] side or on Shell's side.
 [18] Look on to the next paragraph:
 [19] "As mentioned, if the project proceeds, Shell
 [20] would be the lead partner in organising the consortium
 [21] which would consist of a range of retailers, plus
 [22] possibly fast-moving consumer goods' brands, and other
 [23] businesses, with each partner operating the scheme on a
 [24] exclusive basis within their own market sector."
 [25] Yes?

[1] **Q:** So far as you were concerned, this could perfectly well
 [2] have been adding new information to discussions which
 [3] had already occurred?
 [4] **A:** It may have been.
 [5] **Q:** And, if it was, what was the point in adding information
 [6] in circumstances where neither party wished to proceed?
 [7] **A:** Because, long-term, we would dearly have liked to have
 [8] got business on that project with Shell and with
 [9] Sainsburys.
 [10] **Q:** So you are writing a letter of record for history, are
 [11] you?
 [12] **A:** Not for history. Because, if Shell, at a later
 [13] stage -- remember what I said earlier on: these
 [14] promotional cycles had been going since the 1960s with
 [15] the oil companies, from loyalty to games. I knew that
 [16] it would turn again, as of course it did, and I was
 [17] anxious that, if that did happen, if Shell decided they
 [18] were interested in it, we could resurrect and contact
 [19] Sainsburys.
 [20] **Q:** Go on in the paragraph we have here:
 [21] "The parties could issue the currency against a
 [22] different purchase value. For example, one point for
 [23] every £5 spent at Shell stations and one point with
 [24] every £2 spent at Sainsburys. Some other businesses
 [25] might be linked to the scheme only to the extent of

[1] **A:** Yes.
 [2] **Q:** What is the point of writing this in this letter at that
 [3] point in time?
 [4] **A:** I think it was because our own thinking had proceeded,
 [5] had moved forward, and this was a convenient way of
 [6] putting it into writing where both sides got a copy of
 [7] it, that is Shell and Sainsbury's.
 [8] **Q:** You wanted to create a written record, did you?
 [9] **A:** Yes, of the thinking as it had been advanced at that
 [10] stage.
 [11] (11.30 am)
 [12] **Q:** Go to the next paragraph:
 [13] "The programme could even be set up as a separate
 [14] business venture, in which all of the partners issuing
 [15] and redeeming the common promotional currency could
 [16] share the costs and the benefits."
 [17] What exactly was the "separate business venture"
 [18] you are discussing there in that paragraph?
 [19] **A:** I think it was that the consortium members could change
 [20] the loyalty scheme into its own brand, where they all
 [21] had shares in the company.
 [22] **Q:** Are you saying that this had previously been discussed
 [23] on the telephone with Horley?
 [24] **A:** I do not know, because I do not think I had that
 [25] conversation with him.

[1] redeeming the promotional currency."
 [2] Do you see that?
 [3] **A:** Yes, I do.
 [4] **Q:** Is it your recollection, or is it your evidence to
 [5] my Lord that this represents information disclosed
 [6] orally beforehand to Horley?
 [7] **A:** It is very difficult for me to put myself back now nine
 [8] years as to the information that Mr Sotherton had given
 [9] to me verbally and was involved in the construction and
 [10] drafting of this letter. I cannot be sure of what
 [11] stemmed from his discussions with them and what we had
 [12] added to when we were writing the letter.
 [13] **Q:** Turn to the top of the next page, page 450:
 [14] "Being the originators of the idea, Don Marketing
 [15] and our Managing Director, John Donovan, who has a
 [16] personal stake in the project, would require an
 [17] appropriate concept fee, a role in the promotion, UK and
 [18] international royalties covering proprietary rights,
 [19] plus agency commission on merchandise, instant gifts or
 [20] otherwise and on promotion and advertising."
 [21] **A:** Yes.
 [22] **Q:** What was the point in telling him that?
 [23] **A:** Just saying that we would want to earn money out of the
 [24] venture if it did proceed. Because it would obviously
 [25] be a very important promotion. It would be long-term.

[1] It could make any promotion company that was involved
[2] with it. That did not mean to say that we expected to
[3] get all of those things. It was just a statement of
[4] what our aims were.

[5] **Q:** It is a statement you are making to a potential possible
[6] partner in retailing at a future date. Did you make any
[7] such similar statement to Shell at that time?

[8] **A:** We sent them a copy of this letter and we may have -- or
[9] Roger may have discussed that with them. I am not sure
[10] about that.

[11] **Q:** That is dealings between Sotherton and King, is it not?

[12] **A:** Yes.

[13] **Q:** Go to the next paragraph:

[14] "Paul King of Shell has given me authority to
[15] disclose to you that he recently approached Tesco to
[16] explore the possibility of a joint promotion. This
[17] followed up a meeting which John Donovan had with Tesco
[18] Directors some time ago on the Shell-led consortium
[19] principle. Although Tesco apparently gave a favourable
[20] response to FKB, Shell's senior management decided
[21] against pursuing the discussions with Tesco. We have
[22] reason to believe that Sainsburys would be Shell's
[23] preferred partner. We informed Shell of our discussions
[24] with you, and Mr King subsequently approved the content
[25] of this letter which was drafted following a long

[1] **Q:** You see "Either Don Marketing or Shell 'will be' in
[2] contact with you at an appropriate date in the future to
[3] discuss making a detailed presentation to
[4] Sainsburys ..."

[5] **A:** Yes.

[6] **Q:** It is the words "will be".

[7] **A:** Yes, well ...

[8] **MR JUSTICE LADDIE:** Please, Mr Cox, do not interrupt the
[9] cross-examination. It is most distracting for Mr Hobbs,
[10] it is distracting for me and it is distracting for the
[11] witness. If you wish to make an objection, stand up and
[12] object. But stage whispers, please not here.

[13] **MR COX:** I am not very good at stage whispers, I am afraid.
[14] They tend to carry rather further than I intend.
[15] I apologise.

[16] **MR HOBBS:** You are writing this letter and you are making
[17] more than, if you like, a prediction: you are saying
[18] that Don Marketing or Shell will be in contact with you
[19] and I am asking you what basis, according to your
[20] knowledge, there was for making that statement?

[21] **A:** You are saying, instead of "will", I should have put
[22] "may"?

[23] **Q:** Yes.

[24] **A:** I am not sure that I gave it that thought at the time.
[25] Perhaps I should have done.

[1] telephone conversation with him."

[2] Right?

[3] **A:** Yes.

[4] **Q:** If I have understood this correctly, you are saying in
[5] this portion of text we have just looked at that you
[6] were authorised to discuss Shell's thinking vis-a-vis
[7] Sainsburys on the one hand and Tesco on the other?

[8] **A:** Yes.

[9] **Q:** You are saying, are you, that you got that authorisation
[10] from Mr King?

[11] **A:** Yes.

[12] **Q:** You are not saying, are you, that you got any such
[13] authorisation from Stuart Carson?

[14] **A:** As I said earlier on, I may have spoken to Stuart Carson
[15] about it. We had many conversations over the telephone,
[16] we had many meetings at Shell-Mex House. I cannot
[17] recollect doing so.

[18] **Q:** Your next paragraph says:

[19] "Either Don Marketing or Shell will be in contact
[20] with you at an appropriate date in the future to discuss
[21] making a detailed presentation to Sainsburys and other
[22] selected potential partners."

[23] What basis was there for that statement?

[24] **A:** Based on the discussions that Roger Sotherton had had
[25] with Paul King.

[1] **Q:** You see, you have two people, Shell and Sainsburys, who
[2] have no immediate interest in pursuing this project with
[3] each other?

[4] **A:** That is correct.

[5] **Q:** If that is correct, how is it that you are able to write
[6] here that "Don Marketing or Shell will be in contact
[7] with you"?

[8] **A:** Because Shell was certainly interested in the Sainsburys
[9] connection. They were interested in the Multibrand
[10] Loyalty Scheme. Sainsburys were interested, though
[11] perhaps to a lesser extent. But it was a magic
[12] combination, if it could be put together, and, when the
[13] market changed, we would certainly have it in mind, if
[14] Shell gave its permission, we would want to go back to
[15] Sainsburys.

[16] **Q:** Look on in that paragraph:
[17] "Bearing in mind the cyclical nature of
[18] promotional activity on petrol forecourts, we anticipate
[19] that there is likely to be a substantial interval,
[20] perhaps five years or six years, before Shell decides
[21] that the timing is suitable."

[22] **A:** Yes.

[23] **Q:** Where did you get those figures of five or six years
[24] from?

[25] **A:** Based on -- I have been involved in petrol promotions

[1] since 1967. I have seen these cycles happen repeatedly
 [2] and I thought -- that was my guess at the time: that it
 [3] would be five or six years before they turned back to
 [4] loyalty schemes.

[5] **Q:** So that is 1995 or 1996?

[6] **A:** Yes.

[7] **Q:** You were predicting, were you not, in this letter of
 [8] 24th July 1990 that there would be a communication, it
 [9] would come between Shell UK and Sainsburys, but it would
 [10] not come for a long period of time, which you set or
 [11] indicated would be five or six years' time?

[12] **A:** Yes.

[13] **Q:** What happened in 1995, as you now know?

[14] **A:** In October 1994 Shell launched the pilot scheme, or a
 [15] scheme in Scotland, for the stand-alone Smart Scheme.

[16] **Q:** And in 1995 John Menzies was there?

[17] **A:** Yes, July 1995.

[18] **Q:** In 1996 you got that statement -- 21st July 1996 -- in
 [19] The Times Business News?

[20] **A:** And this Project Rainbow consortium with Sainsburys
 [21] I think that same year as well.

[22] **Q:** Yes, the Rainbow/Sainsburys consortium the same year as
 [23] well: 1996?

[24] **A:** I think it was, yes.

[25] **Q:** Your ability to foretell the future is, if I may say so,

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[1] **A:** I would have to check the articles. I think it was in
 [2] 1996. It would have been after September 1996.

[3] **Q:** Well, there we are. You predicted in this letter in
 [4] 1990 that they would in communication in connection with
 [5] a multibrand loyalty programme in five or six years'
 [6] time i.e. 1995 or 1996. Look at the next paragraph:

[7] "The proposed multibrand loyalty scheme could
 [8] utilise plastic Swipe Cards. In the not too distant
 [9] future a multipurpose Smart Card could not only process
 [10] the common promotional currency but also provide other
 [11] functions, including data capture and even financial
 [12] transactions. We have already discussed possibilities
 [13] with Barclays Bank. It is possible that the cards
 [14] could, to some degree, be personalised in terms of
 [15] design and function to suit the marketing objectives of
 [16] the individual partners, who could reap the benefits of
 [17] shared customer data, shared costs and unprecedented
 [18] advertising exposure at many thousands of retail
 [19] outlets, all using the same basic continuous programme
 [20] under a universal identity."

[21] You were predicting the future again in this
 [22] paragraph, were you not?

[23] **A:** Yes.

[24] **Q:** And the future you predicted seems to have come to pass,
 [25] if we look backwards down the telescope of time?

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[1] astonishing in this letter of 1990?

[2] **A:** I have been in petrol retailing or petrol promotions --
 [3] for over 30 years I have been associated with them.

[4] I have been a Greenshield franchise holder, I have been
 [5] a Pinkshield franchise holder, I have run all sorts of
 [6] promotions, I have supplied promotions to Shell, I have
 [7] supplied ten promotions to Conoco, I have acted as a
 [8] consultant to BP. Yes, I do know about petrol

[9] promotions and the cycles that frequently happen, yes.

[10] **Q:** But let us just again -- because I think it repays
 [11] reiteration here: you are writing this letter in
 [12] circumstances where Shell has no immediate interest in
 [13] going ahead with Sainsburys, Sainsburys has no immediate
 [14] interest in going ahead with Shell and you are telling
 [15] both of them that, whatever they might think, in fact
 [16] you are predicting that in five or six years' time they
 [17] will come together and will be talking about this very
 [18] thing?

[19] **A:** As it happens, my prediction was not that accurate, was
 [20] it? Because Shell actually started work on the project
 [21] in 1992, late 1992. So it was not all that accurate.
 [22] It just took a long time to actually be launched.

[23] **Q:** I think you yourself just referred to the discovery
 [24] relating to Project Rainbow and I think you yourself
 [25] fixed it at 1996, did you not?

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[1] **A:** Yes, it has.

[2] **Q:** You are describing here the Shell Smart Scheme?

[3] **A:** I think I am, yes.

[4] **Q:** You are, are you not?

[5] **A:** Yes.

[6] **Q:** That is exactly what you are describing in this letter.
 [7] You are writing this as a description of the Shell Smart
 [8] Scheme?

[9] **A:** That is why we are all here, I think.

[10] **MR COX:** Will my learned friend make his allegation --

[11] **MR JUSTICE LADDIE:** No, Mr Cox, please wait until Mr Hobbs
 [12] sees his way to the end of the letter. I will ensure
 [13] that he is fair to the witness. Do not worry.

[14] Carry on, Mr Hobbs.

[15] **MR HOBBS:** I did not actually hear what the witness last
 [16] said, because of this intervention on my left.

[17] **MR JUSTICE LADDIE:** Mr Donovan, go back again. You were
 [18] describing the Smart Card system, were you not? The
 [19] Shell Smart system?

[20] **A:** Yes, I was.

[21] **MR HOBBS:** This is an accurate description -- substantially
 [22] accurate, let us say, so we do not get into the details
 [23] -- of the Shell Smart Scheme, was it not?

[24] **A:** This in combination with the proposal we put to Shell,
 [25] yes.

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[1] **Q:** Let us look at the degree of prediction that you have
 [2] here. On the preceding page at 449 you say, underneath
 [3] the heading "Multibrand Loyalty Programme":
 [4] "We foresee a wide variety of redemption options,
 [5] perhaps including Air Miles."
 [6] **A:** Correct.
 [7] **Q:** That came to pass, so far as the Shell Smart Scheme was
 [8] concerned?
 [9] **A:** To be fair, they had already been running Air Miles for
 [10] three years. So I suppose it could be said it was a
 [11] reasonably obvious development: that Air Miles could be
 [12] retained in the new scheme.
 [13] **Q:** It came to pass?
 [14] **A:** Yes, it happened.
 [15] **Q:** You have, at the bottom of page 449:
 [16] "Some other businesses might be linked to the
 [17] scheme only to the extent of redeeming the promotional
 [18] currency."
 [19] **A:** Yes.
 [20] **Q:** That came to pass with the Shell Smart Scheme, did it
 [21] not?
 [22] **A:** Yes, it did.
 [23] (11.45 am)
 [24] **Q:** You suggested in the prepenultimate paragraph on
 [25] page 450 that Sainsburys and Shell would be coming

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[1] that last comment?
 [2] **A:** What I mean is that there may be more in this letter
 [3] than was actually discussed with Sainsburys.
 [4] **Q:** If that is right, why did you write those words:
 [5] "I trust that the above account accurately
 [6] reflects the various matters disclosed and discussed."
 [7] **A:** Because it would cover the matters that were disclosed
 [8] and discussed.
 [9] **Q:** It says:
 [10] "The above account accurately reflects" --
 [11] accurately reflects -- "the various matters disclosed
 [12] and discussed."
 [13] **A:** Yes.
 [14] **Q:** I am understanding those words, as you may be gathering,
 [15] as indicating that what has gone before is an accurate
 [16] reflection in writing of the various matters disclosed
 [17] and discussed?
 [18] **A:** It may be -- it may be that I have added something to
 [19] it. It is a long while ago and, as I said earlier on,
 [20] Roger had had the discussions with Mr Horley. He had
 [21] relayed that to me. He was involved in drafting this
 [22] letter with me and, at the time, I felt it proper to put
 [23] that at the foot of the letter. That is all I can say
 [24] to you.
 [25] **Q:** Look at the very bottom:

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[1] together in this connection in five or six years' time.
 [2] That is 1995 and 1996. That came to pass?
 [3] **A:** It came to pass in late 1996, yes.
 [4] **Q:** Then you make the reference to multipurpose Smart Cards,
 [5] data capture, financial transactions and that came to
 [6] pass too, did it not?
 [7] **A:** Yes. But, of course, there had been a number of pilot
 [8] schemes for Smart Cards, as you are probably aware of,
 [9] stretching back to the late 1980s. I had also had
 [10] discussions with John Orrick from Ilets Lottery
 [11] Systems (?), a sister company of Fortronic.
 [12] **Q:** That is the stuff you referred to yesterday?
 [13] **A:** That is correct, yes.
 [14] **Q:** You see at the bottom there, above "yours sincerely":
 [15] "I trust that the above account accurately
 [16] reflects the various matters disclosed and discussed"?
 [17] **A:** Yes.
 [18] **Q:** This is purporting to be a complete record in writing of
 [19] discussions between your company, represented, as
 [20] I understand it, by Sotherton, and Sainsburys,
 [21] represented by Horley. That is what this letter is
 [22] purporting to be?
 [23] **A:** Yes, I think that it covered the subjects that had been
 [24] discussed and I would suspect that it was also added to.
 [25] **Q:** Just tell me what you are wanting me to understand from

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[1] "cc Shell UK Promotions Department,
 [2] Mr Stuart Carson, National Promotions
 [3] Coordinator/Mr Paul King, Promotions Coordinator."
 [4] You are, at least, in that annotation at the
 [5] footnote, indicating that it was a matter of interest to
 [6] Stuart Carson that you would have been communicating
 [7] with Sainsburys in these terms if you did?
 [8] **A:** Yes, because I had started with him. I had started the
 [9] contact with Sainsburys with his knowledge.
 [10] **Q:** You never got any reply to this letter from Sainsburys,
 [11] did you?
 [12] **A:** No, we did not. Not that I can recall.
 [13] **Q:** You never subsequently spoke to Sainsburys in this
 [14] connection, did you?
 [15] **A:** No, we did not.
 [16] **Q:** The letter itself is not signed. It is not unusual, but
 [17] there are quite a few letters from your files in which
 [18] we have a photocopied version with a signature on. Do
 [19] you recollect seeing this letter signed?
 [20] **A:** Not offhand, no, I cannot.
 [21] **Q:** Is it your evidence that it was in fact sent on
 [22] 24th July 1990?
 [23] **A:** Yes, it is.
 [24] **Q:** Who would have signed off on it? Was it signed off in
 [25] your presence?

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[1] **A:** This is nine years ago. I was involved in another
 [2] £4,500,000 project for Shell. I am sorry, but I cannot
 [3] remember details like that on this particular scheme.
 [4] **Q:** I think I understand your evidence correctly to be that,
 [5] at the date of this letter, Shell had taken an option on
 [6] it?
 [7] **A:** That is correct, yes.
 [8] **Q:** You mention the financial proposals at the top of
 [9] page 450. I think I am right in saying, I have not
 [10] noticed that you make any note in here of Shell having
 [11] taken an option on this proposal?
 [12] **A:** No, but there was another letter, was there not?
 [13] I believe there was another letter that went to Shell.
 [14] **Q:** So your evidence to my Lord is that Shell senior
 [15] management authorised you and Sotherton, or Sotherton --
 [16] one or other of you. I do not know particularly
 [17] which -- but you are saying that Shell senior management
 [18] authorised you to send this letter in this form to
 [19] Sainsburys on a proposal that they themselves were not
 [20] interested in pursuing at that stage?
 [21] **A:** Shell senior management know Paul King. He spoke to
 [22] Roger about it.
 [23] **Q:** You do not know that, do you?
 [24] **A:** I do know that, because Roger told me at the time and
 [25] I was then involved in drafting the letters.

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[1] to have sent to Paul King on 24th July 1990; correct?
 [2] **A:** Correct.
 [3] **Q:** You never got a reply to this letter, did you?
 [4] **A:** Not that I can recall, no.
 [5] **Q:** In fact, this is the letter you say was mislaid for some
 [6] considerable period of time?
 [7] **A:** That it was misfiled, yes.
 [8] **Q:** This is the letter which, on the face of it, you purport
 [9] to grant Shell an option?
 [10] **A:** Correct.
 [11] **Q:** An important sort of a letter, would you not think?
 [12] **A:** An important letter. But, as you have been pointing
 [13] out, Shell were not going to run the scheme at the
 [14] time. It was something for the future but they wanted
 [15] to keep a hold on it. They did not want us to go to any
 [16] other oil company.
 [17] **Q:** So you are saying it was important, I believe?
 [18] **A:** Yes, it was important, yes.
 [19] **Q:** Important for you to keep it on file?
 [20] **A:** Yes.
 [21] **Q:** Because it created, as you would say, a situation in
 [22] which your company and Shell owed obligations to each
 [23] other; is that right?
 [24] **A:** Correct.
 [25] **Q:** It has a file reference number AB/118 at the top and

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[1] **Q:** Roger told you that King had told him that King had
 [2] spoken to Carson; is that right? Is that what you are
 [3] saying?
 [4] **A:** He had spoken to someone else in Shell management and
 [5] had got -- I think there was some change made to a draft
 [6] letter and the letter went off.
 [7] **Q:** What I am going to put to you now is this: what would
 [8] appear to be clairvoyance -- amazingly accurate
 [9] clairvoyance -- in this letter of 24th July 1990 is not
 [10] clairvoyance. That, in fact, this letter was written at
 [11] a time when you knew how the Shell Smart Card consortium
 [12] was working?
 [13] **A:** That is not true.
 [14] **Q:** You understand what I am putting to you?
 [15] **A:** Yes, I do.
 [16] **Q:** I am saying to you that this letter was written entirely
 [17] with the benefit of hindsight?
 [18] **A:** And I am saying it definitely was not.
 [19] **Q:** I am saying this letter was written for the purpose of
 [20] supporting your claim against Shell in connection with
 [21] the litigation which has now come to trial?
 [22] **A:** We sent copies of this letter to Shell, which they must
 [23] have had on file or have on file.
 [24] **Q:** You have mentioned the other letter. I will take you to
 [25] that now. Page 446; this is a letter which you purport

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[1] that is the place it would have been in your files if it
 [2] had existed; correct?
 [3] **A:** Correct.
 [4] **Q:** How do you account for the fact it was not in the those
 [5] files, the AB files?
 [6] **A:** Because I would have been involved in another project
 [7] called Fundraisers and, at some stage, Paul King had
 [8] expressed an interest in it. He said that he would like
 [9] to give details to his research department to look at
 [10] it, which he did. This letter ended up in that file
 [11] because it mentions research in there. About Gill Shaw
 [12] on the Fundraiser project.
 [13] **Q:** So you would have taken it off a file, is that what you
 [14] are saying? It would have been taken off a file and put
 [15] into another file?
 [16] **A:** It got put back into the wrong file because it was
 [17] connected with this Fundraisers project.
 [18] **Q:** Once again this purports to be a letter to Paul King.
 [19] Is it your evidence, or is it your understanding that
 [20] this letter -- this letter here, 24th July -- was sent
 [21] to or discussed with Carson?
 [22] **A:** As I have said earlier, I cannot recall discussing the
 [23] loyalty scheme with Mr Carson. Though it is possible
 [24] I did. Mr Sotherton was dealing with Mr King and he may
 [25] have -- Mr King may have been discussing it with

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[1] Mr Carson or some other Shell manager.
 [2] **Q:** But nobody on your side of that equation took steps, so
 [3] far as you know, to make Carson aware, specifically
 [4] themselves, of what was going on?
 [5] **A:** As I say, I do not have a recollect of discussing it
 [6] with him. I may have done. I had regular meetings with
 [7] him, regular telephone discussions.
 [8] **Q:** Right. Let us look at the letter in the first
 [9] paragraph:
 [10] "Dear Paul, thank you for confirming by telephone
 [11] Shell's approval of the letter to Sainsburys which you
 [12] have now cleared with Stuart Carson and senior
 [13] management."
 [14] **A:** Right.
 [15] **Q:** Do you happen to know the basis in fact upon which that
 [16] statement was made?
 [17] **A:** I assume that it was based on the discussion that
 [18] Mr Sotherton had with Mr King.
 [19] **Q:** "As per the instructions, we have deleted the reference
 [20] to the research findings. The revised version enclosed
 [21] has been mailed to Sainsburys."
 [22] Is it your understand, the same as mine, that the
 [23] enclosure referred to as the "revised version" is what
 [24] we were just looking at a few moments ago?
 [25] **A:** I assume that must be the case.

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[1] **A:** It must have been after Mr Sotherton spoke to Mr Horley
 [2] at Sainsburys about it, based on the original proposal
 [3] to Shell. Then, when we came to actually write the
 [4] letter to Sainsburys, as is often the case, when you
 [5] take a fresh look at an idea after some time has passed,
 [6] then you are likely to change it or add to it. This is
 [7] what happened on this occasion.
 [8] **Q:** So the exercise of putting flesh on Concept Four is
 [9] occurring then in a pretty narrow time-frame. It is
 [10] occurring between, let us say, 12th July 1990 and the
 [11] date of this letter; 24th July 1990?
 [12] **A:** Yes.
 [13] **Q:** You are putting flesh on that concept?
 [14] **A:** Yes.
 [15] **Q:** I believe I am right in understanding your witness
 [16] statement to indicate you are the author. You claim the
 [17] credit for the concept as refined and developed?
 [18] **A:** Correct.
 [19] **Q:** So the people putting the flesh on that concept must
 [20] have included you and may have consisted simply of you;
 [21] correct?
 [22] **A:** Probably did.
 [23] **Q:** So you were putting flesh on that proposal between
 [24] 12th July and 24th July?
 [25] **A:** After Mr Sotherton had spoken to Mr Horley and when we

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[1] **Q:** -- on page 449. The letter goes on to say:
 [2] "The letter does get across the message that you
 [3] were keen to convey that Shell have used Sainsburys as
 [4] an ideal partner. They are apparently not considered to
 [5] be too downmarket."
 [6] **A:** Yes.
 [7] **Q:** "Sainsburys' unexpected interest [the letter at 420] at
 [8] least spurred us on to put some flesh on the initial
 [9] proposal we discussed with you and Tim some months ago."
 [10] **A:** Yes.
 [11] **Q:** This, if I have understood it correctly, is saying that
 [12] Sainsburys letter, the unexpected letter, spurred
 [13] Don Marketing on to flesh out Concept Four?
 [14] **A:** Yes.
 [15] **Q:** Now, we know that the proposal that was first put in
 [16] writing to Sainsburys was for a Megamatch game?
 [17] **A:** Correct, yes.
 [18] **Q:** I think, if I am right, the date of that was
 [19] 10th July letter. So on 10th July the proposal that is
 [20] actually being put is for a Megamatch game and there is
 [21] no mention of any multibrand loyalty proposal?
 [22] **A:** That is correct.
 [23] **Q:** So when do you say there was the "flesh putting" taking
 [24] place in relation to Concept Four? When was the flesh
 [25] put on that concept?

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[1] actually wrote this letter to Sainsburys.
 [2] **Q:** That is right. So you are agreeing with me?
 [3] **A:** Yes.
 [4] **Q:** You are putting flesh on that proposal?
 [5] **A:** Yes.
 [6] **Q:** Tell my Lord exactly how you recollect devising the
 [7] improvements to Concept Four in that 12-day time-frame?
 [8] **A:** Exactly how?
 [9] **Q:** Yes, how did it go? A momentous event surely?
 [10] **A:** Not really, no. The momentous event was the Star Trek
 [11] promotion. This was secondary. It was not immediate.
 [12] But, when I came to actually write the letter to
 [13] Sainsburys, then it went through my mind again and
 [14] I updated it. I knew the cost of Smart Cards was
 [15] falling and I added to what had previously been stated.
 [16] **Q:** So your refinements to Concept Four are what we see
 [17] written out in the letter that we have just looked at to
 [18] Horley?
 [19] **A:** Yes.
 [20] **Q:** You committed yourself to writing on those refinements
 [21] in that letter?
 [22] **A:** It is difficult for me to go back nine years and
 [23] remember exactly what happened. Whether it was
 [24] something that was drafted and then worked on the next
 [25] day or whether it was done in one session, I cannot

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[1] remember now.
 [2] **Q:** And, before that letter of 24th to Horley that we just
 [3] looked at you, you never yourself communicated these
 [4] refinements to Sotherton?
 [5] **A:** I may have discussed it with him before the letter was
 [6] prepared. We may have had a meeting about it. I do not
 [7] know.
 [8] **Q:** Anyway, you yourself have been telling my Lord that your
 [9] letter of 24th July to Horley could well have contained
 [10] additions to anything that might have been discussed
 [11] orally on the telephone?
 [12] **A:** Yes, it is possible.
 [13] **Q:** Insofar as it contained additions, the additions it
 [14] contains are your brainchild which you are committing to
 [15] writing on the 24th?
 [16] **A:** The basic idea was set out in that proposal and this was
 [17] adding to it.
 [18] **Q:** You are agreeing with me, I think?
 [19] **A:** I think so.
 [20] **Q:** Insofar as you are adding material on a brainchild
 [21] process -- you know what I am getting at there? I am
 [22] speaking loosely -- but, insofar as you had brainwaves
 [23] for refinement of Concept Four, you wrote them in the
 [24] letter of 24th July 1990, which we were just looking at,
 [25] to Sainsburys and, if I have understood you correctly,

[1] **A:** As I have said earlier, not that I can recollect.
 [2] Though I may have done, because I spoke all the time to
 [3] Mr Carson. I had meetings with him regularly. I also
 [4] spoke regularly to Paul King and to -- I had meetings
 [5] with him also.
 [6] **Q:** Do you recollect disclosing to anyone at Shell the
 [7] brainwave as described in the letter of 24th July 1990
 [8] to Horley?
 [9] **A:** As I recall, this all happened over a weekend, something
 [10] like a Friday to a Tuesday. We were going into meetings
 [11] at Shell-Mex House. I was probably discussing this with
 [12] Roger on the train and we finally put it into writing.
 [13] It is very difficult for me to say exactly the sequence
 [14] of events. Only what I can see in writing, and that was
 [15] the letter that we ended up with, that we sent. But we
 [16] may have discussed it with Mr Carson. We may have
 [17] discussed it with Mr King. Roger certainly did.
 [18] **Q:** You say you may well have discussed it with Mr Carson or
 [19] Mr King. Where would you have discussed it with them
 [20] and when?
 [21] **A:** During a telephone conversation or during a meeting at
 [22] Shell-Mex House. I am not saying that I did. I am
 [23] saying I may have done.
 [24] **Q:** Let us just assume for the sake of it at the moment that
 [25] you did not communicate it to Shell?

[1] you may well not have communicated those to Sotherton
 [2] before you wrote that letter?
 [3] **A:** It is difficult for me to say, is it not, nine years
 [4] later? I may have discussed it with him first. He
 [5] certainly had one conversation with Mr Horley. He may
 [6] have had two, I do not know. It is a long time ago.
 [7] I am just doing my best to recollect and to tell you
 [8] what I can recall.
 [9] **Q:** Let me put it to you plain fair and square: if you did
 [10] not tell Sotherton, there is no way, on your evidence,
 [11] that Sotherton could have told Horley?
 [12] **A:** I do not know exactly what Mr Sotherton conveyed to
 [13] Mr Horley. It would certainly have been the basics of
 [14] the scheme, the Shell-led consortium, the major
 [15] retailers all issuing or redeeming a common currency.
 [16] That was the basic of the scheme and we added things to
 [17] it in the letter.
 [18] **Q:** So the state of the brainwave on 24th July is set out in
 [19] the letter to Horley. That, I think, is the upshot of
 [20] what you have just said?
 [21] **A:** I -- certainly this was the first time that it was put
 [22] into writing, whatever the thinking was about the -- the
 [23] latest thinking on that concept.
 [24] **Q:** Right. And you had not communicated it to anyone at
 [25] Shell personally yourself at all, had you?

[1] **A:** Right.
 [2] **Q:** You would regard what I have called the "brainwave
 [3] material" in the letter to Horley as an innovation,
 [4] would you not?
 [5] **A:** I would regard the basic scheme as an innovation and
 [6] this was putting some flesh onto it.
 [7] **Q:** So is it really your evidence to my Lord that you are
 [8] disclosing innovative material to Sainsburys almost at
 [9] the same time and possibly not even at the same time as
 [10] you are communicating it to Shell?
 [11] **A:** Yes. There was a lot going on in those days. Because
 [12] we had just got the informal decision to go ahead with
 [13] Star Trek, which was very important to us.
 [14] (12.00 pm)
 [15] So there was a lot of discussion. There were a
 [16] lot of meetings at the time.
 [17] **Q:** You are doing this, are you: that is, disclosing it to
 [18] Sainsburys, even in circumstances where you are not sure
 [19] that you have Carson's approval to do it?
 [20] **A:** According to this correspondence, it says that he did
 [21] know about it. But I do not personally remember
 [22] discussing it with him at the time, no.
 [23] **Q:** You have already agreed with me that neither Sainsburys
 [24] or Shell had any immediate interest in pursuing this
 [25] matter?

[1] **A:** That is correct.

[2] **Q:** So you are actually telling something of considerable

[3] commercial importance, as you would have it, to

[4] Sainsburys in circumstances where neither they nor Shell

[5] are interested in pursuing it at that stage?

[6] **A:** They were not interested at that stage, but the

[7] arrangement was that, if Shell did decide to move

[8] forward with the project at a later date, we would then

[9] recontact Sainsburys. Remember the background history

[10] with Make Money, where I put it to them in 1981 and it

[11] took two years of discussions et cetera before they

[12] actually used it.

[13] **Q:** Anyway, going back to this letter -- and, just before we

[14] go on, is that Mr Sotherton sitting over there?

[15] (Indicates).

[16] **A:** It is indeed.

[17] **Q:** Page 446, in the third paragraph:

[18] "Sainsburys' unexpected interest at least spurred

[19] us on to put some flesh on ..."

[20] Your evidence is that it was some stage between

[21] 12th July 1990 and 24th July 1990, that sort of

[22] time-frame, during which you were spurred on to put

[23] flesh on the initial proposal?

[24] **A:** Yes.

[25] **Q:** Go on to the third line of that paragraph:

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[1] advertising, of the branding, of the marketing.

[2] **Q:** Are you saying that the innovative leap forward was

[3] Concept Four?

[4] **A:** Yes. Concept Four, plus the additions that were spelt

[5] out in this letter. But the basic promotion was Concept

[6] Four.

[7] **Q:** What is being said in this letter surely is that the

[8] unexpected interest of Sainsburys has spurred you on to

[9] put some flesh on the initial proposal -- that is

[10] Concept Four -- and that you are in fact praising the

[11] enhancements which you claim to have made. That is what

[12] you are doing here, is it not?

[13] **A:** Yes.

[14] **Q:** And that is the added matter you are referring to as the

[15] "innovative leap forward". That is what you are

[16] referring to, are you not?

[17] **A:** Could I read it again?

[18] **Q:** Yes, please.

[19] **A:** I think it means exactly what it says: it was adding to

[20] the basic promotion and enhancing it.

[21] **Q:** Yes. You make that clear, do you not, if you look at

[22] the fourth line:

[23] "The expanded proposal, as set out in the agreed

[24] letter to Sainsburys, provides the answers to the

[25] failings in loyalty schemes which our research

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[1] "Your brief challenged to us devise an innovative

[2] leap forward in loyalty schemes. We delivered the

[3] goods."

[4] **A:** Yes. I am just reminding Paul King of what happened.

[5] **Q:** Reminding him?

[6] **A:** Yes.

[7] **Q:** So he already knew?

[8] **A:** He already knew because that had happened back in late

[9] 1989.

[10] **Q:** You were reminding him that you made an innovative leap

[11] forward in loyalty schemes and delivered on his brief?

[12] **A:** Yes. That was the original proposal dated

[13] 23rd October 1989.

[14] **Q:** Is this the first time he is getting this statement from

[15] you? This is 24th July 1990. Is this the first time

[16] you are, as it were, taking him into confidence on the

[17] question of your brainwave?

[18] **A:** No, because the basics of the scheme had already been

[19] set out over six months earlier in that original

[20] proposal.

[21] **Q:** What is the "innovative leap forward" then?

[22] **A:** That was the idea of a multibrand loyalty scheme cutting

[23] out the middle man, so that it did not have an Air Miles

[24] company or Greenshield. Shell would be in control with

[25] its partners of its own scheme, of the data, of the

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[1] identified."

[2] **A:** Yes.

[3] **Q:** What research was that?

[4] **A:** This was the research I have mentioned before that was

[5] carried out, first of all, I think in Essex and then,

[6] secondly, in Stowmarket.

[7] **Q:** When was that carried out?

[8] **A:** The Stowmarket research I think was in late 1989. I am

[9] talking now -- there were no dates on any of the

[10] documents that I can recall. There were just some

[11] survey forms that we made up that were undated. There

[12] was some display that we showed to people.

[13] **Q:** When was it carried out, please?

[14] **A:** I am giving you my guesstimate: somewhere towards the

[15] end of 1989. That would be for the second bout of the

[16] survey.

[17] **Q:** So some time in July prior to 24th July 1990 you come up

[18] with a solution to the problem which has been identified

[19] in research, you say, in 1989?

[20] **A:** Yes. This was mentioned actually in a Promotions and

[21] Incentives article in July 1991, which mentioned the

[22] research we had carried out and that Shell had, on our

[23] recommendation, carried out their own independent

[24] research and found that the independent research had

[25] duplicated our findings and that had persuaded them to

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[1] close the Collect and Select Scheme. You have that
 [2] article in discovery.
 [3] **Q:** Thank you for telling me that. "The research was
 [4] invaluable". Is it there being indicated that the
 [5] research was invaluable to the working up and
 [6] improvement in the form of the expanded proposal? Is
 [7] that what is being said? Is that the fact?
 [8] **A:** Can I read that again? Sorry.
 [9] **Q:** Yes. Please read it.
 [10] **A:** I think I was talking mainly about the concept that we
 [11] put originally to them, but also taking into account the
 [12] extra elements that were spelt out in this letter.
 [13] **Q:** My understanding -- and it may be wrong or
 [14] imperfect -- is that you are saying the research was
 [15] invaluable in connection with working out the expanded
 [16] proposal?
 [17] **A:** You have to remember that I am an advertising man,
 [18] promotions man, not a lawyer. Therefore I might not
 [19] always put things exactly correct when I write a letter.
 [20] **Q:** None of that research gave you anything to do with Smart
 [21] Card technology, did it?
 [22] **A:** I do not think it did, no. It was on the basics. We
 [23] put some traditional collection schemes for various oil
 [24] companies, including, I think, one of Shell's own
 [25] schemes: Collect and Select, and we just got consumer

[1] **Q:** Is it really your evidence to my Lord that you thought
 [2] you had come up with a revolutionary concept and you
 [3] took no steps to make it known -- yourself, personally
 [4] -- to make it known to Stuart Carson, the National
 [5] Promotions Manager?
 [6] **A:** I may have discussed it with him. As I say -- and have
 [7] said many times -- you have to remember the background.
 [8] I had put a lot of work into Megamatch with Paul King.
 [9] He had approached Tesco. That did not go forward. We
 [10] then switched to the Disneytime project. We put a lot
 [11] of work into that -- several weeks I think at least --
 [12] and then that did not go forward because they could not
 [13] get the licensing from the Disney organisation. Those
 [14] schemes were all researched, Disneytime had come out
 [15] number one. So it all looked very promising and then we
 [16] ended up with nothing. So I was delighted and excited
 [17] when we managed to come up with the Star Trek concept,
 [18] right at the last minute when Shell were about to go
 [19] with another agency and they switched to Star Trek and
 [20] of course I had to put a lot of time into that.
 [21] (12.15 pm)
 [22] **Q:** Turn to the bottom paragraph on 446:
 [23] "Even though senior management accepted our
 [24] recommendation to come out of long-term schemes for the
 [25] foreseeable future ..."

[1] reaction to them, compared with promotional games.
 [2] **Q:** Let us move on to the next paragraph:
 [3] "Although we made some suggestions to enhance
 [4] Collect and Select, a revolutionary concept" -- look at
 [5] those words -- "a revolutionary concept along the lines
 [6] proposed would put Shell miles ahead of the opposition
 [7] if you decide to return to collection schemes at a later
 [8] date."
 [9] **A:** That is correct.
 [10] **Q:** What is the revolutionary concept?
 [11] **A:** A consortium of major retailers on a national basis, all
 [12] with market leading brands ideally, co-operating
 [13] together, sharing the benefits, the costs, in control of
 [14] their own scheme, no middle man taking a slice of the
 [15] profits or having control of the various elements of the
 [16] scheme. Shell, first of all, would be able to set up
 [17] the scheme exactly as it wished and the other parties
 [18] could be given the opportunity to share in all of that.
 [19] **Q:** Thank you for that. Now, the revolutionary concept then
 [20] is what you are describing in writing in that letter of
 [21] 24th July 1990 to Horley?
 [22] **A:** Yes.
 [23] **Q:** Right.
 [24] **A:** Because there was no other scheme of that ilk that was
 [25] in operation.

[1] Do you see "the foreseeable future"?
 [2] **A:** I do.
 [3] **Q:** "... it is nice to know that they want to keep our
 [4] Multibrand Loyalty Concept in the locker."
 [5] **A:** Yes.
 [6] **Q:** What is the basis for that statement? Can you help
 [7] my Lord, please?
 [8] **A:** Because Mr King, according to his discussions with
 [9] Mr Sotherton, wanted to retain an option on the scheme.
 [10] This was not unusual. They had previously taken an
 [11] option on the Make Money promotion and, subsequently, on
 [12] Let's Go Racing after this on the Star Trek concept,
 [13] when it was terminated because of the Gulf war. So it
 [14] was not unusual.
 [15] **Q:** If I have the picture correct in my mind, this is
 [16] purporting to indicate that Shell liked the idea -- that
 [17] is, the enhanced idea, yes? Are you following me?
 [18] **A:** Whether they liked the concept of a Shell-led multiparty
 [19] consortium.
 [20] **Q:** It was revolutionary in your terms, they liked it and
 [21] they want to put it in the locker and they are quite
 [22] happy in the meantime to authorise you to tell it to
 [23] Sainsburys, who is not interested in going ahead with
 [24] the scheme?
 [25] **A:** Because Sainsburys was the most important partner that

[1] they could possibly have. At that time Sainsburys was
 [2] the number one supermarket chain and Shell would dearly
 [3] like to have them as a partner.

[4] **Q:** So they authorised you to reveal a revolutionary concept
 [5] to Sainsburys --

[6] **A:** I think we said earlier that, at the time that
 [7] Mr Sotherton had his telephone conversation with
 [8] Mr Horley, it may be that, at that time, we had not
 [9] already got permission to disclose it to them, to
 [10] Sainsburys. We had only had permission for Megamatch.
 [11] Then Roger had discussions with Shell about it.

[12] **Q:** Your evidence, I think, is going to the proposition that
 [13] the letter of 24th July which you helped to write --

[14] **A:** Yes.

[15] **Q:** -- going to Horley contains a statement in writing of
 [16] what you are prepared to say was a revolutionary
 [17] concept?

[18] **A:** Yes.

[19] **Q:** And I think your evidence goes to this: you are saying
 [20] that Shell was not interested in pursuing it with
 [21] Sainsburys; correct?

[22] **A:** They were interested in pursuing it with Sainsburys, but
 not at that time.

[23] **Q:** Not for the foreseeable future?

[24] **A:** Correct. Because they were committed to short-term

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[1] **A:** Yes.

[2] **MR JUSTICE LADDIE:** As the other letter of the same date
 [3] says, his position had now been taken by Mr Carson, who
 [4] was senior to him now in the establishment?

[5] **A:** Yes.

[6] **MR JUSTICE LADDIE:** If you look at the first sentence of the
 [7] first paragraph, you address him as "Paul" and you say
 [8] there is certain confirmation " ... now cleared with
 [9] Stuart Carson and senior management."

[10] Do you see that?

[11] **A:** Yes, I do.

[12] **MR JUSTICE LADDIE:** Senior management is not Stuart Carson,
 [13] it is the top of the company; yes?

[14] **A:** It is probably talking about the General Manager of
 [15] Retail, probably.

[16] **MR JUSTICE LADDIE:** If you now go down to the
 [17] paragraph Mr Hobbs is on, you say:

[18] "Even though senior management ... it is nice to
 [19] know that they want to keep our multibrand loyalty
 [20] concept in the locker."

[21] So somebody told you that somebody above
 [22] Mr Carson, above Mr King, wanted to keep your multibrand
 [23] loyalty concept in the locker. That is what this letter
 [24] says, does it not?

[25] **A:** Yes, this letter was from Roger Sotherton. I was

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[1] activity.

[2] **Q:** And that Sainsburys were not themselves interested in
 [3] pursuing it at that time?

[4] **A:** That is correct.

[5] **Q:** Yet Shell senior management authorised you to reveal the
 [6] revolutionary concept to Sainsburys?

[7] **A:** As I say, they may not have done at the time
 [8] Mr Sotherton spoke to Mr Horley, but they did
 [9] subsequently, as a result of the conversations that he
 [10] had with Mr King.

[11] **Q:** So you yourself are not able to give any evidence, are
 [12] you, of any event involving you directly communicating
 [13] with Carson or anyone other than King about this rather
 [14] momentous event?

[15] **A:** Not that I can recall. I may have discussed it with
 [16] Mr King and Mr Carson, but I do not recollect the
 [17] conversations. My interest at that time was mainly in
 [18] Star Trek and taking that proposal forward.

[19] **Q:** Look on:

[20] "It was also interesting to hear that, at some
 [21] stage, it could have applications in other --

[22] **MR JUSTICE LADDIE:** Stop for a moment, Mr Hobbs. Can I just
 [23] ask you a question, Mr Donovan? This was a letter
 [24] written to Paul King who, by this time, I think Mr Hobbs
 [25] has very gently said, he had been "sidelined"?

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[1] involved in drafting it, as I often was. Almost always
 [2] and it was based on his discussions with Mr King. As
 [3] I said earlier on, although we did not know what had
 [4] happened to Paul King, we knew that he was still a very
 [5] important player there because of his long experience
 [6] with promotions.

[7] **MR JUSTICE LADDIE:** I am sorry, Mr Donovan. I have not made
 [8] myself clear. It is my fault. This says that somebody
 [9] had informed you, or you had got to know, that senior
 [10] management -- not Mr Carson, not Mr King -- that senior
 [11] management wanted to keep your multibrand loyalty
 [12] concept in the locker. All I am asking you is: who in
 [13] senior management or who told you that senior
 [14] management --

[15] **A:** This information came from -- Roger Sotherton informed
 [16] me. He was involved in writing this letter and he had
 [17] spoken to Paul King. So I assumed that he must have got
 [18] that information from Mr King.

[19] **MR JUSTICE LADDIE:** So Mr Sotherton told you that Paul King
 [20] had told him that senior management wanted to keep it in
 [21] the locker?

[22] **A:** Yes, that is correct.

[23] **MR HOBBS:** Following on from that, that was good enough for
 [24] you to feel satisfied that your position was protected
 [25] then vis-a-vis Shell, was it?

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[1] **A:** Yes.

[2] **Q:** I was just referring you to the sentence which says:

[3] "It was also interesting to hear that, at some

[4] stage, it could have applications in other Shell

[5] markets."

[6] **A:** Yes.

[7] **Q:** That statement is in this letter here; 446.

[8] **A:** Yes.

[9] (12.15 pm)

[10] **Q:** That was seeing the future very clearly, was it not?

[11] **A:** Not really, because a number of the promotions that we

[12] had supplied to Shell UK we had then run in various

[13] countries: Singapore and Ireland, on more than one

[14] occasion for Bruce's Lucky Deal, for Make Money, and it

[15] was always dealt with through Shell International.

[16] I guessed there had be some conversation between

[17] Mr Sotherton and Mr King about that.

[18] **Q:** Turn the page. You are referring to Star Trek at the

[19] top?

[20] **A:** Yes.

[21] **Q:** "We are currently finalising details with Stuart Carson

[22] and Sarah Harman."

[23] Sarah Harman is an outside licensing consultant,

[24] is she not?

[25] **A:** She was the agent for Paramount Films, for Star Trek.

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[1] hundred million game pieces to be printed, arranging the

[2] contingency insurance against redemptions. I was

[3] thoroughly immersed in the Star Trek project.

[4] **Q:** Yes. But, you see, the Star Trek project is linked via

[5] this statement about options to the new multibrand

[6] loyalty project. It is linked?

[7] **A:** It is, yes.

[8] **Q:** Do you still stand by your evidence that it was enough

[9] for your purposes that you got a message from Sotherton,

[10] you got a message from King, who had been sidelined

[11] within Shell, that the senior executives were putting it

[12] in a locker for the future? That was good enough for

[13] you?

[14] **A:** We would bend over backwards to give Shell whatever they

[15] wanted because we had got a lot of business from them.

[16] They were our best client for a number of years and we

[17] would do whatever -- if they expressed an interest in a

[18] concept that they could not use at the time but they

[19] wanted to keep it, then we would do whatever we could to

[20] meet their wishes.

[21] **Q:** I think we have probably reached the point where I had

[22] better put it to you quite formally: this letter here of

[23] 24th July 1990 is a letter that was written at some

[24] later stage in time. It was not written on

[25] 24th July 1990, was it?

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[1] **Q:** "It was especially good to hear from Stuart that we will

[2] be working with Allen Roman again."

[3] That is a reference to Stuart Carson, is it not?

[4] **A:** It is.

[5] **Q:** Here we come to the option paragraph:

[6] "On the basis that Shell does adopt our proposal

[7] for a Star Trek-themed blockbuster, we confirm our

[8] agreement, as you requested, to forego an option fee on

[9] the multibrand loyalty scheme. This is on the

[10] understanding that the rights to the Multibrand Scheme

[11] remain vested solely with Don Marketing."

[12] Do you see that?

[13] **A:** Correct, yes.

[14] **Q:** You were in direct frequent contact with Stuart Carson

[15] about the Star Trek theme?

[16] **A:** Yes.

[17] **Q:** The option, which this letter purports to refer to, is

[18] linked to the question of the implementation or

[19] non-implementation of Star Trek, is it not?

[20] **A:** Yes, it was.

[21] **Q:** If this existed, you must inevitably have discussed it

[22] with Stuart Carson in that connection?

[23] **A:** I may have done, but I do not recall. I do recall the

[24] other things that were going on, which was working out

[25] the price fund for the game, arranging for a

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[1] **A:** It was written on or around 24th July 1990.

[2] **Q:** I put it to you that in fact it was written at a much

[3] later stage. It was probably written at an even later

[4] stage than the one of 24th July we looked at on 449.

[5] Would you like to comment on that?

[6] **A:** Only to say that it was written on or around 24th July,

[7] because that is the date on it.

[8] **Q:** And I wish to put it to you explicitly that your failure

[9] to mention the existence of this letter in your letter

[10] before action in 1997 is because this letter had not

[11] been actually written by you or anyone at that stage?

[12] **A:** No, the reason was that the letter had been misplaced in

[13] the Fundraisers research file because it referred to

[14] research Shell had conducted on Fundraisers. It

[15] sometimes happens, unfortunately, that documents do get

[16] misfiled. It does happen.

[17] **Q:** And that your evidence yesterday relating to the fact

[18] that you had forgotten the existence of the option at

[19] certain points in time is attributable to the fact that

[20] the letter had not been written and, therefore, you had

[21] nothing in fact to forget?

[22] **A:** No. It was because it had been put into a file that had

[23] not been used since the early 1990s and I had been

[24] engrossed since 1992 in suing Shell for various actions

[25] and that had -- was not an important thing in my mind.

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[1] I was engrossed in what I was doing.
 [2] **Q:** Anyway, I think you know where I stand in relation to
 [3] those two letters, do you not?
 [4] **A:** I know --
 [5] **MR HOBBS:** Excuse me, I have just heard some more muttering.
 [6] **MR COX:** I am sorry if my learned friend heard my
 [7] muttering. It was not intended to be heard.
 [8] I simply said to myself that, as I understood the
 [9] position, my learned friend has no position. It is his
 [10] client who has the position. It may simply be a
 [11] conflict of styles which exist in different division.
 [12] But it was not intended to be heard and, if he heard it
 [13] and it upset him, I apologise.
 [14] **MR JUSTICE LADDIE:** There is one system of civil justice.
 [15] There is no difference between different courts. We
 [16] will play this one absolutely with a straight bat,
 [17] Mr Cox and Mr Hobbs. Please try to keep your feelings
 [18] to yourselves, both of you.
 [19] **MR COX:** I apologise to my learned friend. If it upset him,
 [20] then I do regret it.
 [21] **MR HOBBS:** Mr Donovan, you understand my client's position,
 [22] do you, in relation to these two letters, which are
 [23] dated 24th July 1990 that we have been discussing for
 [24] some period of time?
 [25] **A:** Yes, I do, and I have made my position clear as well:

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[1] until the last few minutes of yesterday's trailing of
 [2] this extraordinary issue not one single notice or
 [3] mention has been made to the claimant that it was going
 [4] to be suggested that these letters were fraudulent.
 [5] That may or may not be improper or wrong, but this is
 [6] the first time the claimant has understood that these
 [7] letters are questioned in the sense that they were not
 [8] sent to Shell at the material times or to Sainsburys.
 [9] So, my Lord, in our submission, whatever my
 [10] learned friend is about to say would be unsafe and wrong
 [11] admit and it may be that I have to consider a course in
 [12] this trial which could cause considerable delay by
 [13] application to your Lordship if it were to be admitted
 [14] or taken seriously.
 [15] **MR JUSTICE LADDIE:** Mr Hobbs, you may think, in view of
 [16] Mr Cox's interjection, the best thing to do is to say
 [17] nothing more. If you want to subpoena somebody --
 [18] **MR HOBBS:** I certainly do not want to abort the trial.
 [19] **MR JUSTICE LADDIE:** No, I am not going to allow anything to
 [20] happen to abort this trial, Mr Hobbs. So you may decide
 [21] the best thing to do is to say nothing more about it.
 [22] **MR HOBBS:** I will say nothing more and I will address the
 [23] matter with my solicitors over the short adjournment and
 [24] decide what is the appropriate action.
 [25] **MR JUSTICE LADDIE:** Let us leave it like that.

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[1] that they were written at that time.
 [2] (12.30 pm)
 [3] **Q:** Well, my Lord will be the judge of your answers now.
 [4] **MR JUSTICE LADDIE:** Mr Hobbs, I understand in the bundles
 [5] there were no acknowledgments by either Shell or
 [6] Sainsburys in the files. That, so far as discovery
 [7] goes, none of this material was found in Shell's files,
 [8] but there are documents missing from Shell's files. Let
 [9] us not worry about that for the moment. Has anybody
 [10] made enquiries or sought to subpoena Sainsburys,
 [11] **MR HOBBS:** Before I answer that I need to speak to my
 [12] solicitor.
 [13] **MR JUSTICE LADDIE:** Mr Hobbs, before you say any more, if
 [14] this is a matter which you want to address at a time
 [15] more convenient to the presentation of your case, please
 [16] do not let me change the sequence.
 [17] **MR HOBBS:** I am going to answer your Lordship's question
 [18] now. What I wanted to check was that I was able to do
 [19] it. That is why I have just spoken to my solicitors. A
 [20] representative of DJ Freeman, who is the young lady
 [21] solicitor sitting in front of me --
 [22] **MR COX:** I object to this. We have had no notice of it. It
 [23] sounds very much like hearsay piled upon hearsay. That
 [24] of course is a matter for your Lordship to judge.
 [25] I quite understand that. May I also make this plain:

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[1] **MR HOBBS:** There is one point I should perhaps respond to --
 [2] **MR JUSTICE LADDIE:** What did Mr Lazenby say? My
 [3] recollection is that Mr Lazenby gave evidence about
 [4] these letters, did he not?
 [5] **MR HOBBS:** He does give evidence. It is in several places.
 [6] I cannot remember more than the gist of it. On this
 [7] question of no notice or warning, the authority which
 [8] immediately springs to mind is John Walker in which it
 [9] was held specifically that, if a case of this kind
 [10] emerges during the course of a trial, the court can take
 [11] (inaudible) and counsel can raise it properly and
 [12] consistently with the evidence which emerges.
 [13] **MR JUSTICE LADDIE:** Carry on.
 [14] **MR HOBBS:** Would your Lordship give me two seconds to
 [15] consult with those in front and behind as to what I need
 [16] to do?
 [17] **MR JUSTICE LADDIE:** Yes. Would you like me to rise for five
 [18] minutes? I have very acute hearing. I am deliberately
 [19] not listening, but I am also immensely inquisitive and
 [20] I am finding it hard. Would you prefer me to rise?
 [21] **MR HOBBS:** I think I have finished and my point is that I am
 [22] trying to find out whether anyone thinks there is more
 [23] I should put. I think I have finished, but something
 [24] has just been said to me which would make me ask
 [25] your Lordship not to in fact release the witness, but

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[1] perhaps I can stop for the moment.
 [2] **MR JUSTICE LADDIE:** You want not to have Mr Cox re-examine,
 [3] or what?
 [4] **MR HOBBS:** He would say that he should not re-examine until
 [5] I have made my position clear.
 [6] **MR JUSTICE LADDIE:** There are such serious issues in this
 [7] case, Mr Hobbs. I would not want either your client or
 [8] Mr Donovan to be in the position where an attempt to
 [9] find the truth or full facts is impeded. Mr Cox has to
 [10] re-examine anyway. How many more witnesses do we have
 [11] today? Mr Cox, I got a message through the grapevine
 [12] that one of the witnesses that you hope to have here
 [13] today is not going to be here and we may run short.
 [14] **MR COX:** The grapevine has worked.
 [15] **MR JUSTICE LADDIE:** I just wondered whether it would be more
 [16] convenient to the proper conduct of this case for me to
 [17] rise now and start again at 1.45 pm. I will do whatever
 [18] counsel want, as long as it is reasonable.
 [19] **MR HOBBS:** I understand. I am being given to understand
 [20] that there is material that I might wish to put to this
 [21] witness, but I am being also given to understand that it
 [22] cannot be brought here for certain by 2 o'clock. That
 [23] is the reason why I am in this dilemma.
 [24] **MR JUSTICE LADDIE:** Mr Hobbs, this is your
 [25] cross-examination. You have to be prepared to

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[1] re-examination, you should not take it as granted that
 [2] I will allow you to have Mr Donovan back in the witness
 [3] box. You will have to make out strong grounds for it.
 [4] Do you understand that? I do not want you to say it is
 [5] a foregone conclusion. Basically, once Mr Donovan has
 [6] been in and out --
 [7] **MR HOBBS:** -- the normal rule will apply. My Lord, I will
 [8] now sit down and stop.
 [9] **MR JUSTICE LADDIE:** Thank you very much. Mr Cox, is it
 [10] convenient for you to start now or would you prefer
 [11] to --
 [12] **MR COX:** I would infinitely prefer to take the adjournment
 [13] now.
 [14] **MR JUSTICE LADDIE:** And start again at 1.45 pm?
 [15] **MR COX:** If your Lordship pleases.
 [16] **MR JUSTICE LADDIE:** For this afternoon, any idea how much --
 [17] **MR COX:** Twenty minutes.
 [18] **MR JUSTICE LADDIE:** Are we going to take up the whole
 [19] afternoon?
 [20] **MR COX:** It very much looks so now. I do not have any
 [21] criticism about that at all. But it now looks as though
 [22] we shall not have any difficulty at all in so doing.
 [23] **MR JUSTICE LADDIE:** Thank you very much.
 [24] (12.45 pm)
 [25] (The luncheon adjournment)

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[1] cross-examine.
 [2] **MR HOBBS:** Your Lordship --
 [3] **MR JUSTICE LADDIE:** There are faxes, you know,
 [4] **MR HOBBS:** I am sorry, my Lord, This is completely
 [5] unforeseeable from my perspective, no less than from
 [6] anybody else's perspective, The dilemma I am in is what
 [7] I am being told cannot materialise, if it can be made to
 [8] materialise, before 2 o'clock,
 [9] **MR JUSTICE LADDIE:** If it is very important and you have
 [10] cross-examined Mr Donovan and Mr Cox has re-examined
 [11] Mr Donovan, and if you have seen new material which you
 [12] think is crucial, you can always make an application for
 [13] leave to have Mr Donovan put back in the witness box,
 [14] I will consider such an application on the merits and
 [15] bearing in mind the weight or significance of any
 [16] additional material you may have,
 [17] **MR HOBBS:** My Lord, yes,
 [18] **MR JUSTICE LADDIE:** I can do that, What I do not want is to
 [19] let this case go on one minute longer than necessary,
 [20] because both Shell and Mr Donovan are paying a lot of
 [21] money for it,
 [22] **MR HOBBS:** My decision, as captain of the ship, is to say --
 [23] **MR JUSTICE LADDIE:** Before you say anything, I want you to
 [24] understand, Mr Hobbs, that, if you finish your
 [25] cross-examination and Mr Cox finishes his

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[1] (1.45 pm)
 [2] Re-examination by MR COX
 [3] **MR COX:** Mr Donovan, one or two things, please. Could you
 [4] turn to file E2, page 635?
 [5] **MR JUSTICE LADDIE:** Sorry, what page was that, Mr Cox?
 [6] **MR COX:** 635, my Lord.
 [7] **MR JUSTICE LADDIE:** Right.
 [8] **MR COX:** At least, I hope it is. I am going to try to get
 [9] there before others to see that it is. It is 634.
 [10] **A:** I have that letter.
 [11] **Q:** E2?
 [12] **A:** Yes.
 [13] **Q:** 634.
 [14] **A:** A Shell letter to Senior King.
 [15] **Q:** That is it, dated 20th November 1995.
 [16] **A:** Fine.
 [17] **Q:** Let us just have a look at it together for a moment.
 [18] Plainly, it is not a letter that you would have seen
 [19] until discovery; correct?
 [20] **A:** Correct.
 [21] **Q:** It is a letter to Mr Grahame Senior of Senior King from
 [22] Mr Pirret, the General Manager of Retail, and he is
 [23] answering, plainly, the theme on which Mr Hobbs was
 [24] asking you questions, the claim made by Senior King. Do
 [25] you understand?

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[1] A: I do.
 [2] Q: He has dealt, in the first few paragraphs, with points
 [3] about a retainer, that he believed that Senior King had
 [4] been retained to advise on Shell's retail promotions,
 [5] and with regard to the presentations, made initially on
 [6] 8th January, in response to a general enquiry regarding
 [7] Shell's options by various competitors:
 [8] "However, no firm decision was made on the
 [9] progress of the matter until a briefing document,
 [10] prepared by Tim Hannagan was sent out by Andrew Lazenby
 [11] during September 1992 ...
 [12] "As a result of the brief, a number of
 [13] presentations were made to Shell, including one from
 [14] Senior King, putting forward various card based
 [15] schemes. The schemes proposed by yourselves were for
 [16] the use of a contactless smart device manufactured by
 [17] Hughes or for a smart device manufactured by
 [18] Schlumberger. Ultimately it was considered that neither
 [19] of these systems would be appropriate and the solution
 [20] adopted by Shell did not use the devices favoured by
 [21] your company and put forward in your presentations."
 [22] Now, does that reflect what you understood to be
 [23] the position in 1993 and 1994 about the nature of
 [24] Senior King's claims?
 [25] A: Yes, it does. I understood that it was a

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[1] his ability to negotiate or to deal with you on behalf
 [2] of Shell?
 [3] A: No.
 [4] Q: I just want to see if we can get the proximity, how
 [5] recent this change may have been and what you understood
 [6] of it, because on 14th May you actually wrote to Mr King
 [7] about a new game, did you not?
 [8] A: Correct, yes.
 [9] Q: This is concerning "The Games Afoot", which was a
 [10] Sherlock Holmes game?
 [11] A: That is correct, yes.
 [12] Q: When you wrote that letter, why did you write it to
 [13] Mr King?
 [14] A: Well, at that time I must have thought it appropriate to
 [15] send the proposal to him.
 [16] Q: Yes. What you received back, of course, was the letter
 [17] that we see at 417 from Mr Carson, saying he had been
 [18] passed the letter, yes?
 [19] A: Correct, yes.
 [20] Q: Doing your best, and it is a very long time ago, the
 [21] change in relation to Mr King, was it a very recent
 [22] change, as you understood it, in May, June, July of
 [23] 1990?
 [24] A: I think that it probably was. I cannot recollect, but
 [25] according to these documents that would appear to be the

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[1] technology-based proposal.
 [2] Q: Yes, so having nothing to do with the promotional
 [3] framework or scheme that you were proposing?
 [4] A: No.
 [5] Q: Put that file away now for a moment, if you would.
 [6] A: Right.
 [7] Q: I want to come back, if I may, to the documents that
 [8] Mr Hobbs has just been asking you questions about.
 [9] Could you turn to E1 and we can start with the letter of
 [10] 14th May at page 414. I will let everybody find the
 [11] page just for the moment.
 [12] You had told Mr Hobbs, in answer to questions,
 [13] that as at 30th May, which is the date of the letter --
 [14] if you keep your finger at 414 you can see at 417 the
 [15] letter back as it were -- you understood that something
 [16] had happened as a result of which Mr King had been
 [17] replaced as National Promotions Manager, or
 [18] Co-ordinator; is that right?
 [19] A: Yes, correct. Yes.
 [20] Q: But that he was still in the Department?
 [21] A: Yes.
 [22] Q: We have seen a letter addressing him as Promotions
 [23] Co-ordinator; is that right?
 [24] A: Correct.
 [25] Q: Did you understand that Mr King was thereby deprived of

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[1] case.
 [2] Q: Did it affect your belief that Mr King was somebody with
 [3] whom you could negotiate and did negotiate on behalf of
 [4] Shell?
 [5] A: Yes, we dealt exclusively with him with a project called
 [6] the "Select Shop Game".
 [7] Q: If we can turn now to the documents immediately
 [8] relevant, you understand what is being put to you about
 [9] the letter of the 20th, at page 439, and the letter of
 [10] 24th July at page 446; what is being put to you, so that
 [11] you understand it clearly --
 [12] A: Yes.
 [13] Q: -- because I want you to comment on it, is that you are
 [14] a person whose vendetta and hatred is such for Shell
 [15] that you have been prepared to forge these two documents
 [16] at or around March 1997 for the purposes solely of this
 [17] litigation.
 [18] A: That is not the case.
 [19] Q: Just have a look, if you would, at the letters. The
 [20] basis for this suggestion, as I understand it, is that,
 [21] analysing the text and content of these letters, they
 [22] are so inappropriate to their time, as it were --
 [23] MR JUSTICE LADDIE: I think you said 439 and 446.
 [24] MR COX: 446 and 449, my Lord. I beg your Lordship's
 [25] pardon.

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[1] MR JUSTICE LADDIE: Yes.
 [2] MR COX: Analysing those two letters textually, their
 [3] content ..
 [4] A: Yes.
 [5] Q: .. they are so inappropriate to their time by a form of
 [6] textual exegesis that you could not have written them
 [7] then; do you follow?
 [8] A: I do.
 [9] Q: What do you say to that?
 [10] A: That at the time, or just before this, I had actually
 [11] been preparing contingency plans for BP so it was quite
 [12] normal for me to try to look forward into the future to
 [13] see the way that the market was going, and ideally to
 [14] give Shell the first opportunity at new ideas.
 [15] Q: Yes.
 [16] A: Which I did many times.
 [17] Q: Could you keep your finger in the letters, just insofar
 [18] as we can try to get some perspective on this, and turn
 [19] back in the same volume, for example, to the 1986
 [20] Megamatch proposal, and particularly page 110. Looking
 [21] into the future: was that a part of your job, as it
 [22] were, at that time?
 [23] A: Yes, it was.
 [24] Q: Trying to anticipate other people?
 [25] A: Correct. For Shell to be first.

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[1] Q: Meaning what?
 [2] A: Well, the Megamatch game, as far as I know, has never
 [3] been run anywhere.
 [4] Q: Of course, Shell were the first into the market as they
 [5] themselves have pronounced and trumpeted ..
 [6] A: Yes.
 [7] Q: .. with the other idea, the loyalty consortium concept?
 [8] A: Correct.
 [9] Q: Yes. If we go back to those two letters, again just
 [10] briefly, I do not want to go through each one at this
 [11] stage of the trial. It may be a matter for later, for
 [12] analysis with his Lordship.
 [13] It is a very, very grave allegation that is being
 [14] made against you. You perceive that?
 [15] A: I do.
 [16] Q: That you are prepared to forge these documents; do
 [17] you understand?
 [18] A: Yes, I do.
 [19] Q: And, on this basis, to come to court to invite the
 [20] learned judge to give you justice.
 [21] A: Correct.
 [22] Q: Would you do something like that?
 [23] A: No, I would not.
 [24] Q: You are not, I think, as I think his Lordship knows,
 [25] legally aided for this purpose, are you?

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[1] Q: Yes. On page 110, as far back as 1986 we see that
 [2] you are looking into the future again, do we?
 [3] A: Correct, yes.
 [4] Q: If we go as far back as 1981, perhaps I need not deal
 [5] with this one, but in your proposal, I think, for
 [6] Make Money, had you also looked into the future there?
 [7] A: Yes. The promotion changed the whole petrol retailing
 [8] scene in this country when Shell launched the 1984
 [9] version because all the other oil companies then
 [10] followed with similar schemes using the same format,
 [11] which none of them had done before on a national basis,
 [12] and I am talking about no purchase necessary ..
 [13] Q: Let us look at Concept 4 in the same bundle at
 [14] page 347. Under "Conclusion - Multibrand Loyalty
 [15] Programme", at page 347, again, when you first presented
 [16] this as a consequence of the brief given to you by
 [17] Mr King, you said:
 [18] "We predict that Mega Match and this proposed
 [19] development of the multibrand promotional concept will
 [20] come to pass."
 [21] A: Yes.
 [22] (2.00 pm)
 [23] Q: "The benefits will be reaped by the first consortium to
 [24] be set up."
 [25] A: Correct. I was only half right, unfortunately.

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[1] A: That is correct.
 [2] Q: How are you paying for this action?
 [3] A: With a legal charge over my house.
 [4] Q: Who else lives in your house?
 [5] A: My mother and father.
 [6] Q: Your father is how old?
 [7] A: 82.
 [8] Q: Your mother?
 [9] A: Is 78.
 [10] Q: Is she in good health?
 [11] A: No, she has Alzheimer's.
 [12] Q: Why are you bringing this action against Shell?
 [13] A: Because I was the first agency to put up the proposal to
 [14] Shell. I have examined their discovery; I have not seen
 [15] any evidence of any other similar proposal.
 [16] Q: Yes. Would you put that bundle to one side. I have
 [17] asked you to do that, but there is one other question
 [18] I needed to ask you about that letter. Would you come
 [19] back to it? It is the 24th July letter at page 446 to
 [20] Mr King.
 [21] At the bottom of the page, you have been
 [22] cross-examined concerning the sentence and indeed
 [23] I think his Lordship asked one or two questions
 [24] concerning it, the paragraph at the bottom dealing with
 [25] senior management:

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[1] "It is nice to know that they want to keep our
 [2] multibrand loyalty concept in the locker."
 [3] **A:** Correct.
 [4] **Q:** When you wrote this letter --
 [5] **A:** Yes.
 [6] **Q:** -- which you say you did at the time, is that correct?
 [7] **A:** Yes, I did.
 [8] **Q:** Would you have written that if you did not believe that
 [9] senior management had given it consideration?
 [10] **A:** I was told through Roger Sotherton that -- from his
 [11] conversation with Paul King -- that they had.
 [12] **Q:** Right. If this letter went, which it is your case it
 [13] did, would you have been embarrassed to be making a
 [14] statement like that that would turn out subsequently to
 [15] be untrue?
 [16] **A:** I would have thought it would be a dangerous thing to do
 [17] because Shell would have thought very badly of it.
 [18] **Q:** Yes. You might have expected to receive some comeback
 [19] if it was not agreed with?
 [20] **A:** Correct.
 [21] **Q:** Yes. I want to deal with some letters written
 [22] in November and December of 1993 in file E7. Your
 [23] letter of 19th November is at page 2976, I hope.
 [24] **A:** Yes, I have the letter.
 [25] **Q:** This was the letter that you wrote to Mr Watson; is that

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[1] **Q:** Was that the day or round about the days that you taped
 [2] the conversations --
 [3] **A:** Yes, yes.
 [4] **Q:** -- that we can see?
 [5] **A:** Yes.
 [6] **Q:** When you saw that Shell were running a promotion that
 [7] I think, on any view, you at that stage considered to be
 [8] very like yours, did you not?
 [9] **A:** Yes.
 [10] **Q:** What did you suspect had occurred?
 [11] **A:** I knew that something wrong had happened. I did not
 [12] know how it had come about, and I was sick inside at
 [13] seeing the advert.
 [14] **Q:** Why?
 [15] **A:** Because I thought that this was my idea, for Shell to
 [16] run a Nintendo themed promotional game with Gameboy
 [17] prizes, that I put to Mr Lazenby.
 [18] **Q:** Had anybody come back to you from Shell in the meantime
 [19] to explain that they were running with such a promotion?
 [20] **A:** No.
 [21] **Q:** During the conversations -- I do not want to go into
 [22] them in detail at the moment but, during the
 [23] conversations, had certain things been said to you that
 [24] you considered -- I mean the tape-recorded
 [25] conversations --

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[1] right?
 [2] **A:** That is correct.
 [3] **Q:** After you had become aware, in 1993, that Nintendo had
 [4] been launched; yes?
 [5] **A:** That is correct, yes.
 [6] **Q:** Now, let us just get this clear because Nintendo had
 [7] been a proposal you had put to Mr Lazenby when?
 [8] **A:** On 4th June 1992.
 [9] **Q:** Yes. You had faxed Mr Lazenby concerning that proposal
 [10] again in 1993, had you not?
 [11] **A:** I did.
 [12] **Q:** Was that on February 19th, 1993?
 [13] **A:** It was.
 [14] **Q:** What had been the answer that you had had faxed back to
 [15] you by a handwritten note appended to the bottom of that
 [16] fax?
 [17] **A:** That Mr Lazenby would recontact me when there was any
 [18] further progress.
 [19] **Q:** As far as you were concerned, after 19th February 1993,
 [20] what was the position as it was left with Nintendo, the
 [21] game?
 [22] **A:** That it was still under consideration for possible
 [23] research and development.
 [24] **Q:** Right. When did you see that Nintendo was launched?
 [25] **A:** On 18th June, 1993.

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[1] **A:** Yes.
 [2] **Q:** -- that you considered to be unsatisfactory?
 [3] **A:** Yes. There was mention of Megamatch, Make Money, that
 [4] Mr Lazenby or Shell could run these without
 [5] Don Marketing, and I found that also very upsetting in
 [6] view of the previous history with them.
 [7] **Q:** So, by the letter that we have in this bundle, by
 [8] 19th November 1993, the position as you have just
 [9] indicated was that they had run with a promotion without
 [10] telling -- certainly without indicating to you --
 [11] **A:** Yes.
 [12] **Q:** -- very like one you had put up to Mr Lazenby; that is
 [13] your view at the time?
 [14] **A:** Yes, the concept I saw to be the same, yes.
 [15] **Q:** In courses of conversations, Mr Lazenby had also
 [16] indicated that he could run -- or implied or hinted that
 [17] he could run Megamatch and Make Money as well without
 [18] reference to you?
 [19] **A:** Yes, he said that.
 [20] **Q:** Yes. If we come to the letter of 19th November 1993,
 [21] you are writing now to Mr Watson, Mr Lazenby's boss; is
 [22] that right?
 [23] **A:** Correct, yes.
 [24] **Q:** You had also had, I think, a conversation with him
 [25] preceding this?

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[1] **A:** Probably, yes.
 [2] **Q:** If you look at the letter just for a moment, the last
 [3] paragraph:
 [4] "Like Andrew Lazenby, you expressed some doubt
 [5] over our proprietary claim to the 'Mega Match'
 [6] concept ..."
 [7] Do you see that?
 [8] **A:** Yes, that is true. In the conversation that I had with
 [9] him, I had mentioned to him that I was upset that
 [10] Mr Lazenby had said that he could run Megamatch and Make
 [11] Money without Don Marketing, and Mr Watson seemed to
 [12] support that view.
 [13] **Q:** Right. When you came to write this last paragraph of
 [14] this letter, what was the main concern that you had as a
 [15] consequence of those events that you have just run
 [16] through?
 [17] **A:** It was that Shell had plans to develop and run
 [18] Megamatch.
 [19] **Q:** You say:
 [20] "Please note that I am in possession of a
 [21] multitude of documents regarding presentations and
 [22] contact with Shell over several years, which confirm our
 [23] rights to that concept."
 [24] Then you go on:
 [25] "These proposals also cover promotional schemes,

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[1] correspondence. Megamatch was secondary.
 [2] (2.15 pm)
 [3] **Q:** Now, at the last paragraph he wrote:
 [4] "I note the last paragraph of your letter
 [5] regarding the 'Mega Match' concept, but do not however
 [6] entirely understand your position. You may have rights
 [7] over some particular promotions based on the concept of
 [8] various retailers using a common promotional currency
 [9] but you cannot have any rights over the concept itself
 [10] and there have been many such schemes already."
 [11] Did those lines puzzle you?
 [12] **A:** Yes.
 [13] **Q:** Why?
 [14] **A:** Because I could not understand, and still cannot
 [15] understand, exactly what it is saying. Can I read it
 [16] again?
 [17] **Q:** Yes, please do.
 [18] **A:** Sorry. (Pause)
 [19] It is not clear what it is that he is saying.
 [20] **Q:** Did you believe at that time that Shell were embarked
 [21] upon full systems steam ahead upon developing a
 [22] multibrand loyalty concept, just such as the one that
 [23] you had outlined to them ..
 [24] **A:** Definitely not.
 [25] **Q:** .. before?

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[1] whereby the common currency - points, vouchers, tokens,
 [2] etc - are collected or awarded at outlets belonging to
 [3] the various types of retailer participating in the
 [4] activity."
 [5] What was your concern when you wrote that passage?
 [6] **A:** I just wanted to remind Shell that we had invented the
 [7] concept and that we had the rights to it.
 [8] **Q:** Did you, at that stage, have any suspicion that Shell ..
 [9] or any knowledge that Shell were embarked upon exactly
 [10] such a multibrand loyalty concept?
 [11] **A:** None at all.
 [12] **Q:** Had you had such knowledge, would you have been content
 [13] to remain with the few lines at the bottom of that
 [14] letter?
 [15] **A:** No, I would have concentrated on spelling out exactly
 [16] what the background was.
 [17] **Q:** Yes. Let us look, if we may, at the response to this.
 [18] We can stay in that bundle, I hope. Page 3066 is a
 [19] letter to you from Mr Watson dated 2nd December; yes?
 [20] **A:** Yes.
 [21] **Q:** Now, at this stage what was your state of mind?
 [22] You have written on 19th November. What is in your mind
 [23] that Shell might be doing, from your subjective point of
 [24] view?
 [25] **A:** Make Money was the main concern for all of this

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[1] **A:** No.
 [2] **Q:** If we then turn to the conclusion of that little chain
 [3] of correspondence at 3214, you are writing to Mr Watson
 [4] in response to his letter of the 2nd and you express
 [5] some regret about the previous relationship. You had
 [6] hoped Shell:
 [7] "... would have wanted us to be involved in any
 [8] new version of a previous game ..."
 [9] What did you mean? What was the previous game?
 [10] **A:** The 1984 Make Money game.
 [11] **Q:** "My comments regarding the Make Money game [and it
 [12] mentions the ISP award] and proprietary rights ... were
 [13] made in reply ...", and you state there Mr Lazenby's
 [14] assertion that he could run them without any involvement
 [15] by Don Marketing.
 [16] You say that it was the first. You recite the
 [17] history that you provided the copy letter:
 [18] "... and some further background information, just
 [19] to illustrate how inappropriate it was for Mr Lazenby to
 [20] be so dismissive, without apparently having the
 [21] slightest knowledge of the background circumstances."
 [22] Then, in the final paragraph, you wrote:
 [23] "However, unless Shell is actively considering
 [24] running one the relevant promotions, it seems to me that
 [25] further discussion is unwarranted at this moment.

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[1] Discussions relevant to a particular concept could be
 [2] undertaken at the appropriate time, should it ever
 [3] become necessary."

[4] This is 20th December 1993.

[5] A: That is correct, yes.

[6] Q: Did you ever have any communication from Shell
 [7] whatsoever indicating that they were proposing to
 [8] operate, or run, or were using a concept, not
 [9] necessarily yours, but were intending to use a concept
 [10] of a multibrand scheme resembling the one you had put
 [11] forward?

[12] A: No, none at all.

[13] Q: If Mr Watson was, as Mr Hobbs suggested to you in his
 [14] letter of 2nd December 1993, referring to the multibrand
 [15] loyalty concept --

[16] MR JUSTICE LADDIE: 20th December, I think.

[17] MR COX: 2nd December, my Lord. If Mr Watson was referring
 [18] on 2nd December, in his last paragraph, to the
 [19] multibrand loyalty concept, it follows that he knew that
 [20] you were asserting rights, does it not?

[21] A: Yes.

[22] Q: You conclude with the paragraph that if they are not
 [23] going to run it anyway it does not much matter; yes?

[24] A: Yes.

[25] Q: If that had been in Mr Watson's mind on 2nd December,

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[1] promotions.

[2] I did not -- I want to get this correct. We were
 [3] involved in a major promotion in 1967 with a couple of
 [4] oil companies. Then we were involved in the
 [5] garage/petrol retailing, running our own promotions
 [6] until about 1978/1979, and then we started a promotions
 [7] company.

[8] Q: Have you ever provided expert reports or given expert
 [9] evidence in any case?

[10] A: Yes, I have.

[11] Q: Given evidence, or provided reports?

[12] A: Provided reports.

[13] Q: I do not think it has been disputed, and there is
 [14] certainly not anything to dispute those parts of your
 [15] witness statement in which you set out your history and
 [16] background, successful and award-winning in many
 [17] cases --

[18] A: Yes.

[19] Q: -- in developing and devising concepts for promotions.
 [20] Just explain why, when you put this scheme to Shell, you
 [21] thought that it was new, or novel?

[22] A: Well, because there was not, that I was aware of, any
 [23] other scheme anywhere else in any country, that it was a
 [24] Shell-led consortium of major retailers operating in
 [25] different trades on an exclusive basis; and that the

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[1] would you have considered it natural for him, in
 [2] response to your letter, in the light of your letter --

[3] A: Yes.

[4] Q: -- to come back to you to talk about it?

[5] A: Yes, especially because of the long relationship with
 [6] Shell.

[7] Q: So, after that letter, you obviously -- and you have
 [8] made it clear many times -- you had other very
 [9] considerable and engrossing subjects of concern with
 [10] Shell?

[11] A: Yes.

[12] Q: Did you think, from that point on, that a multibrand
 [13] loyalty scheme was going to be proposed -- until 1996?

[14] A: No, I did not, no.

[15] Q: Was going to be used?

[16] If you put that volume away, Mr Donovan, I am not
 [17] sure there could be any better person to ask this -- and
 [18] certainly you have been asked what your concept was and
 [19] questions regarding the means and the particular reasons
 [20] why you considered it to be revolutionary. Do you
 [21] recall those questions?

[22] A: Yes, I do.

[23] Q: You have been in the promotions industry for how long?

[24] A: Since 1967. For a part of that time, I was also in
 [25] petrol retailing with my father and we were running

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[1] consortium members could actually benefit from each
 [2] other's trade. They could have direct redemption so
 [3] that people buying from Shell would have -- if
 [4] Sainsburys was the supermarket partner, they would have
 [5] a very strong reason for going into Sainsburys to get
 [6] their groceries, Shell to get their petrol, and within
 [7] the family of organisations actually conducting the
 [8] scheme.

[9] Q: You were aware, were you, in 1989/1990 and again in
 [10] 1992, for example, of the existence of Air Miles?

[11] A: Yes, I was.

[12] Q: Indeed, you said that -- did you know at the time that
 [13] Shell had been issuing Air Miles --

[14] A: Yes, I did.

[15] Q: -- or members of the Air Miles scheme?

[16] A: I did.

[17] Q: If you had put forward a scheme that simply resembled in
 [18] concept, in structure, Air Miles, would you have
 [19] considered yourself at the time that it was something
 [20] you would have had an interested response in?

[21] A: No.

[22] Q: Were you aware at the time, in 1992, or 1990, or 1989,
 [23] of any of the other schemes that you have heard mention
 [24] of and Mr Hobbs cross-examined upon?

[25] A: I do not think I was aware of them at the time, no.

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[1] Q: Air Miles, certainly?
 [2] A: I knew about Air Miles and --
 [3] Q: Premier Points?
 [4] A: -- Premier Points, yes.
 [5] Q: Again, these schemes were in your mind at the time?
 [6] A: Yes, because they were operated by a third party company
 [7] that organised the scheme and controlled it in every
 [8] respect: the advertising; the marketing; the branding;
 [9] the ownership of the data; the issue rate with the
 [10] previous trading stamp companies, because, as I said,
 [11] I used to have a Greenshield franchise. At that stage,
 [12] when they first started, you could only give single
 [13] stamps on your franchise. Then they changed it to
 [14] double, then treble, quadruple, sixfold it ended up
 [15] with, and it all cancelled out, became -- other people
 [16] of my age group may remember this.
 [17] Q: You mean the currency became diluted, in other words?
 [18] A: Diluted, and we were paying a lot of money to
 [19] Greenshield Stamps at the time and we had a franchise
 [20] with Pinkshield Stamps, and eventually they all
 [21] cancelled each other out.
 [22] Q: What about exclusivity in Greenshield Stamps? Was there
 [23] any exclusivity?
 [24] A: It started off where you had a reasonable franchise
 [25] area, but then Greenshield moved the goal posts and they

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[1] A: No, it would have been a waste of everyone's time.
 [2] Q: When you put forward the schemes, did Mr King, or
 [3] perhaps more importantly Mr Lazenby, ever suggest to you
 [4] that the idea could not be confidential?
 [5] A: No. He never suggested that in respect of any scheme
 [6] that I put to Mr Lazenby. I put several to him and
 [7] there was no question about confidentiality until after
 [8] they launched a Nintendo game on 18th June, 1993.
 [9] Q: I want to break this up into stages. First, did he ever
 [10] say, "I will not accept this in confidence"?
 [11] A: No.
 [12] Q: Did he ever say, "That cannot be treated as confidential
 [13] because it is common information"?
 [14] A: No.
 [15] Q: When you put it to him in those discussions that
 [16] you have given evidence about in your witness statement
 [17] and again yesterday, when you put it, the scheme, to
 [18] him, what was the purpose that you put it to him for?
 [19] A: To see whether he was interested in the idea.
 [20] Q: Subsequently, what did you envisage happening if he were
 [21] to show interest?
 [22] A: That he would bring us in to be involved in it on an
 [23] agreed basis.
 [24] Q: Was that something that you believed to have been
 [25] obvious to anybody who had been present at the

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[1] had a franchise committee where, in our own experience,
 [2] they put in two other sites within our franchise area so
 [3] we ended up competing with other Greenshield outlets.
 [4] This is what really actually drove us into promotions.
 [5] Q: Was that in your mind too when you were thinking and
 [6] refining the multibrand loyalty concept?
 [7] A: Yes, it was.
 [8] Q: When you came to put the idea, the scheme, to Mr King
 [9] and then subsequently to Mr Lazenby in 1992, were you
 [10] conscious that they too would have been aware of
 [11] Air Miles, Premier Points, and so on?
 [12] A: Yes, yes.
 [13] Q: Did you consider yourself to be dealing with experienced
 [14] people or inexperienced people?
 [15] A: With Mr King, I was dealing with a very experienced
 [16] marketing and promotions man; with Mr Lazenby, I do not
 [17] think he had hardly any experience at all.
 [18] Q: But he had experience to draw upon, did he?
 [19] A: I can see from his witness statement that he had been
 [20] involved in the retail network, so he would have been
 [21] aware of other petrol promotions.
 [22] Q: Again, if you put forward to them schemes that -- would
 [23] you have considered it worth putting forward schemes to
 [24] them that simply resembled in every detail and were
 [25] familiar --

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[1] discussions?
 [2] A: Yes.
 [3] Q: Though the meetings were short, or, rather, not the
 [4] meetings but the discussions --
 [5] A: Yes.
 [6] Q: -- that took place within the meetings, I think you have
 [7] given evidence: five or ten minutes on each occasion?
 [8] A: Yes.
 [9] Q: Is there any doubt in your mind that the essentials of
 [10] this scheme were spelt out on 12th May, first?
 [11] A: No.
 [12] Q: Is there any doubt in your mind that, as you put it to
 [13] Mr Hobbs, you went through the Sainsburys letter on
 [14] 24th November?
 [15] A: No. No doubt at all.
 [16] Q: Were the discussions that you had, both on 12th May and
 [17] 24th November, sufficient, in your mind, to have clearly
 [18] conveyed to him the nature of the scheme?
 [19] A: Yes.
 [20] Q: And for it to have lodged in his mind?
 [21] A: Yes.
 [22] Q: In other words, it was not just such a passing reference
 [23] that it might not have stuck?
 [24] A: I would not have thought so.
 [25] Q: In the second meeting, you say you went through the

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[1] letter?
 [2] **A:** Yes.
 [3] **Q:** You realise, of course, that your word is being pitted
 [4] here against that of Mr Lazenby?
 [5] **A:** I do.
 [6] **Q:** I want to come on, if I may, to a period later. You
 [7] received discovery -- I am not going to pin you to a
 [8] date, and I do not suppose anybody else will, but how
 [9] long ago was it when you conducted the discovery?
 [10] **A:** I would guess December last year.
 [11] **Q:** Right. When you went through that discovery, did you
 [12] discover certain documents that led you to certain
 [13] names?
 [14] **A:** I did.
 [15] (2.30 pm)
 [16] **Q:** Was one of them Mr Armstrong-Holmes?
 [17] **A:** It was.
 [18] **Q:** You have been asked about the circumstances in which you
 [19] approached Mr Armstrong-Holmes. Did you have any
 [20] knowledge of Mr Armstrong-Holmes before you came across
 [21] the discovery?
 [22] **A:** None at all.
 [23] **Q:** Did you seek in any way to influence Mr Armstrong-Holmes
 [24] to say something that was not true?
 [25] **A:** No.

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[1] **A:** Of course, it is.
 [2] **Q:** As you know, one of the things I will have to do is
 [3] I will have to decide what the true story is.
 [4] **A:** Yes.
 [5] **Q:** The story that you give and the story that Mr Lazenby
 [6] gives are difficult to reconcile with each other.
 [7] **A:** Yes.
 [8] **Q:** There are all sorts of possibilities.
 [9] **A:** Mmm.
 [10] **Q:** One is that you have made it all up and one is that
 [11] Mr Lazenby has made it all up. Another possibility is
 [12] that parts are true and parts are not true, and at the
 [13] end of the day I am going to have to decide whether the
 [14] whole or a part of a story is true, or whether the whole
 [15] or a part of it is untrue. Do you understand?
 [16] **A:** I do.
 [17] **Q:** I have to do that without regard to the financial impact
 [18] that that will have on the parties.
 [19] **A:** I understand that as well.
 [20] **Q:** Can I ask you to go to file E1? It is the one with the
 [21] letters of 24th July, 1990.
 [22] **A:** Right.
 [23] **Q:** There are some other documents, I do not need to go to
 [24] them, but there are some other documents which seem to
 [25] suggest that you made claims in relation to Concept 4 to

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[1] **Q:** Mr King and your relationship with him, insofar as
 [2] it has been raised -- although sometimes by what I will
 [3] call "implication" -- your relationship with Mr King:
 [4] did you ever have anything other than a relationship on
 [5] a professional basis with Mr King?
 [6] **A:** No.
 [7] **MR JUSTICE LADDIE:** I do not think any suggestion of
 [8] impropriety was being made by Mr Hobbs. If it was, it
 [9] passed me by, Mr Cox, and I will not allow Mr Hobbs to
 [10] run it now.
 [11] **MR COX:** Thank you, Yes, Would your Lordship give me just
 [12] one moment? (Pause)
 [13] Does the same apply to Mr McMahon?
 [14] **A:** Yes, it does.
 [15] **Q:** As did for Mr Armstrong-Holmes, I mean.
 [16] **A:** Yes.
 [17] **Q:** Thank you, my Lord, Thank you, Mr Donovan,
 [18] **MR JUSTICE LADDIE:** Mr Donovan, I would just like to ask you
 [19] a couple of questions.
 [20] **A:** Right.
 [21] **Q:** Mr Cox, at the beginning of his re-examination of you,
 [22] asked you to explain the funding of this case?
 [23] **A:** Yes.
 [24] **Q:** Of course, this case must be a significant worry to
 [25] you.

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[1] Shell. I am concerned about the documents at 446 and
 [2] 449.
 [3] **A:** I have those.
 [4] **Q:** I want you to look at them carefully, I want you to read
 [5] them to yourself. 446 and 449. Read them to yourself.
 [6] (Pause)
 [7] **A:** Yes, I remember the letters.
 [8] **Q:** Whatever may be the status of other documents --
 [9] **A:** Yes.
 [10] **Q:** -- I want you to reflect again on what Mr Hobbs is
 [11] putting to you.
 [12] **A:** Yes.
 [13] **Q:** Are you sure that you wrote these letters in July of
 [14] 1990 --
 [15] **A:** I --
 [16] **Q:** -- and sent them, "and sent them", in July of 1990?
 [17] **A:** I am sure that I wrote -- I was involved in writing the
 [18] letters, probably the prime person involved in it, and
 [19] that the letters were prepared and put in the mailing
 [20] system, but I do not know whether they were actually
 [21] sent, and so on.
 [22] **Q:** In July 1990?
 [23] **A:** In July 1990.
 [24] **Q:** Thank you very much.
 [25] **MR COX:** Thank you, Mr Donovan.

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[1] (The witness withdrew)

[2] **MR COX:** My Lord, Mr Roger Sotherton, please.

[3] **MR ROGER GEOFFREY SOTHERTON (sworn)**

[4] Examination-in-chief by MR COX

[5] **Q:** Mr Sotherton, I think you should find -- I hope it is a

[6] yellow bundle -- in the carousel to the right of you,

[7] marked C1.

[8] **A:** Did you say yellow?

[9] **Q:** I hope it is yellow.

[10] **A:** It looks like "G", but it says "C1", yes.

[11] **Q:** If you turn to tab number 2 there, you should find the

[12] frontispiece to a statement that purports to be yours.

[13] If you turn to the end, there is a photocopy and it

[14] bears a signature which I want to ask you if you

[15] recognise as yours.

[16] **A:** It is mine.

[17] **Q:** Is this the statement that you made for the purposes of

[18] this case?

[19] **A:** It is.

[20] **Q:** Mr Sotherton, the way it is done here is that I do not

[21] get a chance to ask you questions about yourself. I am

[22] simply going to ask you to confirm that, to the best of

[23] your recollection and belief, the details in that

[24] statement true?

[25] **A:** Yes.

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[1] **Q:** Thank you. Have you had a detailed breakdown of what

[2] has been going on in your absence?

[3] **A:** No, I have not.

[4] **Q:** How detailed was it, if it was not detailed?

[5] **A:** I saw part of a transcript of yesterday's proceedings.

[6] **Q:** Did you?

[7] **A:** That is all I have seen.

[8] **Q:** What was the part of the transcript of yesterday's

[9] proceedings you looked at?

[10] **A:** Most of the latter part, for some of which I was present

[11] as it was happening.

[12] **Q:** Right. You will remember, I think, that the Shell Smart

[13] Scheme rolled out, became public, in 1994?

[14] **A:** If that is the date you say it was, yes, I accept that.

[15] **Q:** Do you remember the Shell Smart Scheme coming onto the

[16] scene?

[17] **A:** Not really, no. I had not taken much notice. I was

[18] advised that it had come onto the scene.

[19] **Q:** Who advised you?

[20] **A:** John Donovan.

[21] **Q:** When did he advise you, can you recollect?

[22] **A:** I cannot really, but I think it was in early -- what

[23] year did you say?

[24] **Q:** It is 1994.

[25] **A:** 1994. I would have thought it would have been early-ish

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[1] **Q:** There will be questions for you from Mr Hobbs.

[2] Cross-examination by MR HOBBS

[3] **Q:** Mr Sotherton, did you just take something into the

[4] witness box with you? I saw you carrying something in.

[5] **A:** (Indicating)

[6] **Q:** Is there anything in there?

[7] **A:** Yes, there is a copy of my statement, a couple of

[8] statements and things.

[9] **Q:** Nothing else beyond that?

[10] **A:** No.

[11] **Q:** Right. Now, Mr Sotherton, you have been in court today,

[12] I believe? If you do not say out loud "yes", it will

[13] not come onto the tape.

[14] **A:** Yes.

[15] **Q:** You have been in court today. Were you in court at all

[16] yesterday?

[17] **A:** For a short period at the end.

[18] **Q:** Right. Have you been receiving reports as to what has

[19] been going on?

[20] **A:** Yes, some.

[21] **Q:** Who has been communicating those reports to you, if you

[22] do not mind me asking?

[23] **A:** Mr Woodman.

[24] **Q:** Sorry?

[25] **A:** Mr Woodman.

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[1] 1994.

[2] **Q:** Can you remember the occasion when he advised you about

[3] the introduction of the scheme?

[4] **A:** Not really, no, other than that it was a casual -- I say

[5] casual, obviously now important -- telephone call that

[6] he had made.

[7] **Q:** Right. You, at that stage, were not, I think, still

[8] connected with Don Marketing, were you?

[9] **A:** No, far from it.

[10] **Q:** Right. You say "far from it"; were you at loggerheads

[11] with Don Marketing?

[12] **A:** No, not at all. I had gone into a completely different

[13] area of business.

[14] **Q:** At what point in time, looking back, do you say that you

[15] formed the idea in your mind that the Shell Smart Scheme

[16] used concepts disclosed, as you would say, in 1992 to

[17] Mr Lazenby?

[18] **A:** After the point I had had the conversation with John who

[19] had advised me, and he explained to me, the essence of

[20] what is the Smart scheme, and it seemed obviously so

[21] similar to what it is that we had proposed earlier.

[22] **Q:** This is the conversation you have just referred to --

[23] **A:** Yes.

[24] **Q:** -- when John Donovan rang you?

[25] **A:** Yes.

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[1] Q: That was in 1994 and he was talking to you about the
 [2] scheme that had just rolled out from Shell?
 [3] A: Yes.
 [4] Q: So this was a new scheme he was talking to you about?
 [5] A: Yes.
 [6] Q: His position in conversation with you was, at that
 [7] stage, that this appeared to involve concepts which had
 [8] been disclosed to Lazenby before; is that correct?
 [9] A: Yes.
 [10] Q: Right. What happened after that? How did it go? That
 [11] is 1994 and here we are in 1999, and there are
 [12] five years in between.
 [13] A: Right. Well, very much left to John Donovan to pursue
 [14] the matter how he felt that he should and that I was
 [15] available if he wanted any information that I could
 [16] possibly help with along the way.
 [17] Q: Quite, so how did you leave it? You left it on the
 [18] basis that he would do some further investigations into
 [19] the scheme which had just rolled out from Shell?
 [20] A: Yes, and that we would just keep in touch as to how
 [21] things were going; was it indeed the Don Marketing
 [22] scheme, et cetera.
 [23] Q: Did he come back to you at all? When did he come back
 [24] to you? He must have come back to you, so when did he
 [25] come back to you? The same year, 1994?

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[1] A: No.
 [2] Q: He was proposing, was he, to investigate with a view to
 [3] bringing a further complaint against Shell; is that your
 [4] understanding of these discussions?
 [5] A: That is what it turned out to be, yes, with the passage
 [6] of time.
 [7] Q: Yes. It was not a surprise to you that that is what it
 [8] turned out to be because that is how it started out:
 [9] he was going to look into the Shell scheme?
 [10] A: Absolutely, yes.
 [11] Q: Yes, he was going to get to the bottom of it?
 [12] A: Yes.
 [13] Q: He was going to bring a claim against Shell --
 [14] A: Yes.
 [15] Q: -- at a time that he saw fit?
 [16] A: Yes.
 [17] Q: You had conversations with him in 1994 and you have said
 [18] it could have been as many as 15 conversations?
 [19] A: Yes.
 [20] Q: It was quite a few. I should imagine, but you must help
 [21] me please, did this go on during 1995 as well? Were
 [22] there further conversations between you and him?
 [23] A: Yes, there must have been. I cannot recollect any, but
 [24] yes, there must have been.
 [25] Q: Right, there must have been. Were these face-to-face,

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[1] A: Certainly, yes. We would have had conversations during
 [2] the course of the year. I would not like to put a time
 [3] span on it.
 [4] Q: Can you give us an indication of the number of
 [5] conversations there might have been: 5, 10, 15?
 [6] A: Could have been.
 [7] Q: Could have been what, 15?
 [8] A: It could have been 10, it could have been 15. I think
 [9] it would have been weekly, maybe the odd monthly --
 [10] I think probably as news arose, or there was a
 [11] development, then he would just make me aware of that.
 [12] Q: All right. You say he was making you aware of it. Can
 [13] you recall, please, for us now, what sort of points were
 [14] coming up in the discussions that he was having with you
 [15] and you were having with him?
 [16] A: Well, it was very much -- or it appeared to me to be
 [17] very much an "Oh, here we go again" situation, keeping
 [18] in mind the three previous cases that had been some
 [19] while before --
 [20] Q: Right.
 [21] A: -- and John was going to decide quite what he had done
 [22] about what appeared to be our idea being used. That was
 [23] very much left in John's court to deal with. I had no
 [24] interest in the matter at all.
 [25] Q: You had no interest in the matter?

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[1] or some of them face-to-face and some of them over the
 [2] telephone?
 [3] A: Probably a mixture of both.
 [4] Q: Right. When you did meet face-to-face -- you had some
 [5] face-to-face contact?
 [6] A: Yes.
 [7] Q: When you did have face-to-face contact, was that at the
 [8] offices of Mr Donovan, or was it at your home, or his
 [9] home? Where would you meet?
 [10] A: At his office at his home, or there were perhaps a
 [11] couple of other occasions where we were meeting friends
 [12] and we would meet together.
 [13] (2.45 pm)
 [14] Q: All right. Could you give us an indication of the
 [15] frequency with which you met to discuss the state of the
 [16] Shell Smart Scheme and Mr Donovan's position in relation
 [17] to it during 1995?
 [18] A: I think there was no planned frequency. There was --
 [19] casual updating probably is the best way to describe it.
 [20] Q: You think it could have been as many as 15 discussions,
 [21] or so, in 1994. Would it have been more or less during
 [22] 1995, or as many again?
 [23] A: Maybe as many again, but I am working that on the basis
 [24] that perhaps we talked once a month and maybe twice in
 [25] one month or something.

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[1] Q: Right. I should imagine that you were aware that,
 [2] during 1995, Mr Donovan was in dispute with Shell?
 [3] A: Yes.
 [4] Q: Right. Not to put too fine a point on it, there came a
 [5] point in time where you had a disagreement with him, did
 [6] you not?
 [7] A: Yes.
 [8] Q: Would you like to just tell us please, from your own
 [9] recollection, what the nature of that dispute was and
 [10] how it resolved itself?
 [11] A: Yes. Earlier, some concepts had been presented to Shell
 [12] that had materialised in varying forms but certainly
 [13] appearing to be Don Marketing concepts. John took an
 [14] action against Shell for those, but my involvement was,
 [15] at the time those presentations, et cetera, were made,
 [16] I was working alongside John on a speculative basis, so
 [17] I was putting my time and my effort into developing my
 [18] aspect of the promotions, which was generally the
 [19] mechanical side and security aspects.
 [20] Q: Yes.
 [21] A: This was done with no payment from anywhere, purely
 [22] speculative. When it came to the --
 [23] Q: Could I just interrupt for a moment? This was 1992, was
 [24] it not?
 [25] A: Yes.

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[1] a conclusion of his dispute with Shell --
 [2] A: Yes.
 [3] Q: -- and that that would bring some remuneration in his
 [4] direction?
 [5] A: Yes.
 [6] Q: And your position was that you were entitled, under the
 [7] agreement you had with him, to a percentage of it?
 [8] A: Yes.
 [9] Q: Right. I believe I am right in saying that he did not
 [10] share your view of that matter?
 [11] A: Well, he did, but -- I do not think he would have
 [12] wrenched on the deal, that is to say, but what did happen
 [13] was that suddenly I was faced with silence from
 [14] John Donovan.
 [15] Q: Right.
 [16] A: Something had gagged him and I could no longer get
 [17] information from him as to how the proceedings were
 [18] going, or what was happening indeed. I ended up taking
 [19] out a writ against John Donovan.
 [20] Q: A writ? It became that serious, did it?
 [21] A: Yes, it did.
 [22] Q: Right. Would I be right in thinking this was 1995, or
 [23] would it be 1996?
 [24] A: I am unsure of the dates. I cannot recall.
 [25] Q: Shall we, at this juncture, just look at bundle X? One

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[1] Q: Okay. Carry on please.
 [2] A: Well, I think it was 1992. I am terrible on dates,
 [3] so --
 [4] Q: I can help you in a moment or two. Carry on.
 [5] A: It reached the point where John was taking the action
 [6] against Shell and I was obviously involved because I had
 [7] been involved on a promise of a share in the revenue
 [8] from the promotions as and when they rolled out, if and
 [9] when they rolled out.
 [10] Q: What was the promise, tell us please?
 [11] A: It was commission-based on the amount of game pieces
 [12] that may be produced for any particular promotion.
 [13] Q: Was it a percentage, in fact?
 [14] A: Yes, it was.
 [15] Q: Am I right in thinking it was 17.65 per cent?
 [16] A: Correct.
 [17] Q: Have you read about my questions to Mr John Donovan in
 [18] the transcript yesterday on this point?
 [19] A: Not on that point, no.
 [20] Q: No, all right. Carry on. Let me help you carry on.
 [21] You had an arrangement with him which would give you,
 [22] shall I call it, a piece of the action, if you know what
 [23] I mean?
 [24] A: Yes.
 [25] Q: Is this correct: you became aware that he was coming to

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[1] has been prepared and I am afraid it has not reached
 [2] your Lordship's bench. Could I hand it up to
 [3] your Lordship now? (Handed)
 [4] MR JUSTICE LADDIE: Certainly. Does it have some flags on
 [5] it for all the documents we have already accumulated?
 [6] MR HOBBS: It does. There should be one in the witness box
 [7] on the carousel somewhere beside you. You still have
 [8] the clutter, I think, left over from before, have you?
 [9] A: I have the clutter, yes.
 [10] MR JUSTICE LADDIE: Why not get one of your solicitors to go
 [11] up? Just find one on the carousel for him, otherwise it
 [12] wastes time.
 [13] MR HOBBS: Tab 4, please. If the system has gone well, this
 [14] should be page 16 and it should be a letter which
 [15] I think you will be familiar with.
 [16] A: Yes.
 [17] Q: Actually this is 1996, I notice?
 [18] A: Yes.
 [19] Q: Were those your solicitors, Gudgeons Prentice?
 [20] A: Yes.
 [21] Q: You had to go and issue a writ, I should imagine, at
 [22] some point just after this?
 [23] A: Yes.
 [24] Q: This is a letter of demand?
 [25] A: Yes.

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[1] Q: All right.
 [2] A: This was the first letter that was sent.
 [3] Q: The first letter, was it?
 [4] A: Yes.
 [5] MR JUSTICE LADDIE: Sorry, which tab are you in?
 [6] MR HOBBS: Tab 4, my Lord.
 [7] MR JUSTICE LADDIE: Sorry, yes.
 [8] MR HOBBS: On that letter, please, Mr Sotherton, let us just
 [9] have a look at the second blocked paragraph there,
 [10] "We are instructed"; do you see that?
 [11] A: Mmm.
 [12] Q: "We are instructed that an independent witness was
 [13] present when our client agreed terms with
 [14] Mr John Donovan, a director of Don Marketing ..."
 [15] Who was the independent witness?
 [16] A: Mike Macrow.
 [17] MR JUSTICE LADDIE: Sorry, who was that?
 [18] A: Mike Macrow, M-A-C-R-O-W.
 [19] MR HOBBS: Okay:
 [20] "... that our client would provide on a
 [21] speculative basis, his time and expertise in the
 [22] preparation and presentation of promotional proposals to
 [23] Shell. In return, our client would be entitled to an
 [24] agency commission of 17.65 per cent on any concept fee,
 [25] commission and any other fees received by Don Marketing

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[1] collection.
 [2] Q: Is that because, therefore, your position in 1996 was
 [3] that those were the only presentations that had been
 [4] made at those meetings?
 [5] A: No, it is just that they were the only ones that were in
 [6] dispute.
 [7] Q: But your agreement is in relation to all presentations
 [8] made at those meetings, is it not?
 [9] A: Well, yes, this is obviously written by someone in the
 [10] legal profession to cover all points, but I had not
 [11] realised it had covered all points, or had that
 [12] potential.
 [13] Q: So your position is that you do not, in fact, have an
 [14] interest, via the agreement that we see written here, in
 [15] relation to Mr Donovan's claim in the present case?
 [16] A: Not at all. I abandoned all involvement with this after
 [17] that case was resolved.
 [18] MR JUSTICE LADDIE: That is a bit unfair on him because he
 [19] may have found that his lawyers have given him a
 [20] contractual right much greater than he had anticipated
 [21] and his right may be determined by the contract that his
 [22] lawyers entered into on his behalf. I think he can say
 [23] what his expectations were, but I do not think it is
 [24] right to say whether he is abandoning rights, or
 [25] anything like that.

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[1] from Shell arising from the presentations that
 [2] John Donovan and our client might make to Shell's
 [3] National Promotion Manager. Such presentations were
 [4] made at Shell-Mex House in 1992 on 12th May, 4th June
 [5] and 24th November."
 [6] Do you see that?
 [7] A: (Witness nods)
 [8] Q: Right. The National Promotions Manager mentioned there
 [9] was Andrew Lazenby, was it not?
 [10] A: Yes.
 [11] Q: There were three presentations during that year: the
 [12] 12th, the 4th and the 24th?
 [13] A: Yes.
 [14] Q: Correct. You had an involvement, did you, on a
 [15] speculative basis in relation to those three meetings?
 [16] A: Yes.
 [17] Q: Let me just ask you this: is it your position and your
 [18] perspective that, if Mr Donovan succeeds in this present
 [19] action against Shell, this agreement will agree to the
 [20] proceeds of this action too?
 [21] A: No, I had not even realised that this was that tightly
 [22] worded. As far as I was concerned, this was involving
 [23] purely those three cases that were being dealt with --
 [24] two cases, in fact, that were being dealt with earlier,
 [25] which was the Nintendo game and the Hollywood

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[1] MR HOBBS: I am sorry.
 [2] MR JUSTICE LADDIE: It may be that this will end up with yet
 [3] another round of litigation.
 [4] MR HOBBS: Perish the thought, my Lord, that any such thing
 [5] should happen.
 [6] MR JUSTICE LADDIE: Perish the thought, Mr Hobbs, quite.
 [7] MR HOBBS: Perish the thought.
 [8] MR JUSTICE LADDIE: You have the point that you wanted out
 [9] of it. I just think that to go further and to get him
 [10] to say that he is abandoning any claims --
 [11] MR HOBBS: No, I am sorry.
 [12] MR JUSTICE LADDIE: It is all right. Do not worry,
 [13] Mr Sotherton.
 [14] MR HOBBS: You are not deaf, you have heard the exchanges.
 [15] We read what we read here.
 [16] Anyway, you found yourself in a dispute with
 [17] John Donovan, did you not?
 [18] A: Yes.
 [19] Q: It was resolved, and it was resolved on the basis that
 [20] you got some compensation, did you not?
 [21] A: Yes, I did. I was happy with the outcome at the end of
 [22] the day, at the end of the final mediation.
 [23] Q: On that note I need to ask you, please, to reach for
 [24] volume B.
 [25] In that volume, if you would not mind

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[1] Mr Sotherton, please turn behind tab 4.
 [2] **MR JUSTICE LADDIE:** Which is volume B?
 [3] **MR HOBBS:** The core bundle, my Lord.
 [4] **MR JUSTICE LADDIE:** Yes. Tab 4, did you say?
 [5] **MR HOBBS:** Tab 4, my Lord, yes, please.
 [6] **MR JUSTICE LADDIE:** Yes.
 [7] **MR HOBBS:** Mr Sotherton, there is a document and we can see
 [8] your name on it.
 [9] **A:** This is the letter of agreement. I have the right
 [10] document, have I?
 [11] **Q:** I do not want to show you mine because it has markings
 [12] all over it?
 [13] **A:** Is that the one. (Indicating)
 [14] **Q:** It looks like the one, yes. You have the heading. Look
 [15] down those names in the middle -- Don Marketing,
 [16] Shell UK -- and then you have a list of names and
 [17] you are the fifth man.
 [18] **A:** I am.
 [19] **Q:** Do you remember how you came to be a party to this? In
 [20] fact you signed it, look, on the next page.
 [21] **A:** Yes. This was the outcome of the mediation, was it
 [22] not?
 [23] **Q:** This is the outcome of the litigation.
 [24] **A:** Yes.
 [25] **Q:** This is John Donovan's dispute coming -- well, one of

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[1] you from time to time for help, or giving you an update
 [2] on his progress, was he not?
 [3] **A:** Yes.
 [4] **Q:** We lurch into 1997 and in 1997 are you aware that
 [5] Mr Donovan went forward with his claim against Shell, in
 [6] other words he put it into a letter? Were you aware
 [7] that that had happened?
 [8] **A:** Not as a specific thing, no.
 [9] **Q:** Right. Do you still have bundle X anywhere near you?
 [10] **A:** X?
 [11] **Q:** Yes. That was the one we were looking at a moment or
 [12] two ago.
 [13] **A:** Yes.
 [14] **Q:** Behind tab 1 in that bundle is a letter which you will
 [15] see under the Don Marketing letterhead. It is dated
 [16] 27th March 1997. Do you have that?
 [17] **A:** Yes, I have it. Yes.
 [18] **Q:** Is this a letter you have seen before?
 [19] **A:** I probably have, but I do not actually recall it.
 [20] (3.00 pm)
 [21] **Q:** That leaves me in a little bit of a difficult position.
 [22] You probably have, but you do not recall it. Are you
 [23] saying that you probably did because you realise what
 [24] the nature of the letter is? Are you saying to me that
 [25] you knew that there came a time when John Donovan

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[1] his disputes. I cannot remember what the sequence was,
 [2] but this is one that is coming to a conclusion. The
 [3] letter of agreement is undated but it turned into a
 [4] court order behind the next tab, tab 5,
 [5] in October 1996.
 [6] **A:** Right.
 [7] **Q:** You do not seem to have a recollection of how you came
 [8] to be named on there or why you were signing it. Let me
 [9] help you, if I can.
 [10] It was the case, was it not, that Shell required
 [11] any settlement to be comprehensive and that, since
 [12] you had an outstanding claim for some of the proceeds in
 [13] that dispute, it was suggested, and you acceded to the
 [14] suggestion, that you should become a party to the
 [15] settlement agreement?
 [16] **A:** Yes.
 [17] **Q:** That is more or less how you remember it, is it?
 [18] **A:** Yes.
 [19] **Q:** During this period, this period being 1996, and I am
 [20] speaking in terms of a calendar year, you were still in
 [21] communication with John Donovan, were you not, on the
 [22] subject of the Shell Smart Scheme?
 [23] **A:** Yes.
 [24] **Q:** So far as you were aware, he was continuing to build his
 [25] case against Shell during that period and he was asking

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[1] unveiled his claim to Shell in writing and that you see
 [2] this letter and you assume, therefore, that this is a
 [3] letter you will have seen before? Is that your
 [4] position?
 [5] **A:** Yes, that John has probably said to me, "Look, this is
 [6] the letter that I had to send to Shell".
 [7] **Q:** Right.
 [8] **A:** But I certainly would not have absorbed it.
 [9] **Q:** Before John Donovan wrote this letter to Shell, he would
 [10] have had discussions with you and he would, would he
 [11] not, have cleared the text of it with you to see whether
 [12] it tallied with your recollection?
 [13] **A:** Yes, probably. I do not recall if that was the case,
 [14] but yes, probably.
 [15] **Q:** Let us see how much of this --
 [16] **A:** Certainly if I am mentioned in the letter, that would be
 [17] sure.
 [18] **Q:** Well, you are mentioned in the letter.
 [19] **A:** Right.
 [20] **Q:** Has anybody told you that I was asking questions about
 [21] this letter yesterday?
 [22] **A:** No.
 [23] **Q:** Perhaps I had better ask you then specifically: which
 [24] portion of the transcript for yesterday was it that you
 [25] read? What was the subject matter you read about?

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[1] A: It was the latter part dealing with discussions that
 [2] I had with Paul King. In fact, it is a similar subject
 [3] that went on again this morning.
 [4] Q: So you read the evidence relating to the two letters,
 [5] both of which bear your name, I think.
 [6] MR COX: My Lord, there is no secret. I asked my solicitor
 [7] to speak to him about this issue :-
 [8] MR HOBBS: I did not suggest there was a secret.
 [9] MR JUSTICE LADDIE: All right, Mr Hobbs, put your horns in.
 [10] The letter of 24th July.
 [11] MR HOBBS: Yes, and that was the portion of the transcript,
 [12] and you were here this morning to hear further
 [13] questioning on that?
 [14] A: Yes.
 [15] Q: Those were the documents which had your name or your
 [16] initials on them?
 [17] A: Yes.
 [18] Q: In terms of this letter, you may or may not have seen
 [19] this before? You think you probably did, but you cannot
 [20] be certain for the moment?
 [21] A: Yes, I would say that almost certainly I must have read
 [22] it at some point because it does involve me and, as you
 [23] quite rightly say, John may have said to me, "Where
 [24] you are mentioned, does that fit in right with your
 [25] recollection of things?"

[1] he was putting his case together for this claim, there
 [2] was Paul King, was there not? You knew about that?
 [3] A: Yes.
 [4] Q: Yes, and there were people from Senior King who were one
 [5] of Shell's agencies at one particular point in time, and
 [6] you knew about that, did you not?
 [7] A: I was aware of those, yes.
 [8] Q: Yes, and were there any other names mentioned in that
 [9] connection that John Donovan told you that he had been
 [10] approaching in connection with what we see here as
 [11] Project Hercules?
 [12] A: Not that I can recall.
 [13] Q: Right. The position was, as stated here, that the
 [14] information that he told you he had received from these
 [15] people was that project Smart was designed from the
 [16] outset to eventually become a consortium promotion, was
 [17] it not?
 [18] A: Mmm.
 [19] Q: You are saying :-
 [20] A: Yes.
 [21] Q: It will not come on the transcript if you do not say the
 [22] word "yes".
 [23] This, in fact, is the nature of the information
 [24] that he was telling you he was receiving from the people
 [25] that he was communicating with over this period of years

[1] Q: Absolutely. Here we are in 1997. This claim has been
 [2] brewing for three years and during that period he has
 [3] been in frequent communication with you. It would be
 [4] strange and illogical, would it not, if he did not in
 [5] fact touch base with you closely on this letter at this
 [6] time?
 [7] A: Yes.
 [8] Q: Right. There are just a couple of points I would like
 [9] to draw your particular attention to. Look at the top
 [10] of page 2. This is Mr Donovan's letter to the Chairman
 [11] of Shell UK:
 [12] "We have contacted a number of potential witnesses
 [13] including Shell and senior agency staff involved in
 [14] 'Project Hercules' - your code-name for the Smart
 [15] project. They confirm that Mr Lazenby headed up the
 [16] project team and that Smart was designed from the outset
 [17] to eventually become a consortium promotion. This is
 [18] further confirmed by a recent report in 'Marketing
 [19] Week' ..."
 [20] Just concentrating on that top paragraph, those
 [21] are matters that John Donovan had made you aware of over
 [22] the years, had he not, that he had made enquiries of
 [23] potential witnesses?
 [24] A: Yes.
 [25] Q: Right. Amongst the witnesses that he had spoken to as

[1] that he was investigating the Shell Smart Scheme;
 [2] correct?
 [3] A: Yes.
 [4] Q: There are a number of letters down here. I could take
 [5] up a lot of time going to the various bundles with you
 [6] in relation to these letters, but I just want to see
 [7] where we are getting to. Do you see that number 5 on
 [8] that page 2 is a letter to Sainsburys, dated 24th July?
 [9] A: Yes.
 [10] Q: I will just read you the text:
 [11] "On 24th July 1990, we sent a further letter to
 [12] Sainsburys following discussions which Mr Sotherton and
 [13] I had with Mr Brian Horley, their Advertising and
 [14] Marketing Manager. We sent with the letter a copy of
 [15] Concept 4 from the October 1989 proposal plus the cover
 [16] page of the proposal."
 [17] Now, from that description there and from what
 [18] you have heard in court and from what you read in
 [19] yesterday's transcript, you know what that letter is :-
 [20] A: Yes.
 [21] Q: - what that letter reference is, do you not?
 [22] A: Yes.
 [23] Q: If you turn the page and flick, as it were, between
 [24] page 2 and page 3, you will notice that there is no
 [25] mention in this letter of the other letter of 24th July

[1] 1990 that you heard so much about, which is the letter
 [2] to King at Shell. It is not mentioned here.
 [3] **A:** No.
 [4] **Q:** I will not beat about the bush with you on this. It is
 [5] a matter of considerable surprise to me, where I am
 [6] standing, that John Donovan should have unveiled his
 [7] claim in this letter in 1997 and yet not put in a
 [8] reference to that letter of 24th July 1990 to Mr King.
 [9] Are you surprised to see that it is not mentioned here?
 [10] **A:** I am not sure of its relevance, so I ..
 [11] **MR JUSTICE LADDIE:** Mr Hobbs, this is an important issue.
 [12] I think you really ought to show him the letter so that
 [13] he has it fully in mind. He has been sitting in the
 [14] spectators' section. Why not let him see the document,
 [15] so he knows what it is, and then he can express views as
 [16] to whether he is surprised it is left out.
 [17] **MR HOBBS:** Right. For that purpose we need volume E1,
 [18] please.
 [19] **MR JUSTICE LADDIE:** E1/446.
 [20] **A:** It happens to be already open.
 [21] **MR HOBBS:** What do you say now?
 [22] **A:** It happens to be already open.
 [23] **Q:** Good. You are one jump ahead of me. E1/446 is a letter
 [24] to Paul King and it has your signature on the second
 [25] page?

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[1] **A:** Yes.
 [2] **Q:** It is supposed to be recording the existence of an
 [3] option agreement concluded between Don Marketing and
 [4] Paul King on behalf of Shell UK, on 24th July 1990.
 [5] That is what it appears to be recording to me, all
 [6] right?
 [7] **A:** Yes.
 [8] **Q:** Right. Let me ask you, do you have any recollection,
 [9] independently of this letter, of any such option
 [10] arrangement having been made?
 [11] **A:** Yes, but very little.
 [12] **Q:** What little do you recollect?
 [13] **A:** Well, the fact that there was an option that was taken.
 [14] The exact timings I would not like to guess at.
 [15] **Q:** The exact timing of the option?
 [16] **A:** Yes.
 [17] **Q:** You would not like to say for certain that it was at the
 [18] date of this letter, the apparent date of this letter
 [19] then?
 [20] **A:** Well, I would say that, as the letter refers to it at
 [21] that point, that yes, that would be ..
 [22] **Q:** Right, okay, well you see ..
 [23] **A:** I think there may have been some discussion beforehand,
 [24] you see.
 [25] **Q:** Yes. Look, the point that brought me to this letter

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[1] **A:** Yes.
 [2] **Q:** This is a letter that you must be pretty familiar with?
 [3] **A:** Yes, reasonably so.
 [4] **Q:** Pardon?
 [5] **A:** Reasonably so.
 [6] **Q:** When did you last read it before you read it there?
 [7] **A:** Probably earlier in the year.
 [8] **Q:** I cannot hear you, I am sorry?
 [9] **A:** Probably earlier in the year.
 [10] **Q:** When did you last read it before that?
 [11] **A:** Probably when it was written.
 [12] **Q:** What, eight years ago then?
 [13] **A:** Yes.
 [14] **Q:** Right. You have read the letter recently, have you
 [15] not ..
 [16] **A:** Yes, I have.
 [17] **Q:** .. before just sitting there now?
 [18] **A:** Yes.
 [19] **Q:** This letter seems to be recording a communication of a
 [20] conversation between yourself and Paul King?
 [21] **A:** Yes.
 [22] **Q:** One aspect of it on the second page, at 447, is an
 [23] option arrangement?
 [24] **A:** Yes.
 [25] **Q:** You see that option arrangement, do you not?

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[1] was, do you remember, I was showing you the other letter
 [2] in the bundle X file?
 [3] **A:** Yes.
 [4] **Q:** If you still have that, I was asking you to, as it were,
 [5] flick between pages 2 and 3 of that X file letter.
 [6] **A:** Yes.
 [7] **Q:** Flicking between pages 2 and 3 of the X file letter,
 [8] I was telling you, and I said I would not beat about the
 [9] bush on it, that I am very struck by the fact that there
 [10] is no mention in this letter, where John Donovan is
 [11] unveiling his claim, there is no mention of the letter
 [12] you have open in front of you in the other bundle.
 [13] **A:** Right.
 [14] **Q:** Do you find that odd?
 [15] **A:** In retrospect, I guess yes.
 [16] **Q:** I mean, it is ..
 [17] **A:** It seems as though it ought to be there.
 [18] **Q:** Well, an option agreement ..
 [19] **A:** Yes.
 [20] **Q:** .. over the very thing. For goodness sake, if there was
 [21] one place where it ought to be mentioned, you would
 [22] agree with me it is in this letter, is it not?
 [23] **A:** Yes.
 [24] **Q:** Absolutely.
 [25] **A:** Yes.

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[1] Q: Are you able to offer my Lord any explanation as to why
 [2] it is not in this letter, this letter being the X file
 [3] letter? I know you did not write it. Are you able to
 [4] offer my Lord any explanation at all as to why it was
 [5] not in this letter?
 [6] A: No, I do not think I am. My recollection of all this is
 [7] fairly poor anyway.
 [8] Q: Is your recollection of events poor on the meetings back
 [9] in 1992 as well?
 [10] A: Yes, with a few highlights that I can remember.
 [11] Q: Right. Anyway, I think we can agree, can we not, that
 [12] we are both mutually surprised by the absence of any
 [13] reference to that letter of 24th July that you have open
 [14] in the other bundle?
 [15] A: I should think, if it is that important, it ought to be
 [16] there, yes.
 [17] Q: Agreeing on that basis then, can I put it to you quite
 [18] formally -- and I think you know what I am about to say,
 [19] do you not?
 [20] A: (Witness nods)
 [21] Q: You are nodding in agreement. The reason it is not
 [22] mentioned in this letter is because it was not in
 [23] existence at the date of this letter; what do you say?
 [24] A: Certainly not the case.
 [25] Q: When you say "certainly not", when did it come into

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[1] producing my statement, that any of this material has
 [2] actually come to light again.
 [3] Q: On the X file letter which we had open on page 2, item 5
 [4] is the letter at 449 in the other bundle to
 [5] Brian Horley.
 [6] A: Yes.
 [7] Q: So you will, will you not, have been aware of the
 [8] existence of the reference, at least, to that letter on
 [9] 27th March 1997 or some time shortly before? You will
 [10] have known, will you not?
 [11] A: Sorry, would you put the question to me again?
 [12] Q: Yes. You have a letter at 449 of the big bundle.
 [13] A: Yes.
 [14] Q: At 449 of the big bundle, it is a letter to Brian Horley
 [15] of Sainsburys?
 [16] A: Yes.
 [17] (3.15 pm)
 [18] Q: Okay. On item paragraph number 5, page 2 of the letter
 [19] of 27th March, that I have open in front of you in the X
 [20] file, item 5 is that letter?
 [21] A: Yes.
 [22] Q: All right? I thought we had reached a position where
 [23] this letter -- that is the letter of 27th March 1997 --
 [24] it is likely to have been discussed with you before it
 [25] was sent?

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[1] existence?
 [2] A: At this point in time.
 [3] Q: Did it?
 [4] A: 24th July or thereabouts.
 [5] Q: Did it?
 [6] A: Certainly.
 [7] Q: Mr Sotherton, it is not too late to recognise the
 [8] position. Will you please now confront this issue? Was
 [9] the letter that we have open of 24th July 1990, was that
 [10] letter written long after 1990 and signed by you long
 [11] after that date?
 [12] A: Certainly not.
 [13] Q: I see. You are going to maintain in evidence, are you,
 [14] that the letter of 24th July 1990, in 446, that we have
 [15] open, and the letter that you have heard about this
 [16] morning on 449, that both of those letters were written
 [17] as they purport to be written?
 [18] A: Definitely.
 [19] Q: How certain are you?
 [20] A: I am very certain.
 [21] Q: What makes you so certain?
 [22] A: Because the letters would have been produced at the
 [23] time. I certainly never had sight of those letters for
 [24] any reason at all -- were filed by John Donovan
 [25] somewhere -- and it is not until more recently, in

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[1] A: Yes.
 [2] Q: Right. Now, assuming it to be quite likely that the
 [3] letter was discussed with you before it was sent, it is
 [4] equally likely, is it not, that you would have seen and
 [5] looked through the letters which he itemises in that
 [6] letter under paragraphs 1 to 14?
 [7] A: No, it is not. It is not necessarily likely that that
 [8] would have happened.
 [9] Q: It is not?
 [10] A: No.
 [11] Q: You see, he is mentioning your name in a number of
 [12] places?
 [13] A: I know he does and I certainly would take John at his
 [14] word. If he has included a reference to me in here,
 [15] I would not need to double-check it. If John has put in
 [16] here a comment relating to me, I would trust him, that
 [17] the comments that he made were accurate. I would not
 [18] have to go to files and double-check what he had
 [19] written. My interest in it was not that great.
 [20] Q: Tell me why your interest in it was not that great. He
 [21] had been speaking to you on and off over a period of
 [22] what, possibly three years by now?
 [23] A: Yes.
 [24] Q: But your interest was not that great?
 [25] A: Not really, no.

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[1] Q: What was your attitude then? "Why is this man bothering
[2] me?"

[3] A: No, it was not. It was I was keen to see justice done
[4] for what appeared to be more taking of Don Marketing
[5] concepts.

[6] Q: How keen were you then; were you not keen enough to take
[7] an interest in the contents of his letter of 27th March
[8] 1997?

[9] A: Certainly, but from the sidelines.

[10] Q: Yes, but you must have been keen in knowing what he was
[11] saying in support of the claim to put the record
[12] straight, as you would say?

[13] A: Yes, I suppose to a degree.

[14] Q: Why do you need to suppose? Can you not remember?

[15] A: I do not remember the occasion of reading the letter,
[16] no. I do not attach great importance to it. I have not
[17] had the interest in it to want to follow it.

[18] Q: You have not?

[19] A: No.

[20] Q: So what was the purpose of him ringing you up on and off
[21] over all those years?

[22] A: Just to update me and let me know what was happening.

[23] Q: Why an earth should he have thought you wanted to know
[24] if you did not have an interest in it?

[25] A: Because I was involved in the previous history with it.

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[1] Q: Absolutely. So you think it more likely than not you
[2] would have gone through this checking to see whether
[3] anything had been left out?

[4] A: No, not whether anything had been left out. I said
[5] whether it was spelling mistakes or words had been left
[6] out. If it did not read right, grammar.

[7] Q: Okay. So you think it is more likely than not you would
[8] have gone through this with an editorial eye?

[9] A: There is a very good chance of that, yes.

[10] Q: Not only going through it with an editorial eye, but you
[11] will have also surely at the same time have been reading
[12] it with a view to the accuracy of its contents, would
[13] you not?

[14] A: Reasonably so, yes.

[15] Q: You are not his proof reader, are you? You are going to
[16] read this letter both for editorial accuracy and for
[17] truth and accuracy of its contents. You must have done
[18] that, must you not?

[19] A: To a degree.

[20] Q: To what degree?

[21] A: To a very small degree.

[22] Q: How small is small?

[23] A: John would have given it to me to read, look through,
[24] and say, "Does that sound right to you, does it look
[25] right?" I would say, "Yes, it sounds okay to me".

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[1] Q: Right, So you are telling my Lord that this letter,
[2] I think you have agreed that you are more likely than
[3] not to have been aware of the existence of this letter
[4] in March 1997, You are therefore more likely than not
[5] to have been aware that he was about to tackle Shell
[6] again; yes?

[7] A: Yes.

[8] Q: You would have been aware that more likely than not it
[9] concerned you, because it was a series of incidents in
[10] which you were directly and personally involved?

[11] A: Yes.

[12] Q: He take steps, does he not, more likely than not to keep
[13] you informed of what it is he is about to say to Shell?

[14] A: Yes.

[15] Q: And he is putting your name in the frame in that
[16] connection?

[17] A: Yes, and he is keeping me updated on that basis, that
[18] "You are involved with this, or you were there, here is
[19] your update", Almost certainly, at the same time,
[20] probably John would have asked me to check spellings,

[21] Q: Why is that?

[22] A: It is just something that we have always done over the
[23] years, with letters, I would check spellings, The
[24] computer does it now, more so, Had anything been left
[25] out, was anything was misspelt?

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[1] Q: Mr Sotherton, you went through it with a fine toothcomb,
[2] did you not?

[3] A: I would not need to.

[4] Q: You did, Mr Sotherton?

[5] A: I did not.

[6] Q: You did?

[7] A: I would remember it if I did.

[8] Q: Mr Sotherton, in order to carry out the kind of
[9] editorial exercise that you have described, checking for
[10] typos and grammar, you would inevitably at the same time
[11] have gone through it with a fine toothcomb for its
[12] content, would you not?

[13] A: No, a fine toothcomb and absorbing some of the content
[14] of it. I certainly would have absorbed the content of
[15] it at the time. But as for checking what is or is not
[16] in the letter, no, I certainly would not have done.

[17] Q: You said you had absorbed some of its content. How does
[18] this work? That you are editorially examining line by
[19] line for accuracy of language and yet you are only
[20] absorbing parts of the meaning and message of the text?

[21] A: Correct.

[22] Q: Only parts of it?

[23] A: Yes. Especially when my name appears.

[24] Q: Yes, of course. Especially when your name appears. So
[25] I look at this, do I, as if it is a variegated leaf with

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[1] some dark patches where you have absorbed information
 [2] from it and light patches where you have not. Is that
 [3] how you are asking us to look at this document?
 [4] **A:** I am not asking you to look at the document. That is
 [5] probably how I looked at the document.
 [6] **Q:** Okay. Doing the very best you can, which bits of it do
 [7] you think you absorbed from the text of it? Give us the
 [8] edited highlights?
 [9] **A:** Shall I look over it and give you an idea of what might
 [10] have been the situation?
 [11] **Q:** Yes, please.
 [12] **A:** Certainly the third paragraph, which opens, on page 1:
 [13] "We presented to Shell two alternative executions
 [14] of our proposals."
 [15] **Q:** Thank you.
 [16] **A:** I have absorbed a bit of that because I would have known
 [17] which the two alternatives were.
 [18] John probably would have told me on the first
 [19] paragraph on page 2 that he had contacted potential
 [20] witnesses.
 [21] **Q:** You would have noted it?
 [22] **A:** He probably would have mentioned those to me and who
 [23] they were at the time.
 [24] **Q:** Go on.
 [25] **A:** I probably would not have put too much in store on the

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[1] I would not have paid too much attention to.
 [2] I certainly would have read the similarities page, which
 [3] is page 5.
 [4] **Q:** Right. From what particular perspective would have read
 [5] that page?
 [6] **A:** As the heading says, "The similarities between DM's
 [7] proposals and the Smart Consortium". Just for personal
 [8] information as to what are the differences.
 [9] **Q:** Look at item (c) on that page, by the way. Do you see:
 [10] "Uses a multipurpose Smartcard which can
 [11] accumulate points and capture customer data. DM
 [12] discussed the technology for a Shell consortium
 [13] Smartcard in 1990 with a security print plc who
 [14] specialise in supplying loyalty cards. Mr Paul King was
 [15] present during one such discussion at the printers'
 [16] factory."
 [17] Do you remember such an event in 1990?
 [18] **A:** No, I do not. I do not think it involved me.
 [19] **Q:** Do you have any knowledge or awareness of any initiative
 [20] on the part of Don Marketing in 1990 with regard to
 [21] Smartcards?
 [22] **A:** Yes, there were various -- we were continuing to look to
 [23] new technology and take an interest in it from wherever
 [24] it was coming from.
 [25] **Q:** Tell me more.

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[1] list of letters because they were past history.
 [2] **Q:** Except for the one in particular at 5 that has your name
 [3] on it?
 [4] **A:** Yes. But then again, that was past history.
 [5] **Q:** So you think that because it is past history you might
 [6] not have put much weight on even that reference in that
 [7] letter?
 [8] **A:** Yes. Not from a personal point of view, certainly not.
 [9] **Q:** Giving it your best shot now, do you think you actually
 [10] looked at a copy or asked to see a copy of that letter
 [11] again at the time of this letter?
 [12] **A:** I would not have asked to look at any copies of any of
 [13] those letters.
 [14] **Q:** You would not?
 [15] **A:** No.
 [16] **Q:** But you had no recollection of the actual contents of
 [17] that letter independently of what he is writing here
 [18] then?
 [19] **A:** No.
 [20] **Q:** You did not want to see a copy of it to check it out,
 [21] refreshing your memory?
 [22] **A:** Not at all. It did not need to be put into my memory.
 [23] I was merely reading this letter.
 [24] **Q:** Carry on, please. This is a very useful exercise.
 [25] **A:** All of the letters really that are contained in that,

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[1] **A:** I cannot really remember a lot about it, to be honest
 [2] with you. That is an area that probably John Donovan
 [3] dealt with more than I did.
 [4] **Q:** You were not a very crowded office, were you?
 [5] **A:** No.
 [6] **Q:** It was about six of you at times, yes?
 [7] **A:** Probably, yes.
 [8] **Q:** You really knew what was going on around you?
 [9] **A:** Basically, yes.
 [10] **Q:** What I am really asking you is, is it your recollection
 [11] that in 1990 there was discussion about the
 [12] technological aspects of Smartcards within Don
 [13] Marketing?
 [14] **A:** I cannot remember.
 [15] **Q:** Okay. What do you think --
 [16] **A:** Did you wish me to continue through the letter?
 [17] **Q:** Yes, please.
 [18] **A:** I probably would have taken interest in page 9.
 [19] **Q:** Yes.
 [20] **A:** Where we have a list of --
 [21] **Q:** What was about to happen?
 [22] **A:** Yes.
 [23] **Q:** Did you, in fact, take a sufficient interest to know
 [24] what did happen in the aftermath of this letter in
 [25] 1997/1998?

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[1] **A:** Do you mean did I follow it up?
 [2] **Q:** Yes.
 [3] **A:** No.
 [4] **Q:** Did you hear about it; did John Donovan keep in touch
 [5] with you?
 [6] **A:** He almost certainly would have updated me.
 [7] **Q:** So you knew about the campaigning, and so on and so
 [8] forth, that occurred in 1997 and 1998, did you?
 [9] **A:** I am sorry?
 [10] **Q:** Did you know about campaigning by John Donovan during
 [11] 1997 and 1998, in support of his claim?
 [12] **A:** Yes.
 [13] **Q:** He kept you informed?
 [14] **A:** Yes, reasonably so.
 [15] **Q:** Do I get the picture correctly that he has kept you
 [16] informed of developments at every stage, every time
 [17] there was a development from 1994 onwards?
 [18] **A:** I would not say necessarily every stage but certainly
 [19] the majority of major events.
 [20] **Q:** Go back to page 7 of the letter you have open in front
 [21] of you. You would have --
 [22] **MR JUSTICE LADDIE:** Was that page 11?
 [23] **MR HOBBS:** 7, the bottom two paragraphs there. These are
 [24] matters that you would have taken an interest in, would
 [25] you not? Look at the one that says:

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[1] "The Megamatch option for Shell-led promotion
 [2] consortium issuing and redeeming a common promotional
 [3] currency was also touched on in discussion with you in
 [4] May 1995."
 [5] That is surely something you would have taken
 [6] notice of because it was during this period that you had
 [7] a financial interest in the claim that he was making in
 [8] his then pending disputes against Shell?
 [9] **A:** It would have interested me in May 1995 but may not have
 [10] interested me so much in March 1997.
 [11] **Q:** Right. Okay. I think you are saying to me that you did
 [12] not take much interest in what was said in that
 [13] paragraph in terms of content?
 [14] **A:** I do not think so, no.
 [15] **Q:** In the bottom paragraph, is there anything there on
 [16] page 7 that you would have taken much interest in in
 [17] this connection when reading this letter?
 [18] **A:** Only the last three lines would have interested me.
 [19] **Q:** Right. Because that is the stuff that involved the
 [20] earlier claims and part of those earlier claims was your
 [21] claim on the periphery?
 [22] **A:** Yes.
 [23] **Q:** Anyway, can we take it that this letter is as proof-read
 [24] by you, even if not as fully digested by you?
 [25] **A:** Yes.

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[1] **Q:** There came a time, did there not, in the course of this
 [2] present litigation leading up to the trial in which you
 [3] prepared a witness statement?
 [4] **A:** Yes.
 [5] **Q:** Just describe, please, the exercise as you remember it
 [6] of preparing that statement. First of all, did you
 [7] write your own statement?
 [8] **A:** No, only some parts of it, handwritten. A very small
 [9] part of it.
 [10] **Q:** Did you sit down with John Donovan and discuss the
 [11] contents of your witness statement before you finalised
 [12] it?
 [13] **A:** Yes.
 [14] **Q:** How frequently did you sit down with him for that
 [15] purpose?
 [16] **A:** Three or four times.
 [17] **Q:** Were these fairly long sessions; were these a couple of
 [18] hours at a time, more than a couple of hours at a time?
 [19] **A:** Probably a couple of hours, maybe more, on one or two
 [20] occasions.
 [21] **Q:** On those occasions, you were considering not only what
 [22] you would be saying in your statement but what he would
 [23] be saying in his statement; correct?
 [24] **A:** Yes.
 [25] **Q:** On those occasions documents were tabled, were they not,

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[1] so that you could look back at the documents you were
 [2] referring to in your statement?
 [3] **A:** Yes.
 [4] **Q:** And documents that he was proposing to refer to; they
 [5] were tabled and you looked at those as well, did you
 [6] not?
 [7] **A:** Yes.
 [8] **Q:** So the statements that you both put in represent, as it
 [9] were, your respective -- they accord, do they, with your
 [10] respective views as to what happened in times gone by in
 [11] these disputes?
 [12] **A:** I think so, yes.
 [13] **Q:** Right. I would like to show you -- let me just find
 [14] it -- in the volume you have open, the other volume you
 [15] have open, which is E1?
 [16] **A:** Yes.
 [17] **Q:** I would like to show you, please, page 450/A.
 [18] (3.30 pm)
 [19] **A:** Yes.
 [20] **Q:** Do you have that? That handwriting at the top, on the
 [21] top right on that page, whose handwriting is that?
 [22] **A:** That is mine.
 [23] **Q:** Turn the page to 450/B.
 [24] **A:** Yes.
 [25] **Q:** Whose handwriting is that?

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[1] A: That is mine.
 [2] Q: Are the words, if we can read them together:
 [3] "Meeting with AL [Andrew Lazenby] 24/11/92.
 [4] Shell will negotiate royalty arrangement [something]
 [5] with us."
 [6] What is that word, "etc"?
 [7] A: I think it is, yes.
 [8] Q: "... with us, if they progress scheme probably at
 [9] future date. Don could work with Shell International to
 [10] exploit overseas. Copy of this letter left with AL
 [11] [Andrew Lazenby]"?
 [12] A: Right.
 [13] Q: Right. When was that note written in your handwriting
 [14] on the document that carried it?
 [15] A: 24/11/92.
 [16] Q: Can you remember writing those words on that paper?
 [17] A: Not specifically.
 [18] Q: Or at all? You cannot remember at all, can you?
 [19] A: Well, the evidence of writing it is there in front of
 [20] me. I wrote it.
 [21] Q: Yes. Can you remember holding a pen in your hand and
 [22] writing those words on that paper?
 [23] A: No, I do not think I can.
 [24] Q: You cannot?
 [25] A: No. But that is how they got there.

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[1] A: Mmm.
 [2] Q: So even if he did not actually instruct you to write
 [3] them, you would have told him, "Here you are, I have
 [4] written this note on here, it is for the record"?
 [5] A: That is right. They are for the record, to be filed for
 [6] future reference.
 [7] Q: You would have brought them -- the fact that you had
 [8] written these words on here -- to his attention, when
 [9] you wrote them or soon after you wrote them?
 [10] A: Probably.
 [11] Q: Right. Giving it the best shot you can, using your
 [12] recollection, and concentrate as hard as you can, do you
 [13] think you wrote these words during the course of the
 [14] meeting with Lazenby or at some time afterwards? Do the
 [15] best you can on this, please.
 [16] A: I would say, as I said a moment ago, either during the
 [17] course of the meeting or on the return train journey.
 [18] I would not have completed the notes much after that.
 [19] Q: No.
 [20] A: In fact, I can even be more positive, on reflection. It
 [21] has just occurred to me that at the time John Donovan
 [22] and I, on reaching our destination station, would have
 [23] gone in separate ways. I would not necessarily be
 [24] seeing John Donovan the following days, or days to
 [25] follow. It is likely that I would give him a

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[1] Q: You moved a pen and the words appeared on the paper.
 [2] Yes, I think we can agree on that. But you do not
 [3] remember when you actually wrote those words on there?
 [4] A: I could have a pretty good guess. I would say that they
 [5] were on 24/11/92 and they would have either been written
 [6] during the course of the meeting or, if not, certainly
 [7] afterwards on the return train journey home.
 [8] Q: You travelled to that meeting with John Donovan, did you
 [9] not?
 [10] A: Yes.
 [11] Q: And you travelled away from that meeting with John
 [12] Donovan?
 [13] A: Yes.
 [14] Q: So if you wrote them on your way home you would have
 [15] written them on the train, in his presence, and he would
 [16] have seen you write them, would he not?
 [17] A: Probably.
 [18] Q: Probably, yes?
 [19] A: Yes, probably, yes.
 [20] Q: Right.
 [21] A: It may have been him who told me to write them.
 [22] Q: Because there is always a good need to keep an accurate
 [23] record?
 [24] A: Exactly. These notes actually are for him.
 [25] Q: They are for him?

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[1] bundle that he would take back to the office and file or
 [2] act on, or whatever.
 [3] Q: Right. The bundle, the copy you gave him would have had
 [4] your note on it?
 [5] A: Mmm.
 [6] Q: The existence of that note on it, since it was for his
 [7] record, you would have made sure one way or another that
 [8] he knew that the note was on there when you gave him the
 [9] documents to take away with him?
 [10] A: Probably. He would know, if there was anything
 [11] important, that I had made a note on the document.
 [12] Q: Absolutely. That is the whole point of making the note,
 [13] to bring it to John Donovan's attention, is it not?
 [14] A: Yes.
 [15] Q: And give him a good and accurate record of the point
 [16] that you are noting for him?
 [17] A: Of course, yes.
 [18] Q: Right. How clearly do you remember this meeting on 24th
 [19] November 1992, since we have this open in front of us?
 [20] A: That was our third meeting.
 [21] Q: Yes. Third meeting that year.
 [22] A: I think we proposed the Hollywood Collection.
 [23] Q: Do you have a clear recollection of the meeting, or do
 [24] you have any recollection of the meeting?
 [25] A: Yes, I have a very loose recollection of the meeting.

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[1] **Q:** Taking it by stages, so that you can help us with your
 [2] recollection as it currently is, first of all, where did
 [3] the meeting take place; do you recollect?
 [4] **A:** Always at Shell House.
 [5] **Q:** The parties present were, as I understand it, yourself
 [6] and John Donovan, Andrew Lazenby and nobody else?
 [7] **A:** Correct.
 [8] **Q:** How long did the meeting last?
 [9] **A:** Meetings usually lasted about an hour, unless there was
 [10] any particular points that needed further discussion.
 [11] It could go on for an hour and a half.
 [12] **Q:** Do you remember going to that meeting and taking
 [13] anything with you for the purposes of the meeting?
 [14] **A:** Certainly we would have taken proposals and
 [15] what-have-you, anything else that had been requested.
 [16] **Q:** You say anything else that would have been requested.
 [17] Can you identify anything else that you think may have
 [18] been requested?
 [19] **A:** Not off the top of my head.
 [20] **Q:** Do you have a recollection of taking anything more to
 [21] that meeting than a proposal?
 [22] **A:** Not certainly. This letter would have gone.
 [23] **Q:** Can you remember that letter being tabled at that
 [24] meeting?
 [25] **A:** No, I cannot clearly.

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[1] content.
 [2] **MR JUSTICE LADDIE:** Mr Sotherton, you said "probably would
 [3] have" and kept on phrasing your answers "probably would
 [4] have" and then you have been asked to say how long you
 [5] spent on this and you have given us a guess.
 [6] **A:** Yes.
 [7] **Q:** I just want to note, do you actually recall discussing
 [8] this letter at the meeting or are you trying to
 [9] reconstruct it now? Do you actually recall --
 [10] **A:** I do not clearly recall discussing the letter but it is
 [11] apparent that we did discuss the letter because I have
 [12] made notes to that effect on the letter.
 [13] **MR HOBBS:** Right. Now, discussion of the matters discussed
 [14] in this letter would have involved discussion of what is
 [15] called there, on 450/A, the multibrand loyalty
 [16] programme?
 [17] **A:** Yes.
 [18] **Q:** Is that something you, as opposed to John Donovan, would
 [19] have discussed with Mr Lazenby or is that something that
 [20] John Donovan would have discussed with Mr Lazenby?
 [21] **A:** We could both have discussed it, and probably would both
 [22] have discussed it.
 [23] **Q:** You do not claim, do you, to have been the person who
 [24] devised the multibrand loyalty programme as summarised
 [25] in this letter that we have open in front of us?

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[1] **Q:** Can you remember it being the subject of any discussion
 [2] at that meeting?
 [3] **A:** We certainly had discussion that involved the letter.
 [4] **Q:** Tell me what you recollect of those discussions.
 [5] **A:** It was with regard to the acceptability of Sainsbury's
 [6] becoming involved in promotional games/involvement in a
 [7] consortium promotion or scheme.
 [8] **Q:** All right. So your recollection is that there was some
 [9] discussion of those matters?
 [10] **A:** Mmm.
 [11] **Q:** In a meeting lasting about an hour, give or take a bit.
 [12] How much time do you think was spent on discussing those
 [13] matters you have just mentioned?
 [14] **A:** The majority of time would have been spent presenting
 [15] the contents of the proposals that we would have taken.
 [16] **Q:** Right.
 [17] **A:** We probably would have covered an item like that towards
 [18] the end of the meeting. It could last anything from
 [19] five minutes to maybe twenty minutes if it was that
 [20] interesting.
 [21] **Q:** What is your best recollection as to how long it took?
 [22] **A:** Well, it would be purely a guess. The letter written,
 [23] read, being discussed, a two-page letter, maybe 15
 [24] minutes, 10 minutes. I cannot recall whether there was
 [25] too much in the way of expansion in the letter or its

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[1] **A:** No, I do not.
 [2] **Q:** And John Donovan is the person who does claim to have
 [3] been the deviser of it?
 [4] **A:** Certainly.
 [5] **Q:** Therefore, would I be right in thinking that as between
 [6] the two of you he is the person who is going to discuss
 [7] it, rather than you?
 [8] **A:** Yes.
 [9] **Q:** Right. Do you have any recollection of Mr Lazenby's
 [10] contributions to the discussion on this matter, these
 [11] matters in this letter?
 [12] **A:** Only that that are noted.
 [13] **Q:** Only --
 [14] **A:** Those that are noted.
 [15] **Q:** Right. What you are saying here in this note is that
 [16] Andrew Lazenby made some commitment or other that "Shell
 [17] will negotiate royalty arrangements, et cetera, with us
 [18] if they progress the scheme at a future date"?
 [19] **A:** Yes.
 [20] **Q:** Is it your evidence that Mr Lazenby did commit Shell,
 [21] then, to make payments in respect of what ultimately
 [22] became the Shell Smart Scheme?
 [23] **A:** No, it is said that Shell would negotiate,
 [24] **Q:** All right. In principle, he agreed that there would be
 [25] remuneration to be discussed --

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[1] **A:** If they used our scheme.
 [2] **Q:** And you are saying that that was a matter which was
 [3] discussed between your side and Andrew Lazenby on 24th
 [4] November, are you?
 [5] **A:** Yes.
 [6] **Q:** Right. Could you just look at it from his perspective
 [7] for a moment? Here he is in 1992. Do you know, from
 [8] any discovery documents, what was going on in Shell in
 [9] 1992?
 [10] **A:** No, I have not read them.
 [11] **Q:** Right. Do you know about Project Hercules?
 [12] **A:** No.
 [13] **Q:** No?
 [14] **A:** I am aware of it.
 [15] **Q:** Right.
 [16] **A:** The name.
 [17] **Q:** You see, in 1993, Project Hercules was developed and
 [18] progressed within Shell and it matured into the Shell
 [19] Smart Scheme. Does that tally with what you may have
 [20] heard from John Donovan?
 [21] **A:** Yes.
 [22] **Q:** Right. During 1992 work was going on in an earlier
 [23] phase in relation to that project. This is happening in
 [24] 1992; all right? Are you following me?
 [25] **A:** Yes, I am with you.

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[1] **A:** Yes.
 [2] **Q:** Do you, in fact, then remember carrying anything with
 [3] you to that meeting? Do you actually remember carrying
 [4] this letter to the meeting?
 [5] **A:** I do not remember specifically carrying the letter to
 [6] the meeting but I know I would have had a bundle of
 [7] documents to be taken to the meeting. This obviously
 [8] would have been one of them.
 [9] **Q:** You will have had discussions with John Donovan on the
 [10] train on the way down as to how you would play the
 [11] meeting and what you were going to discuss at the
 [12] meeting, would you not?
 [13] **A:** Yes.
 [14] **Q:** That is normal common sense planning, is it not?
 [15] **A:** Yes.
 [16] **Q:** Right. Concentrate now. In those discussions on the
 [17] train on the way down, do you have any recollection of
 [18] John Donovan saying to you, "He has been in touch with
 [19] me and he wants to have a copy of the Sainsbury's
 [20] letter"?
 [21] **A:** No, I do not recall that.
 [22] **Q:** It was not in fact you then that carried the letter down
 [23] to the meeting at all, was it?
 [24] **A:** I may well have done, if I had been given a bundle for
 [25] the presentation. We would each probably carry

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[1] **Q:** Looking at this meeting from Andrew Lazenby's
 [2] perspective, he, Andrew Lazenby, is involved in
 [3] preparatory work which is going in due course to mature
 [4] into the Shell Smart Scheme and yet, according to your
 [5] note, he is committing Shell to an agreement in
 [6] principle to pay money to your company for the use of
 [7] that concept?
 [8] **A:** If that is the definition of it - if that is ultimately
 [9] the legal definition of it, then yes, that is the case.
 [10] I do not attach such importance to it as that.
 [11] **Q:** Tell me why you do not?
 [12] **A:** Because I think the discussions were much looser than
 [13] that.
 [14] **Q:** How loose is loose?
 [15] **A:** It may or may not happen, therefore no importance is
 [16] attached to it, but if indeed we are interested in
 [17] taking this one to its ultimate end, then obviously,
 [18] when the time is right, negotiations will take place in
 [19] terms of payment and overall distribution, perhaps.
 [20] **Q:** Do you remember your journey down on the train to this
 [21] meeting?
 [22] **A:** No, I certainly do not.
 [23] **Q:** You are very adamant that you do not remember the
 [24] journey down and yet you remember some aspects of the
 [25] meeting?

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[1] duplicates. That would be normal for all
 [2] presentations. We would have copies of all documents
 [3] for all those persons at the meeting, including
 [4] ourselves.
 [5] **Q:** If I have the picture correct, you are indicating that
 [6] it was intended that you would go to a meeting, that
 [7] there would be tabled at that meeting a copy of this
 [8] letter, that this letter would be read through at that
 [9] meeting and that there would then be a discussion
 [10] between those present at the meeting about the contents
 [11] of it?
 [12] **A:** Yes.
 [13] **Q:** That must have been, if it happened, the subject of
 [14] discussion between yourself and John Donovan beforehand,
 [15] must it not?
 [16] **A:** At some point beforehand, certainly.
 [17] **Q:** At what point beforehand, if not on the train journey on
 [18] the way down?
 [19] **A:** I am not sure, when it was put together.
 [20] **Q:** When what was put together?
 [21] **A:** The presentation, the documents for the presentation and
 [22] the need for documents for the presentation.
 [23] **Q:** Right. So there must have been some discussion of what
 [24] you were going to do with this letter at that meeting.
 [25] There must have been?

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[1] **A:** Probably, if I look at it logically, I probably would
 [2] not have had contact with John the day or days before
 [3] that. I would probably be making a special journey to
 [4] go into Shell with this and I believe probably what
 [5] happened is that John would hand me my bundle of copies
 [6] for the meeting.
 [7] **Q:** All right. You will, of course, have read that bundle
 [8] because there is no point in going to any meeting
 [9] without reading the papers in advance?
 [10] **A:** I probably would have done that in the train on the way
 [11] down.
 [12] **Q:** You would have said to him, "Hey, John, what is this
 [13] letter to Sainsbury's doing in this file I am reading"?
 [14] **A:** Probably.
 [15] **Q:** You would be bound to, would you not?
 [16] **A:** If I was not aware of what it was doing there, yes.
 [17] **Q:** How else are you going to be aware it was there? It is
 [18] not being put there by you at your request. It is being
 [19] put there by John Donovan at his request, is it not?
 [20] **A:** Yes.
 [21] **Q:** Since are you are going to go to a meeting and you will
 [22] want to be properly briefed in relation to it, you are
 [23] going to say to him, "John, what is this letter doing in
 [24] this file?"
 [25] **A:** Yes.

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[1] document was not tabled at that meeting and that there
 [2] were no discussions of these financial arrangements;
 [3] what do you say?
 [4] **A:** I say, as far as I am concerned it definitely happened.
 [5] **Q:** I put it to you that it was not. You are not able to
 [6] say for certain that it was, are you?
 [7] **A:** Yes, because I have this as evidence of the date that
 [8] this was -- that the notes was made and the letter was
 [9] presented.
 [10] **Q:** What you are saying is that your only basis for saying
 [11] that it was put forward is your own note in the bottom
 [12] right-hand corner?
 [13] **A:** Yes.
 [14] **Q:** And you do not have an actual recollection of putting
 [15] pen to paper to make that note, do you?
 [16] **A:** No.
 [17] **Q:** Therefore, you cannot say with any certainty when the
 [18] document was put before Mr Lazenby, if it ever was?
 [19] **A:** Yes, on 24th November, which is why I made the note on
 [20] it.
 [21] **Q:** You understand that I take a different position on
 [22] behalf of Shell. My position to you is that this letter
 [23] was not produced at this meeting. You understand that?
 [24] **A:** I understand that, yes.
 [25] **Q:** Insofar as what was discussed at the meeting, do you

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[1] **Q:** What explanation did you get?
 [2] **A:** I do not recall. He may have said, "I am going to
 [3] present that to Andrew for X, Y, Z reason". I have no
 [4] recollection at this time.
 [5] **Q:** It must follow from that -- does it not seem logical to
 [6] you then, if in fact you had no recollection of it, it
 [7] is because you were not going to have a speaking part in
 [8] relation to that letter at that meeting?
 [9] **A:** Probably.
 [10] **Q:** The likelihood is, on the evidence that you are giving,
 [11] that you did not have a speaking part in relation to
 [12] this letter and that John Donovan did?
 [13] **A:** Very possibly, yes.
 [14] **Q:** So as between the two of you, he would have been the
 [15] person primarily concerned with this aspect of that
 [16] meeting, is that correct?
 [17] **A:** Yes.
 [18] **Q:** Are you aware that Mr Lazenby has no recollection of
 [19] this document being produced to him at that meeting?
 [20] **A:** I understand that, yes.
 [21] **Q:** Are you aware that he has no recollection of any royalty
 [22] arrangements of the kind noted in this document on
 [23] page 450/B?
 [24] **A:** I am aware that he said that.
 [25] **Q:** I am going to put it to you now that in fact this

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[1] have any recollection of what other matters were
 [2] discussed at the meeting?
 [3] **A:** No, very little at all.
 [4] **Q:** You say "very little" and you have said "very little"
 [5] quite a few times. What little do you remember?
 [6] **A:** That we presented the Hollywood Collection.
 [7] **Q:** Yes.
 [8] **A:** That we presented a second promotion; that we had some
 [9] general discussion about promotions in general of
 [10] different types, updating on the previous meeting.
 [11] **Q:** The previous meeting being which?
 [12] **A:** The one that was held in -- there were three meetings.
 [13] The second meeting that we had.
 [14] **Q:** You had an updating on the June meeting?
 [15] **A:** Yes.
 [16] **Q:** Right. Now, do you remember the May meeting?
 [17] **A:** Yes.
 [18] **Q:** How clearly do you remember the May meeting?
 [19] **A:** Not very, but there are a few highlights that I recall.
 [20] **Q:** Give us the highlights.
 [21] **A:** Opening the meeting and tabling a handful of promotional
 [22] game cards to Andrew Lazenby.
 [23] **Q:** Yes.
 [24] **A:** Him playing the game cards, as they are irresistible,
 [25] some time going on, bringing the meeting back to order

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[1] so that we got back into the purpose of coming and then
 [2] making the presentations that we had for that day.
 [3] **Q:** Yes?
 [4] **A:** I would need to remind myself of what those were.
 [5] **Q:** Do you have any recollection of what those were?
 [6] **A:** That probably was the Nintendo. No, the first meeting
 [7] was the promotions -- National Promotions and it was,
 [8] from what I recall, a raft of a few promotions,
 [9] promotional ideas, and was being put in as a "test the
 [10] water".
 [11] **Q:** This was the first occasion on which you had ever met
 [12] Andrew Lazenby, was it not?
 [13] **A:** Correct, yes.
 [14] **Q:** He was the new man, he was the National Promotions
 [15] Manager and you wanted to make a presentation that you
 [16] hoped would be effective to him?
 [17] **A:** Yes.
 [18] **Q:** That is right, is it not? In making that presentation,
 [19] was there any discussion of any earlier matters that you
 [20] claimed to have discussed with Paul King?
 [21] **A:** I have a very, very loose recollection that we covered a
 [22] lot of old ground, if you like. That was our history --
 [23] explaining to Mr Lazenby our history with Shell, of the
 [24] work that we carried out for Shell and what was
 [25] available.

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[1] affirmatively.
 [2] For the moment, I would like you to take volume E2
 [3] and turn to page 973, please. (Pause). Do you have
 [4] 973?
 [5] **A:** Sorry, I thought you said 972. Yes, I have that.
 [6] **Q:** It says:
 [7] "Strictly confidential, proposal for National
 [8] Promotion activity."
 [9] And in the bottom left-hand corner it says:
 [10] "12th May 1992."
 [11] **A:** Yes.
 [12] **Q:** We have the same document. Good. When was the last
 [13] time you saw this document?
 [14] **A:** When I produced a witness statement.
 [15] **Q:** Right. Turning into it, the handwriting at the top of
 [16] 975 and the bottom of 975, is that yours?
 [17] **A:** Yes.
 [18] **Q:** Look through it and tell me whether there is any
 [19] handwriting in there that is not yours. I think it is
 [20] all yours, but you can tell me otherwise.
 [21] **A:** Through the entire proposal?
 [22] **Q:** Pardon? I cannot hear you.
 [23] **A:** Are you suggesting through the entire proposal or just
 [24] that page?
 [25] **Q:** I will do it with you. On page 975, that is your

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[1] **Q:** But, as far as I can tell, you did not discuss, did you,
 [2] any communications you may have had, in particular, with
 [3] Paul King on any particular proposals? You were going
 [4] there to present the ones for which you had a written
 [5] brief?
 [6] **A:** Yes.
 [7] **Q:** That is right. Now, let us see if I can trace for you
 [8] the written brief. If you take volume E2.
 [9] **MR JUSTICE LADDIE:** Just before we do that, have you
 [10] finished with 450/A?
 [11] **MR HOBBS:** Yes, I have.
 [12] **MR JUSTICE LADDIE:** Just before you do so, it seems to me
 [13] that there are a number of possibilities. You have put
 [14] to Mr Donovan a certain position that your clients take
 [15] in relation to that letter --
 [16] **MR HOBBS:** Yes.
 [17] **MR JUSTICE LADDIE:** -- as to its proper date and as to how
 [18] it came to be written. You have cross-examined this
 [19] witness as to his recollection of whether or not it was
 [20] presented at the meeting. There is a certain lack of
 [21] consistency, it seems to me, between the points that you
 [22] are putting to the two witnesses on a critical issue.
 [23] **MR HOBBS:** I have not finished, because 450/A is a different
 [24] version of the letter which precedes it, and I am going
 [25] back to that. That is why I answered your Lordship

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[1] handwriting?
 [2] **A:** Correct.
 [3] **Q:** The first proposal in the text there is Megamatch; do
 [4] you see that?
 [5] **A:** Yes, on page 975.
 [6] **Q:** That is it. Then there is a graphic on 976, and that is
 [7] a Megamatch graphic. We can see that.
 [8] **A:** Yes.
 [9] **Q:** Then the second of the two proposals discussed at that
 [10] meeting is on 977 and that is the Shell Treble Chance
 [11] proposal. Do you remember that one?
 [12] **A:** Yes.
 [13] **Q:** There is a graphic for that on 978.
 [14] **A:** Yes.
 [15] **Q:** It looks to me as though, on 979, the Pools coupon prize
 [16] is all part of the graphic game we have seen on the
 [17] previous page.
 [18] **A:** Yes.
 [19] **Q:** Look at the bottom:
 [20] "AL says soccer theme produced poor results in
 [21] research."
 [22] So he is showing negative inclinations in relation
 [23] to that proposal?
 [24] **A:** Yes.
 [25] **Q:** Then, on page 980, you have a conclusion paragraph and

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[1] you have:
 [2] "RGS mentioned multibrand ...", what is that?
 [3] A: "Multibrand".
 [4] Q: "...loyalty card scheme presented to Paul King.
 [5] Andrew Lazenby said Shell could be interested, but at a
 [6] later date. Will ask Paul for proposal to make sure it
 [7] is retained for long-term?"
 [8] A: Yes.
 [9] Q: Is that your handwriting?
 [10] A: Yes.
 [11] Q: Will you have written that note at that meeting?
 [12] A: Yes, or on the train on the way home.
 [13] Q: Will you have brought that note to the attention of
 [14] John Donovan at or shortly after the time you wrote it?
 [15] A: I think he would have been aware of it at the time and,
 [16] therefore, probably I would not have made a special note
 [17] to bring it to his attention.
 [18] Q: What, you think he would have seen you write the
 [19] manuscript note on there?
 [20] A: Possibly.
 [21] Q: Right. Now, this refers to the multibrand loyalty card
 [22] scheme presented to Paul King?
 [23] A: Yes.
 [24] Q: No mention there of Sainsbury's proposals or anything of
 [25] that kind, is there?

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[1] A: No, I think not.
 [2] Q: You think not. Right. Turning, therefore, to page 981
 [3] for a moment -- are you with me? 981.
 [4] A: Yes.
 [5] Q: This is a --
 [6] A: Oh. I am not sure.
 [7] Q: What are you not sure about?
 [8] A: What is 981? Okay, I have found it.
 [9] Q: It should be headed "Don Marketing Promotional Games".
 [10] It is a Don letter, signed by John Donovan, 14th May?
 [11] A: Yes.
 [12] Q: This follows on from that meeting in May?
 [13] A: Yes.
 [14] Q: "Dear Andrew, Roger Sotherton and I would like to thank
 [15] you for the time you gave to our presentation. With
 [16] your authority, I will now be contacting the various
 [17] potential partners we discussed in relation to the
 [18] multibrand proposal. I will supply them with outline
 [19] proposals, plus invitations to attend exploratory
 [20] discussions at Shell-Mex House in June as per
 [21] instructions."
 [22] A: Yes.
 [23] Q: Do you remember what that is about?
 [24] A: Yes.
 [25] Q: Tell me.

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[1] A: Not within the notes that I have written.
 [2] Q: No. There was not in fact any discussion about the
 [3] Sainsbury's communications or correspondence at this
 [4] meeting at all, was there?
 [5] A: Not that I have noted.
 [6] Q: No. If there had been, you would have noted it, would
 [7] you not?
 [8] A: Probably, if there was any significance in it, yes.
 [9] Q: You see, you did not go to this meeting with any
 [10] Sainsbury's letters or anything of that kind
 [11] supplementing the written proposal, did you?
 [12] A: It seems not.
 [13] Q: No. If there had been a requirement to follow the
 [14] meeting up with any Sainsbury's material, that is
 [15] something that would have been noted down on this
 [16] document, would it not?
 [17] A: Not necessarily, but probably.
 [18] Q: You would have --
 [19] A: Sometimes I had separate notes. Action notes were kept
 [20] to one side and notes for file would be written into
 [21] something like this.
 [22] Q: At this meeting, the May meeting that we are discussing,
 [23] where these proposals were put, can we agree that there
 [24] was no discussion of Sainsbury's communications between
 [25] Don Marketing and Sainsbury's?

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[1] A: That follows on from a note I have made here on
 [2] page 975.
 [3] Q: Yes.
 [4] A: "JAD to contact Woolworth, Safeway, Little Chef, Sun."
 [5] Q: If you care to just keep a finger in 981 and go to the
 [6] preceding page, 980/C --
 [7] A: Yes.
 [8] Q: -- that is Andrew Lazenby's note, that is his
 [9] handwriting?
 [10] A: Yes.
 [11] Q: His second bullet point at the bottom:
 [12] "They to develop Megamatch to named partners."
 [13] All right? "They" meaning your side, Don:
 [14] "They to develop Megamatch to named partners".
 [15] A: I have it.
 [16] Q: There are three bullet points at the bottom.
 [17] A: I cannot read the second but last word.
 [18] Q: The first is "Reconvened week commencing 1st June". The
 [19] second one is "They to develop Megamatch to named
 [20] partners".
 [21] A: It was the word "named" that I could not read.
 [22] Q: Okay. The third is "AJ Lazenby to approve" --
 [23] approve -- "competitions". Looking then on page 981
 [24] again, the first paragraph accords with your
 [25] recollection as to what the outcome of the meeting was,

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[1] Q: That is not the kind of thing you would do anyway, is
 [2] it? You would go to a meeting and you would know what
 [3] it was you wanted to talk about. You would not, as it
 [4] were, simply switch to another important topic on the
 [5] spur of the moment without having discussed it with
 [6] John Donovan first, would you?
 [7] A: I have been known to.
 [8] Q: But on this occasion it did not happen, did it?
 [9] A: No.
 [10] Q: Right. Let us close up.
 [11] MR COX: I wonder if my learned friend could put to him the
 [12] corollary of that question.
 [13] MR JUSTICE LADDIE: Let him do it his own way. If, at the
 [14] end of the day, he has not done it properly, Mr Cox --
 [15] MR COX: I beg your Lordship's pardon. I am forgetting your
 [16] Lordship is in charge. It is not a jury.
 [17] MR JUSTICE LADDIE: It feels like it. But it is not. At
 [18] the end, Mr Cox, if you think something has not been put
 [19] fairly, you just remind me.
 [20] MR HOBBS: I am about to move to another topic and I know
 [21] I will not finish it in five minutes.
 [22] MR JUSTICE LADDIE: Let us not start it then. Just remind
 [23] me, before we rise, the letters you were putting to
 [24] Mr Donovan in cross-examination, the 24th July letters,
 [25] those are letters which you told me were not to be found

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[1] MR HOBBS: Yes.
 [2] MR JUSTICE LADDIE: We will leave it like that. I would
 [3] like to see leading counsel in my room, please.
 [4] (4.15 pm)
 [5] (The court adjourned until 10.30 am
 [6] on Monday 21st June 1999)
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[1] in Shell's discovery?
 [2] MR HOBBS: Before I say "Yes, that is correct" --
 [3] MR JUSTICE LADDIE: 449 and 446.
 [4] MR HOBBS: Yes, they were sent to us with the letter before
 [5] action, my Lord. One of them was. Otherwise --
 [6] MR JUSTICE LADDIE: They are not to be found in --
 [7] MR HOBBS: No.
 [8] MR JUSTICE LADDIE: And you have made your position clear to
 [9] Mr Donovan. The document which contains Concept Four,
 [10] is that one which was found in Shell's discovery?
 [11] MR HOBBS: I am told that it is only the one that was sent
 [12] to us with the letter before action as well.
 [13] MR COX: My Lord, I have checked this. I see Mr Joseph has
 [14] just given instructions. If it assists, I hope it is
 [15] right that our position is the only documents of Concept
 [16] Four, the letter of 24th July, the letter of 20th July,
 [17] have been ones that we, in the past, have supplied to
 [18] Shell's solicitors. Therefore, there are no documents
 [19] coming from Shell delineating or relevant to this
 [20] concept.
 [21] MR JUSTICE LADDIE: Does that include 981? Can you just
 [22] look at 981? Is 981 a document which was --
 [23] MR COX: That I have not checked. Concept Four I have.
 [24] MR HOBBS: 981, the letter I am told was in our discovery.
 [25] MR JUSTICE LADDIE: Fine. That is all I wanted.

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[1] MR JOHN DONOVAN (continued)
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