

In The Matter Of:

*John Alfred Donovan v.
Shell UK Ltd*

*Day 1
June 15, 1999*

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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 it

[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 it 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 π this may be a slight
 [11] exaggeration π 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] 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 π

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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 π we say that is just plainly wrong π 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] 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 π 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 I 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 I can I take you back
[14] very quickly I 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 I 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 I

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

[8] **MR JUSTICE LADDIE:** I 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:** IE 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 I

[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 III

[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 grouching, 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] 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 [1]
[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] 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 build 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] 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 Norway 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] again as your Lordship enquires 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 [1]
[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?

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[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 although it reviews other
 [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

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[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

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[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 was 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:

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[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 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] 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] 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 you 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

[25] members of that group?

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] 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] 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] 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 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 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 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 ifings 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 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 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 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 promoters both
[21] redeeming and issuing electronic points. Each
[22] individual partner promoter 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 promoter 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 promoters 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 promoters 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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SMITH OR LRI

[1] Opening Submissions by MR COX 1

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