

CHANCERY DIVISION

B E T W E E N:

JOHN ALFRED DONOVAN

Plaintiff

- and -

SHELL UK LIMITED

Defendant

(by Original Action)

AND B E T W E E N:

SHELL UK LIMITED

Plaintiff by Counterclaim

-and-

- (1) JOHN ALFRED DONOVAN**
- (2) DON MARKETING UK LIMITED**
- (3) ALFRED ERNEST DONOVAN**

Defendants to Counterclaim

(by Counterclaim)

**WITNESS STATEMENT OF
RICHARD MAX WISEMAN**

I, RICHARD MAX WISEMAN of Shell UK Limited, Shell-Mex House, Strand, London WC2R 0DX WILL SAY as follows:-

- 1. I am Legal Director at Shell UK Limited. I have held this position since 16 November 1992. I have been involved in the conduct of each legal action brought**

against Shell UK by Don Marketing UK Limited, Alfred Donovan and most recently his son John Donovan.

Previous Litigation

2. At paragraph 25 of his Statement of Claim in this action, John Donovan has pleaded three of the previous pieces of litigation as similar fact evidence: CH 1994 D 1927 (which I will refer to as 'Make Money'), CH 1994 D 2259 (which I will refer to as 'Nintendo') and CH 1994 D 5417 (which I will refer to as 'Now Showing'). These actions were all brought by Don Marketing UK Limited against Shell UK Limited.
3. None of these actions proceeded to trial. In relation to each of these actions, John Donovan has relied in his Statement of Claim on the terms of settlement. He claims that each was settled "on terms favourable to the Plaintiff". He is clearly contending that he would have won each of the previous actions - if not, there would be no relevance whatsoever in pleading them as similar fact evidence.
4. Shell UK objects to John Donovan's attempts to resurrect the previous claims: they were fully and finally settled without admission of liability. However, just in case the court is persuaded that it is relevant to explore the merits of each of the previous actions, I will describe the conduct of each of these actions after the writs were issued.

Make Money

5. I did not have day to day conduct of the proceedings relating to Make Money and for the purposes of this case I have considered the correspondence in the Make Money action and I have spoken to Shell personnel involved in the proceedings. The Make Money writ was issued by Don Marketing (UK) Ltd on 6 April 1994. At this time Shell UK were in the midst of preparations to run the Make Money promotion. Shell UK's legal representatives made it very clear to Royds Treadwell (acting on behalf of Don Marketing) that Shell UK did not accept that Don Marketing had any rights in the Make Money concept and that Shell UK did not accept any liability. However, for reasons of economic expediency (which were made very clear to Royds Treadwell) it was desirable from Shell UK's point of view that any dispute should be speedily resolved. On 18 April 1994 Don Marketing discontinued its action against Shell UK in return for the payment of the sum of £60,000 and the assignment to Shell of any rights Don Marketing claimed they held in the concept of "Make Money". Even though this sum was far less than the cost of delaying the launch of the Make Money promotion, in retrospect I can now see that this conciliatory approach was the wrong one to adopt in relation to John Donovan and his father.

Nintendo and Now Showing

6. Three days later on 21 April 1994 Don Marketing issued proceedings against Shell UK in the Nintendo action. From 22 April 1994 onwards John Donovan

threatened to tell the world (by way of Press Releases and circular letters) about his company's claim and about the settlement of Make Money for "a substantial sum". He also started writing letters of demand directly to senior Shell UK staff in spite of our frequent requests that such correspondence should be addressed to Shell UK's lawyers. This was to set the pattern of behaviour which has continued to the present day. I deal with his campaigning materials in a separate section, below.

7. During the next six months, John Donovan made repeated demands for a negotiated settlement and was seemingly dismayed at Shell UK's refusal to make him an offer. The Nintendo Statement of Claim was eventually served on 23 September 1994. It was followed one week later by another writ, this time in relation to Now Showing.
8. On 20 October 1994 Don Marketing issued further proceedings, this time in the Bury St. Edmunds County Court. The summons sought £940 for wasted management time in relation to the failure of a proposed mediation in the Nintendo action. This action was later stayed.
9. At this stage Shell UK was perhaps understandably becoming concerned with the amount of time, energy and money which was being expended in the conduct of multiple sets of proceedings, with no realistic prospect of recovering its costs in the event of its success. Shell UK has a public responsibility to its shareholders. Accordingly, Shell UK applied for security for costs against Don Marketing UK

Limited on 21 October 1994 in relation to both of the High Court actions. Shell UK's Defences in both actions were served on 18 November 1994.

10. On 17 March 1995 Shell UK issued a press release stating that the Nintendo and Now Showing claims were "untrue" and that "[John Donovan] and his father have adopted the unusual course of mounting a publicity campaign to ventilate allegations against Shell ... in the hope that the company may be coerced into settling false claims". A High Court libel writ from Alfred Donovan followed on 12 April 1995.
11. On the next day, 13 April 1994, Shell UK was successful in obtaining an order for security for its costs. Don Marketing did not lodge the security ordered.

Funding Deed

12. Throughout the Nintendo and Now Showing actions John Donovan persisted in portraying Don Marketing as David to Shell UK's Goliath. John Donovan also kept up his media campaign against Shell UK. This included letters to Shell UK retailers, senior Shell staff, the Advertising Standards Authority and Members of Parliament. He also maintained an internet web site, organised the Shell Corporate Conscience Pressure Group and campaigned outside Shell-Mex House on The Strand. The materials he disseminated made serious allegations against individual Shell UK employees.

13. Matters came to a head at The "Shell" Transport and Trading Company, p.l.c ("ST&T") Annual General Meeting on Thursday 18 May 1995. John Donovan spoke to the Chairman of ST&T, John Jennings, who agreed to set up a meeting between John Donovan and Chris Fay (Chairman of Shell UK Limited) to allow John Donovan to voice his concerns.
14. The meeting between Chris Fay and John Donovan took place on 25 May 1994 at Shell-Mex House, as arranged I was not present at this meeting. It was agreed in principle that if John Donovan was prepared to cease his publicity campaign, Shell UK would be prepared to fund both sides of the High Court litigation so as to create the "level playing field" that John Donovan evidently thought he was being denied. The libel action and the County Court litigation were to be discontinued.
15. Following negotiations as to its precise terms, the Funding Deed was entered into on 6 July 1995. The Funding Deed was entered into contrary to my advice. On the same day, in accordance with the terms of the deed, Shell UK transferred £50,000 to Royds Treadwell's client account in respect of past and ongoing legal costs.
16. For Shell UK to undertake to pay both sides' legal costs in expensive High Court litigation was an unorthodox decision which was not undertaken lightly. The final form of the Funding Deed contained several vital safeguards for Shell UK. Firstly, Shell UK insisted that the deed should bind not only the Plaintiff, Don

Marketing UK Limited, but also John Donovan and his father Alfred Donovan, who together had campaigned vigorously against Shell UK and its staff.

17. Secondly, covenants were put in place to prevent Alfred Donovan, John Donovan and Don Marketing from picketing Shell premises or campaigning against Shell or publicising the litigation or the terms of the Funding Deed. In order to give the covenants "teeth", it was agreed that all money paid under the deed would become repayable by Alfred Donovan, John Donovan and/or Don Marketing in the event of their breach. This would go some way towards compensating Shell UK in the event that Alfred Donovan and John Donovan did not keep their side of the bargain.

18. Thirdly, in the light of Alfred Donovan's and John Donovan's predilection for serial litigation, Shell UK sought assurances that there were no other potential actions lurking in the background. This was a very important clause for Shell UK. John Donovan had indicated in telephone conversations and then in a letter to David Watson of Shell UK dated 19 November 1993 that Don Marketing UK Limited had a propriety claim to the "Mega Match" concept, involving retailers in different trades participating in a single promotion with a common promotional currency. John Donovan alleged that the proposals relating to Mega Match also concerned promotional schemes "whereby the common currency - points, vouchers, tokens etc - are collected or awarded at outlets belonging to the various types of retailer participating in the activity". The clause in the Funding Deed was intended to be an assurance that John Donovan or Don Marketing UK Limited

would not bring an action in relation to Mega Match and the related proposals. Alfred Donovan, John Donovan and Don Marketing therefore covenanted that they would not bring any further actions against Shell UK or its associated companies in relation to any subsisting or outstanding legal claims. In the event that any of them did so, it was agreed that they would indemnify Shell UK for its costs in those actions.

19. In August 1995 the County Court action was withdrawn and in September the libel action was discontinued.
20. As the High Court litigation slowly progressed towards trial, it became increasingly apparent that the Funding Deed regime was unworkable. Shell UK was committed to paying the Plaintiff's costs in circumstances where it could exercise no effective control over the manner in which the Plaintiff ran the litigation. The long and expensive exercise of discovery was still unfinished nearly a year later in June 1996. By this time, it is fair to say that the only people benefitting from the Funding Deed were the lawyers: costs were even being expended arguing in correspondence about the lack of progress of the action. This is not intended to be a criticism of the solicitors involved at the time, rather a sad reflection of the pre Woolf regime.
21. The only way out appeared to be mediation. This took place on 5 and 6 September 1996 before Mr Nicholas Pryor, a trained mediator appointed by CEDR. Roger Sotherton, a consultant to Don Marketing, was at this point claiming a 17.65%

share of any settlement monies recovered; and was therefore also a party to the mediation.

22. The mediation was intended to be confidential and was conducted on CEDR's standard terms. It resulted on 21 October 1996 in the payment of £30,000 by Shell UK to Don Marketing in respect of those legal costs which remained outstanding under the Funding Deed. A further payment was made with no admission of liability. The compromise of the High Court litigation was then formalised by an undated Letter of Agreement and a Consent Order dated 25 October 1996.
23. The Letter of Agreement was a relatively brief document, as the important safeguards for Shell UK were already contained in the Funding Deed. The Letter merely obliged John Donovan, Alfred Donovan, Roger Sotherton and Don Marketing UK Limited to keep the terms of the Funding Deed and the terms of the settlement confidential. The sum of £20,000 repayable on breach of these obligations was an agreed 'ball park' figure which attempted to quantify the loss to Shell UK in the event of Alfred Donovan's and John Donovan's breach. *really?*
24. Having spent many hours and vast resources dealing with John Donovan's grievances, I and my colleagues at Shell UK had hoped that this would be the final chapter in the Don Marketing saga. Sadly, that was not the case.

Indemnity in relation to SMART

25. As is set out in the other witness statements dealing with the development and launch of the SMART scheme, the scheme was in existence long before John Donovan signed up to the Funding Deed, in which he agreed to indemnify Shell UK against any potential causes of action in existence at that date. The SMART national roll-out took place in October 1994. The mechanics of the scheme were public knowledge from this date. The Funding Deed was not signed until 6 July 1995. John Donovan could and should have brought the SMART claim before 6 July 1995. Instead he waited until April 1997 before raising his claim.

Campaigning / Picketing

26. In relation to the SMART action, John Donovan has once more waged a publicity campaign against Shell UK. Mr Lazenby (whose name John Donovan has attempted to blacken over the course of the past 5 years) deals with examples of such campaigning in his evidence. Further examples are contained in the Schedule to the Amended Defence and Counterclaim.
27. Alfred Donovan has also taken to picketing Shell UK premises in London and the Hague; and the offices of DJ Freeman, our solicitors in this action. Copies of the materials handed out are available to the court together with supporting photographic evidence.

28. Alfred Donovan and John Donovan claim that they are free to carry out this campaigning and picketing because Shell UK have somehow repudiated the Funding Deed by issuing a press release on 21 April 1998. That press release stated merely that

MR JOHN DONOVAN

Over the last four years, Mr John Donovan, who has a company called Don Marketing UK Limited, has made various claims that he or his company own rights in respect of several Shell UK forecourt promotion. His most recent allegations have been that his company invented the SMART loyalty programme and that he or his company should be compensated for its use.

The claim has been most carefully investigated and discussed in correspondence with Mr Donovan and his solicitors, and Shell UK is satisfied that it is entirely without substance.

Mr Donovan has now issued a writ against Shell UK in respect of SMART. We intend to defend his claim vigorously in court.

**Shell UK Media Relations
April 1998**

These comments are far less objectionable than the press coverage and publicity already generated by Alfred Donovan and John Donovan prior to 21 April 1998.

29. In this witness statement I have necessarily referred to the Funding Deed but I have tried to do so only insofar as it is necessary to set out Shell UK's case.

Purported Assignment dated 4 April 1998

30. John Donovan's previous Chancery actions against Shell UK (Make Money, Nintendo and Now Showing) were all brought through the medium of the limited company Don Marketing UK Limited. Each of these actions was privately funded due to the ineligibility of Don Marketing, as a limited company, to obtain legal aid. As stated above, Shell UK obtained security for its costs in Nintendo and Now Showing against Don Marketing on the basis that Don Marketing would be unable to pay Shell UK's legal costs if unsuccessful in its claim. Don Marketing could not and did not pay the sum ordered.

31. In this action, John Donovan has sued Shell UK in his personal capacity. As a result, no security for costs has been obtained and John Donovan has applied for Legal Aid. He claims to have obtained his right to sue by virtue of a document dated 4 April 1998 ("the Assignment") whereby Don Marketing UK Limited purported to assign its rights to him together with half of any proceeds of this action, in return for one pound. The Assignment also contains a certificate of value, certifying that "the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the aggregate amount or value of the total consideration exceeds £60,000", I have assumed that this is an indication of the value John Donovan places on the claim, although he has in his campaigning material claimed that he has a multi million pound claim against Shell. At no stage during these proceedings has John Donovan quantified

his claim against Shell or explained how he intends to calculate any potential damages.

32. Although John Donovan claims his agreement was sanctioned by the board of Don Marketing, no such document has yet been produced in his discovery. In fact, no financial documents whatsoever relating to the company's status have been produced, despite Shell UK's clear challenge to the validity of the assignment on the grounds that it was ultra vires as an unauthorised reduction of capital. Therefore I can only comment on the basis of the documents obtained independently by Shell UK from Companies House.

33. Don Marketing UK Limited's Articles of Association state that its assets may not be distributed to its shareholders where this would result in a reduction of capital "without first obtaining the sanction (if any) required by law."

34. From Don Marketing's latest filed Balance Sheet (for the year ended 31 March 1997) it is evident that its liabilities significantly exceed its assets. The profit and loss account is £166,304 in deficit and the company owes £87,920 to its creditors.

35. John Donovan has publicly maintained that the cause of action transferred to him from Don Marketing is considerably more valuable than the £1 he paid for it. For example a Press Briefing Document displayed on the Don Marketing internet web site asserts that John Donovan "has personally issued a multi-million pounds High Court Writ".

36. On John Donovan's view of the value of his claim, he has received a valuable asset for a significant undervalue and the creditors of Don Marketing UK Limited have been deprived of a valuable asset against which they might otherwise have enforced their claims.

I confirm that the contents of this statement are true to the best of my knowledge and belief.

SIGNED *R Max Wiseman*
RICHARD MAX WISEMAN

DATED 13/11/99