

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1998 D No. 2149.

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

16th June 1999

Before:

MR JUSTICE LADDIE

JOHN ALFRED DONOVAN
(Plaintiff)

-v-

SHELL UK LTD
(Defendant)
(by Original Action)

AND BETWEEN

SHELL UK LTD
(Plaintiff by Counterclaim)

-and-

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

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

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



SMITH BERNAL
INTERNATIONAL

A LEGALINK COMPANY

[1] Wednesday, 16th June 1999

[2] (10.30 am)

[3] OPENING SUBMISSIONS by MR COX (continued)

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

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

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

[15] My Lord, we had reached 24th December by which
[16] time it is the claimant's case that what became and what
[17] is referred to in the witness statements as the "Shell
[18] vision" had already essentially been determined.
[19] Your Lordship will recall the letters to Sainsbury's,
[20] the paragraph with the minutes, the note dealing with
[21] the ultimate scheme, the lifestyle promotion. All of
[22] these documents existed prior to 24th December and
[23] reflected, in our submission, a clear understanding of a
[24] consortium approach with an issuing and a redeeming in
[25] an exclusive consortium of partners.

Page 1

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

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

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

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

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

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

[12] My Lord, without now exposing these documents, as
[13] I am afraid at some stage it may be necessary to do
[14] either by me providing your Lordship – and I suspect
[15] this might be helpful – with a schedule under headings
[16] of each document that we say is relevant to that
[17] specific point. That may be helpful to your Lordship.
[18] I do not know. But these documents do require – and of
[19] course they have not received analysis in any of the
[20] witness statements, for obvious reasons – some careful
[21] examination.

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

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

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

Page 3

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

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

[9] **MR COX:** Option One were brought in. They were not brought
[10] in to do what was described in some of the notes as
[11] "blue sky meandering". They were brought in to
[12] implement a predetermined and established vision. The
[13] vision was one that is set out in the Option One
[14] response document, dated 2nd March 1993. My Lord,
[15] without taking you to it, may I cite a few lines from
[16] it. Option One entitled this document "The Shell Vision
[17] Outline Response", and they wrote in a prefatory
[18] paragraph that they were now at the stage where
[19] Project Hercules, as it had then become, with Mr Lazenby
[20] as its head, was starting to take shape in their minds.
[21] What we submit is it is clear from what has gone before
[22] that what they meant was they were beginning to
[23] understand what Shell was driving at, what it was
[24] getting at. They described it as opening the door, the
[25] Smart Card technology that was being proposed, to a new

Page 2

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

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

Page 4

[1] finalised scheme. In January 1993 what is being greeted
 [2] is a new concept of a relationship between major
 [3] High Street retailers which had never been achieved or
 [4] even really thought of, we say, before.

[5] **MR JUSTICE LADDIE:** Fine. I understand that. Even that,
 [6] Mr Cox, I understand. It may come as a surprise, but
 [7] I understand that. But I do not need thousands of
 [8] documents to see that point.

[9] **MR COX:** Of course not.

[10] **MR JUSTICE LADDIE:** I have also seen the reference in one of
 [11] the Shell documents saying the only thing in any way
 [12] like this was with Air Miles. Which is one of the
 [13] documents you drew to my attention, and I can see the
 [14] differences. Then there will be questions as to what
 [15] was it that your client handed over to Mr King and again
 [16] to Mr Lazenby, if he did, and whether that was the
 [17] origin of what it is that has gone into the defendant's
 [18] long-term promotion. I am a bit concerned that we are
 [19] going to end up rather like an advertising campaign in
 [20] this court, which I can tell you I will set my face
 [21] against. I do not believe the court's time or the
 [22] parties' money should be spent on that sort of thing.

[23] We have to get down to the nitty-gritty.

[24] **MR COX:** My Lord, we agree. The documents throughout 1993
 [25] we say show - first, it goes to the issue of the

Page 5

[1] anyone else. But I am afraid in real time I have to
 [2] unfold these things. I have taken the decision this
 [3] morning not to trouble your Lordship with it, but to do
 [4] it by short order.

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

[6] **MR COX:** And that is by scheduling the documents under
 [7] headings during the course of the trial. But may
 [8] I simply, plucking at random - for example, there is at
 [9] volume 4/1796 qualitative consultancy market research
 [10] results. When I seized these examples, frankly I am
 [11] embarrassed by the number of plums that I could pluck
 [12] from the tree. So I do not mean this to be exhibiting
 [13] the strongest case that I could manage. But, my Lord,
 [14] qualitative consultative market research greeted the
 [15] idea that they had been brought in to test by focus
 [16] group of consumer reaction as this new idea from Shell.

[17] **MR JUSTICE LADDIE:** Mr Cox, for goodness sake. We are grown
 [18] men. What do you expect them to say? They have just
 [19] been brought in by Shell. "We have been asked to test
 [20] this trite thing". What do you expect them to say?
 [21] They are in the advertising field.

[22] **MR COX:** Yes, I know, and that may well be the answer: the
 [23] whole thing was just a lot of puff. But, insofar as one
 [24] can base anything on the documents that were
 [25] contemporary, they point one way. I am going to be

Page 7

[1] quality of confidence because everybody -

[2] **MR JUSTICE LADDIE:** That is not in dispute, Mr Cox. It is
 [3] not in dispute. Mr Hobbs accepts that, if it was
 [4] suitable for treating as confidential: that is, of
 [5] sufficient merit - whatever it was was handed over
 [6] under obligations of confidence. There is no doubt
 [7] about that.

[8] **MR COX:** No, my Lord, forgive me. I am not making myself
 [9] clear. As I understand it, what is disputed or not
 [10] admitted - not so much denied but not admitted - is
 [11] that this information possessed the necessary quality of
 [12] confidence. It was not new: it was trite. It was so
 [13] ordinary, so much in the public domain that it was
 [14] completely incapable of protection by an obligation of
 [15] confidence. Now, to that issue, to some extent, in our
 [16] submission - I will not trouble your Lordship with it
 [17] now - the clear contemporary evidence of the response
 [18] of the trade is both foreshadowed in the authorities as
 [19] a relevant factor and is shown in the documents as being
 [20] all one way, as being a profoundly new concept. For
 [21] example, and I quoted at random from such a plethora of
 [22] examples that I am embarrassed by them. Indeed, I am
 [23] embarrassed in presenting them to your Lordship.
 [24] Because of course I know your Lordship can seize the
 [25] essence of a document faster than I can and faster than

Page 6

[1] exposed -

[2] **MR JUSTICE LADDIE:** It may be that this is not the strongest
 [3] point that Mr Hobbs has. Whatever the input of your
 [4] clients, at the end of the day the project that Shell
 [5] had was considered by them to be commercially worthwhile
 [6] and, at the least, commercially sufficiently valuable to
 [7] need to keep it from the eyes of competitors. Although
 [8] they accepted sooner or later their competitors would
 [9] either find out about it or would get there themselves.
 [10] But they needed to be there first, and it was
 [11] commercially important for them to have this new project
 [12] kept confidential. To the extent that, whatever they
 [13] wanted kept confidential was the same as what Mr Donovan
 [14] handed to them, it is going to be difficult for them to
 [15] say what Mr Donovan had was not of a sufficient quality
 [16] to warrant being kept confidential.

[17] **MR COX:** Sometimes one finds oneself profoundly wishing one
 [18] had put it like that oneself.

[19] **MR JUSTICE LADDIE:** One of the things that I suspect
 [20] Mr Hobbs is going to say is, well, whatever the result
 [21] may have been inside Shell, what was proposed was at
 [22] such a high level of generality and low level of detail
 [23] as to be like whisps in the wind. That is what he is
 [24] going to say. He may not succeed, Mr Cox, but that is
 [25] what he is going to say. If it is his best point, he

Page 8

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

Page 9

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

Page 11

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

Page 10

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

Page 12

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

Page 13

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

Page 15

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

Page 14

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

Page 16

[1] feel of the attraction of such a programme.

[2] My Lord, there were meetings on 7th October 1976
[3] in the studios to disclose this idea and, at the
[4] meeting, from line 22:

[5] "... copies of the plaintiff's submission were
[6] given to a Mr Chisholm, Mr French and Mr Schildberger
[7] and these were left with them. After the meeting the
[8] concept was discussed. The meeting ended on the basis
[9] that the plaintiff would make further enquiries and
[10] contact the other persons further."

[11] He did make other enquiries and then he
[12] endeavoured to get in touch with Mr French. He was
[13] unable to do so for a considerable time. During this
[14] period a pilot script for one episode of the proposed
[15] programme was written, entitled "How To Make A Million"
[16] and dealt with the story of one successful man and how
[17] he succeeded. On 6th January, following a telephone
[18] conversation on that day, the plaintiff wrote to
[19] Mr French enclosing the pilot script:

[20] "Following our telephone conversation, I would
[21] like to submit to you this pilot script. I point out it
[22] is based on actual interviews and is a true reflection.

[23] Since we last talked about this series we have
[24] approached certain individuals on our list of sixty.
[25] All of them have agreed to appear."

Page 17

[1] how a millionaire achieved his success and how viewers
[2] could learn from his example is something he kept
[3] private. He communicated to Television Corporation
[4] Limited in confidence in the course of negotiations for
[5] the sale of a programme embodying the concept ..."

[6] And setting out the relief that is asked for:

[7] "It is clear [says the learned judge] that an
[8] obligation of confidence may exist where there is no
[9] contractual relationships between the parties."

[10] My Lord, we have reflected upon this. There is
[11] degree in the pleadings in which contract is mentioned.
[12] We submit your Lordship need not be concerned with
[13] contract in this case and that, for these purposes in
[14] this case - maybe your Lordship will disagree - no
[15] wider duty owed under the contract and what this case is
[16] about, your Lordship has to decide, is the equitable
[17] obligation.

[18] My Lord, may I return to that? "The information
[19] where a plaintiff sues", says the learned judge -

[20] **MR JUSTICE LADDIE:** I am not sure about that. There are
[21] consequences, Mr Cox. As far as I am aware, this is an
[22] undecided area of law. What happens if you have a
[23] contractual obligation of confidence, whether you can
[24] have simultaneously an equitable duty of confidence.
[25] Mere sensible people, non-lawyers, might say: what

Page 19

[1] He names the various famous people he says would
[2] have agreed:

[3] "I think you would agree it is a pretty imposing
[4] line up. In case you have mislaid the original
[5] submission [page 7] we presented to you in
[6] October, I have taken the liberty of enclosing a copy."

[7] So, my Lord, there we have the broad outline of
[8] the idea and the concept. Thereafter the plaintiff
[9] heard nothing and then he becomes aware, as the learned
[10] judge explains, of the proposal to run a similar
[11] programme.

[12] My Lord, at the bottom, line 40 indicates the
[13] nature of the similarity:

[14] "Tonight we begin a series of reports on a subject
[15] very dear to all of us: money. Every generation
[16] produces its share of self-made millionaires, those
[17] people who by talent, ruthlessness, sheer hard work [the
[18] announcer says over the airwaves] or luck, drag
[19] themselves up by the boot straps, head and shoulders
[20] above the rest of us. How do they do it? Can they tell
[21] us how to do it? Those are the questions which will be
[22] asked in the next four programmes."

[23] Over the page at line 8:

[24] "The plaintiff claims it is the concept which he
[25] developed for the television programme, having its theme

Page 18

[1] difference does it make? It does make a difference.

[2] Because, for example, the financial compensation and the
[3] relief that you can get for breach of an equitable duty
[4] may be very different to the remedies you could get for
[5] breach of contract.

[6] (11.00 am)

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

[8] **MR JUSTICE LADDIE:** It may well be, for example, that,
[9] whereas under an equitable duty one would assume that
[10] the duty would terminate under circumstances of the
[11] judge's choosing basically, where the duty is
[12] contractual, the parties will have determined, as a
[13] matter of contract when the duty arises, when it
[14] terminates and what its value is. So there may be an
[15] enormous difference between a contractual right and an
[16] equitable right. At least as far as relief is
[17] concerned, and maybe duration as well.

[18] **MR COX:** My Lord, I can quite see that. May I return to it,
[19] because it may be a subject your Lordship has to deal
[20] with later.

[21] But to continue with this case, if I may, for the
[22] moment. The learned judge, having set out what the
[23] plaintiff has to establish: it was of a confidential
[24] nature, it was communicated in circumstances importing
[25] an obligation and that there had been unauthorised use,

Page 20

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

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

[17] Now I move to line 14:

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

Page 21

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

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

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

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

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

Page 23

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

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

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

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

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

Page 22

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

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

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

Page 24

[1] idea or concept was public knowledge, was in the public
 [2] domain, it could not be the subject of a duty of
 [3] confidence. But he submitted it was sufficient for the
 [4] plaintiff to show that the idea had not been the subject
 [5] of general awareness or adoption, so as to make it
 [6] within the public domain, whether or not the idea was
 [7] unique:

[8] "I am satisfied that what was called the
 [9] 'commercial twist' or the 'particular slant' of the
 [10] plaintiff's concept or idea does give it a quality which
 [11] takes it out of the realm of public knowledge. Clear
 [12] enough that programmes about successful persons in which
 [13] such persons are asked questions about their success
 [14] have been known on television for some considerable
 [15] time, but, in my opinion, there is a distinct difference
 [16] between such programmes and a programme which has as its
 [17] theme the stories of the careers of some self-made
 [18] millionaires in which, as an integral part of the
 [19] programme, the successful men give their recipes for
 [20] success to the viewers."

[21] My Lord, that was the slant: there had been
 [22] programmes before that asked people about the means by
 [23] which they had reached where they were, but there had
 [24] not been a programme - at least of which there was
 [25] sufficient general awareness. There was some vague

Page 25

[1] unique. So it is unique and is protectable. That does
 [2] not deal with the question of what happens if it is not
 [3] unique. Is it protectable?

[4] **MR COX:** I agree.

[5] **MR JUSTICE LADDIE:** There is authority, which I am sure you
 [6] are aware of. For example *Franchie v Franchie*, which
 [7] says that the issue of public domain is not precise.
 [8] There is a thing called relative secrecy. It may be,
 [9] for example, something which is known in Pristina and
 [10] something which is known in John O'Groats and something
 [11] which is known in Birmingham but not generally
 [12] disseminated. In other words, the same idea had by
 [13] other people in other places and which they are willing
 [14] to flog could still be confidential if somebody else
 [15] comes along and offers it in confidence to a potential
 [16] recipient.

[17] **MR COX:** My Lord, yes.

[18] **MR JUSTICE LADDIE:** It may have a lesser value, because
 [19] somebody else might be able to commercialise their own,
 [20] as it happens, identical propositions.

[21] **MR COX:** My Lord, of course what is unique is sometimes
 [22] almost a metaphysical question. Some people have it:
 [23] there is nothing new under the sun.

[24] **MR JUSTICE LADDIE:** I am not worried about that. The
 [25] trouble is, if you are not careful, you end up with the

Page 27

[1] evidence which is referred to. The evidence was to the
 [2] effect that this had not been done before in Australia,
 [3] with one possible exception about which the evidence was
 [4] vague - but that that slant took the idea into a realm
 [5] that made it confidential. Because it was a new slant:

[6] "Further, the clear implication from the evidence
 [7] is that the plaintiff had not communicated his concept

[8] to anyone outside his own organisation, except

[9] Mr Schildberger. Mr Gillard conceded that the

[10] submission and oral formulation of the plaintiff's

[11] concept and later the pilot script were given in

[12] circumstances which imported confidence. What he

[13] contented was that this still left the network free to

[14] make use of what he called the 'pure idea' of the person

[15] giving the interview giving advice.

[16] "In my opinion the concession was rightly made,

[17] but I am not able to see the network was still left free

[18] to make use of some of the information -

[19] **MR JUSTICE LADDIE:** The judge does not appear to have

[20] thought it necessary to consider line 28.

[21] **MR COX:** "The subject of general awareness or adoption ...

[22] **MR JUSTICE LADDIE:** Whether or not the idea was unique.

[23] **MR COX:** No, he does not. My Lord is right.

[24] **MR JUSTICE LADDIE:** He simply says in the case it was

[25] unique. He comes to a conclusion of fact that it was

Page 26

[1] law of confidence ending up looking like the law of
 [2] patents, which it certainly is not, and a single
 [3] disclosure somewhere else is enough to deprive the
 [4] subject matter of the quality of confidence. My
 [5] inclination is to say that cannot be what the law is and
 [6] relative secrecy has some part to play.

[7] **MR COX:** We submit so.

[8] **MR JUSTICE LADDIE:** It almost got there, but then the judge
 [9] decided it was unique. So it did not matter.

[10] **MR COX:** He decided in some of its element it was not, but
 [11] there was a new slant. Yes.

[12] **MR JUSTICE LADDIE:** Whatever the others were, he says this
 [13] is entirely different. I take it, since he has
 [14] dismissed the only evidence that somebody else had done
 [15] it as being "vague", what he is really saying is this is
 [16] unique, so I do not need to consider what would have
 [17] been my conclusion had it not been unique.

[18] **MR COX:** This particular slant, yes.

[19] My Lord, may I go on because it is the learned
 [20] judge at the bottom of the page who refers, in my
 [21] opinion, to the saleable proposition phrase:

[22] "In my opinion, the situation was that the
 [23] plaintiff had a saleable proposition which had as its
 [24] kernel the valuable concept of a programme which had the
 [25] intent of exposing the lives of successful people with

Page 28

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

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

[12] (11.15 am)

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

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

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

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

Page 29

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

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

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

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

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

Page 31

[1] some of the reason.

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

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

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

Page 30

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

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

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

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

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

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

Page 32

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

Page 33

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

Page 35

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

Page 34

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

Page 36

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

Page 37

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

Page 39

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

Page 38

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

Page 40

[1] Q: That would date back at least to the mid-1980s, if not
[2] before, would it not?

[3] A: Certainly the use of a plastic card to accumulate -
[4] there are two ways we can look at this. One is the use
[5] of a plastic card as a payment's mechanism; the other is
[6] the use of a plastic card as a loyalty token gatherer or
[7] icon of a relationship between a customer and a
[8] supplier.

[9] Q: Let us get a timeframe on this. The use of a card as an
[10] electronic purse for scoring points on is a proposal
[11] which goes back shall I say to 1987, 1986, 1985? It is
[12] a proposal in the loyalty industry that was well-known
[13] at that time, is it not?

[14] A: I think so. There were experiments with various pilots
[15] of those kinds of schemes across the world.

[16] Q: You would not yourself, would you, distinguish between
[17] the use of a mag stripe card, a magnetic stripe card,
[18] and a Smartcard for these purposes, would you?

[19] A: In that you could have the same information,
[20] essentially, on a mag stripe card as you could on a
[21] Smartcard.

[22] Q: But in the sense that as technology marches on, the
[23] Smartcard becomes more reliable, you would naturally
[24] expect a progression, a migration from the mag stripe
[25] card into the Smartcard field, would you not? It would

Page 41

[1] to about 1990. Would that tally with your recollection?

[2] A: Late 1980s, early 1990s, yes.

[3] Q: I am now going to revert to the question of the loyalty
[4] village or department store. In your mental model of
[5] the loyalty village, are you excluding the possibility
[6] that there is a scheme operator who is not a shopkeeper
[7] in the village, as it were?

[8] A: Not in essence, no. It would be possible, I suppose,
[9] for a scheme operator to run that village metaphor, or
[10] department store metaphor, in the same way it would be
[11] possible for one of the shops in the village to be the
[12] originator of the scheme.

[13] Q: You would not see any difference in principle, would
[14] you, between those two modes of operation of the loyalty
[15] village?

[16] A: I think I would really because the way that I am
[17] approaching this in my own mind is that we are looking
[18] here at establishing relationships between the members
[19] of the village and their customer base and my
[20] understanding, my interpretation, my knowledge is that
[21] if it was a third party, an outsider, that relationship
[22] would be held by that third party as the runner of the
[23] scheme whereas, in a sense, if it is operated by
[24] somebody who is a shop in the village, then that
[25] relationship can be held by them.

Page 43

[1] be a natural thing to do.

[2] A: That, indeed, is what is happening to both payment and
[3] non-payment cards.

[4] Q: That was happening, in fact, was it not, in the late
[5] 1980s, 1990?

[6] A: I would not like to say that migration was underway.
[7] There were a number of pilot schemes of both payment
[8] and, if you like, loyalty cards. I do not think you
[9] could necessarily point, in a sense, or talk about the
[10] migration being underway by that time. Really we are
[11] only just now starting to migrate from mag stripe to a
[12] Smartcard.

[13] Q: But there were Smartcards in use for loyalty scheme
[14] purposes in 1990, were there not, according to your
[15] recollection of it?

[16] A: There were some experiments certainly in Japan at that
[17] time, which I am aware of.

[18] MR JUSTICE LADDIE: I missed that.

[19] A: There were some pilot schemes in Japan which I was aware
[20] of.

[21] MR HOBBS: What about the Vision Value network? Are you
[22] aware of that?

[23] A: I have some knowledge of that, not a complete knowledge
[24] but some knowledge.

[25] Q: That dates back, according to the documents I have seen,

Page 42

[1] Q: In terms of practicalities, one of the shopkeepers in
[2] the village may not have the financial resources or the
[3] technical expertise at his disposal to operate this
[4] scheme. Surely it is the same scheme, albeit it is
[5] being operated by somebody who has those resources to
[6] make it possible?

[7] A: It may well look the same scheme in terms of its
[8] functionality, the way the cards are done, and so on,
[9] but I would myself contend that one of the key issues is
[10] really who has the ownership of the relationship with
[11] the cardholders.

[12] Q: Why is that a key issue?

[13] A: In my own mind because I think we are moving into an era
[14] where it is very important that people who wish to have
[15] a long-term supplier relationship with their customers
[16] feel that they have some relationship with them.

[17] Q: So if you have a situation where the villagers in the
[18] loyalty village operate their own scheme and then one of
[19] them decides - or they all decide actually that they
[20] will use an outside operator, you would say it is a
[21] different scheme, would you?

[22] A: I would say that the logic of that is that they have
[23] agreed or decided that they can pass whatever
[24] relationships they had with their customers to a third
[25] party, who then operates that scheme.

Page 44

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

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

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

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

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

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

Page 45

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

[7] A: That is correct.

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

[12] A: No.

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

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

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

[20] A: No.

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

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

Page 47

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

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

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

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

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

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

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

[22] A: No, I have not.

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

Page 46

[1] it, I am afraid.

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

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

[13] A: Yes.

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

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

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

Page 48

[1] member of a Powerpoint network subject to the conditions
[2] of appropriate partners in non-competitive market
[3] sectors and acceptability of the contract terms."

[4] You see those sectors there, petrol, grocery,
[5] travel and clothing. You see the reference to a network
[6] where you have conditions as to appropriate partners in
[7] non-competitive market sectors?

[8] A: Mmm.

[9] Q: Do you think that sounds a bit like your loyalty
[10] village?

[11] A: Yes, it does.

[12] Q: Turning into the document, it is a longish document and
[13] I need just to take you to one or two pages. Would you
[14] go to page 853? Do you have that, Professor?

[15] A: Yes.

[16] Q: Thank you. You will see that they have gone ahead in
[17] their current UK market customer loyalty schemes and
[18] they have divided it up into three categories:
[19] proprietary schemes, joint schemes and self-administered
[20] schemes. Do you recognise any or all of those schemes
[21] mentioned there?

[22] A: I recognise a great many of them, not necessarily all of
[23] them.

[24] Q: Take the joint schemes at the top right, are you
[25] familiar with all of those; Mobil, Argos, Total, M&S,

[1] Q: I think it is a magnetic stripe card scheme, would that
[2] be your recollection?

[3] A: That is correct.

[4] Q: What about the Total M&S/Boots scheme, is that a loyalty
[5] village as well?

[6] A: I think the scheme is slightly different here in that is
[7] not the Total scheme one whereby having collected points
[8] on a magnetic stripe card that is then redeemed for
[9] vouchers from Marks and Spencers and Boots? So it does
[10] not involve those two retailers as collection points for
[11] that scheme.

[12] Q: Is it part of your model for the loyalty village that
[13] the members of the scheme, the High Street shops, as it
[14] were, the metaphorical High Street shops are issuing and
[15] redeeming? Is that part of your model?

[16] A: It is. Yes, and if you mention that issuing and
[17] redemption, that would be my intention, that the village
[18] is one where the shopkeepers both issue and redeem a
[19] common currency.

[20] So looking back to Mobil and Argos, there is a
[21] slight difference here in that, although Mobil, BP now,
[22] Somerfield, et cetera, issue these points, they are only
[23] redeemable in Argos.

[24] Q: Okay. Turn the page in this document you have open,
[25] please, to page 854. You will see a heading which is

[1] Boots, Elf, Intersport? Are you familiar with the
[2] operation of those?

[3] A: Perhaps with the exception of Elf Intersport. Certainly
[4] the other two, yes.

[5] Q: Are the other two loyalty village concepts?

[6] A: I would say - in the sense that you are asking me the
[7] question in that they involve non-competing retailers in
[8] different sectors, you could argue one could say yes,
[9] but I think my sense is that in the case of let us take
[10] the Mobil/Argos scheme, the information about the scheme
[11] and its operation lies entirely with Argos as a third
[12] party supplier.

[13] Q: So it is not a sufficiently integrated scheme, that one,
[14] to be regarded by you as within your loyalty village
[15] concept; would that be a fair comment?

[16] A: My loyalty village concept really refers to the idea of
[17] non-competing retailers in different market sectors,
[18] your department store analogy, and so on. In the sense
[19] that Mobil - if we can take the scheme forward to
[20] contemporalise it, there are a number of other retailers
[21] in that particular scheme who are in non-competing
[22] sectors. In that sense, yes, that would be a loyalty
[23] village.

[24] Q: It is a card scheme, is it not?

[25] A: It is.

[1] "The networking advantage".

[2] A: Mmm.

[3] Q: You see that the author has some star points:

[4] "Networking delivers customer reward
[5] achievability via faster accumulation of points from
[6] many sources and from economies of scale which provide
[7] lower points cost per reward."

[8] You see there that what he was saying is that the
[9] more participants you have in the scheme the faster you
[10] can accumulate the points to get the rewards?

[11] A: Mmm.

[12] Q: Would you have said that in 1992 that was an
[13] earth-shattering revelation?

[14] A: I would say that was eminently common sense.

[15] Q: Absolutely. It is obvious, is it not?

[16] MR JUSTICE LADDIE: Because we have a transcript, when you
[17] agree with something, say you agree with it. If you
[18] disagree, as you may well do with questions asked of
[19] Mr Hobbs, say that you disagree, so it is on the
[20] transcript.

[21] MR HOBBS: When I just said, "It is obvious, is it not?" you
[22] nodded, I believe?

[23] A: I did.

[24] Q: Thank you. You see the next bullet point there:

[25] "There is only one networked customer loyalty

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

Page 53

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

Page 55

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

Page 54

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

Page 56

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

Page 57

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

Page 59

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

Page 58

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

Page 60

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

Page 61

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

Page 63

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

Page 62

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

Page 64

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

Page 65

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

Page 67

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

Page 66

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

Page 68

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

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

[11] A: Ownership of the data?

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

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

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

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

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

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

Page 69

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

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

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

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

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

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

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

Page 71

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

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

[11] A: Mmm.

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

[15] A: Mmm.

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

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

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

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

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

Page 70

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

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

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

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

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

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

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

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

Page 72

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

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

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

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

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

Page 73

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

[3] A: Mmm.

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

[7] A: Yes, I do.

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

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

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

[13] A: Yes.

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

[16] A: Yes, I have.

[17] Q: When did you see it?

[18] A: Monday afternoon.

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

[21] A: I have.

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

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

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

Page 75

[1] payment and non-payment.

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

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

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

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

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

[21] A: Mmm.

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

[25] A: That is correct.

Page 74

[1] customer loyalty front", middle column?

[2] A: Yes.

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

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

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

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

[15] Do you see that?

[16] A: I do.

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

[19] A: Yes, we have.

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

Page 76

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

Page 77

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

Page 79

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

Page 78

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

Page 80

[1] data inside the scheme?

[2] **A:** Yes. My philosophical stance, which differs somewhat,
[3] is that we are being asked to give quite a lot of
[4] information to these schemes, particularly personalised
[5] ones, not just name and address, date of birth, and our
[6] ongoing shopping behaviour is monitored through them.
[7] That is very valuable information and I think who
[8] controls that is of importance, certainly from my
[9] perspective.

[10] **MR JUSTICE LADDIE:** If members of the public knew this was
[11] going on they would all chop up their cards immediately.

[12] **MR HOBBS:** We switch from the objective to the subjective.
[13] I understand what you are saying and I have agreed
[14] to differ with you and I hope you have agreed to differ
[15] with me on this. It does not matter who owns the data,
[16] it is the quality of the person who owns it. It is his
[17] integrity as a data holder that matters, not who he is
[18] in the scheme of things; is that not right?

[19] **A:** That is true in a sense of looking at it from a security
[20] point of view, but I am also looking at it from a point
[21] of view of what is done with that data. What
[22] possibilities exist with that information; what can be
[23] done with it?

[24] **Q:** Can you close up that file and take out volume E1?

[25] **A:** Section E, file 1.

Page 81

[1] have perhaps the wider spread of retailers, such as the
[2] ones we have been talking about previously. That would
[3] be one point. You are asking me about a loyalty village
[4] there?

[5] **Q:** Yes, I am. I am just intrigued by what you said about a
[6] wide spread. What do you think is missing there?

[7] **MR JUSTICE LADDIE:** This is a hamlet with two members; is
[8] that what you are saying? Dahl Superstores and Super
[9] Valu stores, those are the only two members of the
[10] village so it is only a hamlet?

[11] **A:** Both, it would appear, are grocery supermarkets, so in
[12] that sense it is a very -

[13] **MR HOBBS:** If it was not so small, if it was not a loyalty
[14] hamlet, if it was bigger, it would be a loyalty village,
[15] would it not?

[16] **A:** If it was bigger, but on my first reading of this it is
[17] not, it is just a loyalty scheme being run through one,
[18] or in this case two supermarkets, presumably in
[19] different locations.

[20] **Q:** Is your only caveat over size?

[21] **A:** No, it is really over the breadth of coverage of
[22] different market sectors.

[23] **Q:** Okay. Bear in mind what you have read here. Keep it
[24] open, as a matter of fact. I must ask you then in view
[25] of what you have just said to take out at the same time

Page 83

[1] **Q:** That is it. In there, if you would not mind, could you
[2] locate a page which carries the number 377/A?
[3] (12.30 pm)

[4] Do you have that?

[5] **A:** Yes, I have.

[6] **Q:** Is this a document you have seen before?

[7] **A:** Yes, it is.

[8] **Q:** Is this one of those that was shown to you the other
[9] day, Monday?

[10] **A:** It was.

[11] **Q:** It was shown to you at the same time as the one we were
[12] just looking at?

[13] **A:** That is correct.

[14] **Q:** Do you want to read it to yourself again, or can you
[15] remember it?

[16] **A:** I would not mind a quick perusal. Which part are we
[17] looking at?

[18] **Q:** It is "Supermarkets get smart", and follow it through
[19] into the third column. (Pause)

[20] **A:** Fine.

[21] **Q:** Now, is this an electronic loyalty village?

[22] **A:** I do not think in that sense that it is, no.

[23] **Q:** What is it lacking?

[24] **A:** Pardon? It is being provided through a number of
[25] supermarkets as a one distribution source. It does not

Page 82

[1] volume E2. In volume E2 turn to page 703/A.

[2] **A:** Mmm.

[3] **Q:** It should be Retail Automation May/June, 1991?

[4] **A:** It is.

[5] **Q:** Is this one you looked at the other day?

[6] **A:** I think it is. I looked at a lot but I think so.

[7] **Q:** It has not scorched itself into your recollection. Have
[8] a look at the bit which says "Vision Grows", which takes
[9] you across the page. Have a look at the figures there.

[10] **A:** Yes.

[11] **Q:** No longer a loyalty hamlet?

[12] **A:** We may have to agree to differ again. To me, the people
[13] mentioned here as the opportunities to collect points
[14] are all grocery supermarkets, perhaps with different
[15] names, but they are essentially supermarkets in
[16] different locations in America.

[17] **Q:** I see.

[18] **MR JUSTICE LADDIE:** Just so I understand, when you talk
[19] about a loyalty village, you say loyalty village because
[20] all the different suppliers of different types of
[21] products within the village which may be in substance
[22] non-competing are contributing to the scheme. What you
[23] are saying here is this is monochrome?

[24] **A:** Yes.

[25] **Q:** This is all the same type - instead of having whatever

Page 84

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

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

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

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

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

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

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

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

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

Page 85

[1] in that, number one, it was originated by the
 [2] manufacturers of branded products and not by the
 [3] retailers of those products. Number two, it appears to
 [4] me that it is useful only in the sense that it is put
 [5] out through one merchant sector, that is grocery
 [6] retailing. To my mind, it does not qualify as a loyalty
 [7] village, either in its origin of being devised by
 [8] members of the village or in its implementation as being
 [9] available for collection and redemption between all the
 [10] different market sectors or retailers in a village.

[11] **Q:** You can close up those two files and put them away and
 [12] I will take you to another file. File D, which is the
 [13] one that has your statement in. It is the one you
 [14] looked at first. You have read, I understood you to
 [15] say, the report of Jonathan Reynolds?

[16] **A:** That is correct.

[17] **Q:** Do you know him, by any chance?

[18] **A:** I do.

[19] **Q:** Do you each know one another rather well?

[20] **A:** Not rather well, but we know each other.

[21] **Q:** Through your writings, and so on?

[22] **A:** We have met personally as well.

[23] **Q:** His report is behind tab 4 in this bundle. He mentions
 [24] a number of schemes, and one of them I would like to
 [25] look at. Look for page number 96 at the bottom, on the

Page 87

[1] for these purposes, are they not?

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

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

[12] **A:** Indeed, I had. I had heard of Vision Value because of
 [13] its very use of a Smartcard. As you mentioned before,
 [14] I do not have intimate knowledge of it in that sense.
 [15] Again, there may be a catalogue, and indeed that is
 [16] stated in one of the articles here. Still on the
 [17] village idea, the collection and redemption, it seems to
 [18] me this is merely between a number of different grocery
 [19] supermarkets in different geographical locations.

[20] **Q:** If somebody said that the idea of members of a scheme
 [21] issuing and redeeming, in other words, everybody is an
 [22] issuer and a redeemer, was novel in 1992, would you
 [23] agree with me that it would not be novel having regard,
 [24] amongst other things, to Vision Value?

[25] **A:** I think Vision Value is a very different loyalty scheme

Page 86

[1] stamped numeration. There is a heading on that
 [2] page "Virgin Freeway". Do you see that?

[3] **A:** I do.

[4] **Q:** Is Virgin Freeway known to you?

[5] **A:** It is.

[6] **Q:** Is that a loyalty village?

[7] **A:** I would say in the terms of my definition and our
 [8] understanding that it is not, the reason being that the
 [9] collection of points on the Virgin Freeway are from
 [10] separate sources down the redemption of points, apart
 [11] from the scheme's originator, that is Virgin itself.

[12] **Q:** The rewards are available through the participating
 [13] members, are they not?

[14] **A:** That is not my understanding. I believe that you can
 [15] accumulate points through, for example, flying on Virgin
 [16] Airways or using Virgin holidays. Yes, you can also
 [17] redeem points through those, because they are the
 [18] originators of the scheme. There are other ways of
 [19] accumulating points, for example, through hotel chains,
 [20] rentacars and so on, which, with my understanding, you
 [21] cannot redeem the points there, you redeem the points in
 [22] other activities. Jonathan mentions, in 9.2, the
 [23] rewards include a wide choice of activities, gliding,
 [24] golfing, et cetera, et cetera.

[25] **Q:** All right. Subject to that, a problem on which I may

Page 88

[1] have to get clarification myself, we are looking here,
 [2] are we not, at a loyalty scheme where you have
 [3] co-operating participants working together to promote
 [4] loyalty for their common benefit; yes?

[5] **A:** We certainly have a scheme where participants are
 [6] joining together to offer points which hopefully will
 [7] attract people to use their services. But in that
 [8] sense, it is very much, if I can suggest this, more a
 [9] sales promotion activity than a loyalty scheme, whereby
 [10] one is trying to build relationships with customers.

[11] **Q:** Surely it is a loyalty scheme, is it not?

[12] **A:** In the common usage of the word "loyalty", it would be,
 [13] yes, but I am trying to give my opinion that it would
 [14] be - for example, if we take some of the people issuing
 [15] points here, as Chase Manhattan bank, or Holiday Inn,
 [16] I think that companies such as Holiday Inn, for example,
 [17] are involved in a wide range of schemes we could call
 [18] loyalty schemes.

[19] **Q:** It is an example, you will agree, I think, of retailers
 [20] from different spheres co-operating with one another in
 [21] what is, I think you have agreed, a loyalty scheme?

[22] **A:** Indeed, yes.

[23] **Q:** Right. It is by no means an exception, is it? There
 [24] are plenty of examples, dating back to the late 1980s
 [25] and early 1990s, of retailers coming together for common

Page 89

[1] **Q:** Just one thing you are familiar with, I think you wrote
 [2] an article a long, long time ago. Perhaps it was not so
 [3] long ago. 1987 this was on style cards in Glasgow, do
 [4] you remember?

[5] **A:** I do.

[6] **Q:** That was an example which you found quite striking of
 [7] the time, of one store in Glasgow issuing a card which
 [8] was usable without discrimination in a whole variety of
 [9] stores in Glasgow, was it not?

[10] **A:** Indeed it was.

[11] **Q:** That was an early example in this country of retailers
 [12] coming together, working together for the common
 [13] interest, around and about a consumer benefit in the
 [14] form of a credit card?

[15] **A:** Yes, it was, in fact, a payment card, a credit card that
 [16] one could use in a variety of retailers, not just within
 [17] Glasgow but eventually within the whole of the north of
 [18] England and Scotland. In many ways that is not very
 [19] different than retailers coming together to accept Visa
 [20] or Mastercard. It was an acceptance mark.

[21] **Q:** I suppose I had better put it to you quite starkly:
 [22] there is nothing strange or unusual in suggesting, is
 [23] there, that retailers should come together and work for
 [24] their common benefit?

[25] **A:** Not at all.

Page 91

[1] benefit under a loyalty scheme?

[2] **A:** That is correct also, yes. There are many schemes of
 [3] this nature in the sense of frequent flyer schemes as
 [4] well.

[5] **Q:** There are frequent flyer schemes, there are frequent
 [6] buyer schemes, there are frequent hirer schemes. If
 [7] anything is done with frequency there seems to be a
 [8] scheme for it. Does that rather cynical way of putting
 [9] it tally with your perspective?

[10] **A:** I am smiling because ...

[11] **MR JUSTICE LADDIE:** I think you have to distinguish,
 [12] Mr Hobbs, between frequent buyer schemes, so if you go
 [13] to one shop you get loyalty discounts, and what we are
 [14] talking about here. You have blended two together.

[15] **MR HOBBS:** Thank you, my Lord. My question was within the
 [16] frame of reference of co-operating retailers of whatever
 [17] it is. I mean, you are aware, are you not, that there
 [18] have been frequent flyer schemes where you can gain your
 [19] rewards from other participants in the scheme, not just
 [20] one particular airline; you are aware of that, are you
 [21] not?

[22] **A:** I have to confess that I am not. I am not denying that
 [23] that is not the case. You may be able to point me in
 [24] the right direction there but it is not something I am
 [25] familiar with, as we sit here.

Page 90

[1] **Q:** The commune or kibbutz principle is not in itself a
 [2] revolutionary concept in retailing, is it?

[3] **A:** No. Your other example of a department store would
 [4] verify that by the fact that many department stores used
 [5] to rent out space to concessionaires.

[6] **Q:** Store in store?

[7] **A:** Store in store.

[8] **Q:** Let me take you then behind tab 5 in the same
 [9] bundle that you have open. This is Mr Perkins' report.
 [10] He mentions, on stamped page 136, a shopping centre
 [11] scheme.

[12] **A:** Mmm.

[13] **Q:** Do you recollect reading about the Takashimaya Shopping
 [14] Centre scheme?

[15] **A:** Yes, I do.

[16] **Q:** Was it known to you before you read it in this report?

[17] **A:** Yes, it was.

[18] **Q:** My understanding - correct me if yours differs - is
 [19] that this is one of a number of schemes known as mall
 [20] card schemes.

[21] **A:** (Witness nods)

[22] **Q:** You are agreeing with me, I think?

[23] **A:** I am sorry. There are a number of schemes indeed in the
 [24] UK of mall schemes.

[25] **Q:** When was the earliest one you can think of?

Page 92

[1] A: In the UK?
 [2] Q: No, that you knew of.
 [3] A: That is a very difficult question, if you do not mind me
 [4] saying so.
 [5] Q: Generally. Would I be right in thinking that the idea
 [6] of having mall cards which you could use at all the
 [7] shops in the shopping mall goes back to the early 1990s?
 [8] A: Particularly in an American context, I think that would
 [9] probably be the case.
 [10] Q: The cards, do you know of any examples where they were
 [11] Smartcards as opposed to magnetic stripe cards?
 [12] A: No, I do not, to be honest. That is the case that there
 [13] may be now, with Smart technology moving on, but not in
 [14] that early period of 1990, not that I am aware of.
 [15] Q: The advantages of having the mall card can and
 [16] frequently do include, do they not, rewards for loyalty
 [17] and frequent shopping at that particular shopping mall?
 [18] A: Yes, they do, in the same way that sometimes individual
 [19] retailer cards involve some reward. I am thinking of a
 [20] payment card.
 [21] Q: Okay. One last question, just a couple of last
 [22] questions, how is Mr Donovan known to you, Mr John
 [23] Donovan known to you?
 [24] A: We met for the first time this morning.
 [25] Q: You have never had any connection with him before,

Page 93

[1] (Short adjournment)
 [2] (2.05 pm)
 [3] MR JUSTICE LADDIE: I am sorry to have kept everybody
 [4] waiting.
 [5] MR COX: Professor Worthington, I want to examine with you,
 [6] please, the nature and the structure of the
 [7] relationships, first in a scheme which has either owning
 [8] it or jointly owning it, but certainly controlling it -
 [9] such as Powerpoints - and, second, one in which there
 [10] is a consortium of partners who operate the scheme as a
 [11] consortium.
 [12] The first question I want to ask you is this,
 [13] before we come to look at some documents: in
 [14] recent years, has the field which you have specialised
 [15] in, or one of the areas of that field, come to be known
 [16] as relationship marketing?
 [17] A: It has.
 [18] Q: Why is it called relationship marketing?
 [19] A: It represents a new mindset, really, in which the idea
 [20] is to establish, maintain and build relationships with
 [21] customers.
 [22] Q: Does it amount to a study and an examination of what
 [23] it is that builds that central long-term loyalty
 [24] relationship between the customer and a retailer?
 [25] A: Yes, it does, and I guess it also depends on a supplier

Page 95

[1] except by correspondence?
 [2] A: When you said "known to you" I was thinking personally.
 [3] Only by correspondence.
 [4] Q: You were strangers to one another when you received his
 [5] letters in 1997?
 [6] A: That is correct.
 [7] Q: Would your Lordship just forgive me for a second,
 [8] please? (Pause)
 [9] My Lord, I have no further questions.
 [10] Re-examination by MR COX
 [11] MR COX: My Lord, I am going to ask, since my learned friend
 [12] has cross-examined at some length on documents which the
 [13] witness was not familiar with before he gave his
 [14] answers, for a slightly longer short adjournment than
 [15] normal so that he can refresh his memory and have an
 [16] ample opportunity to look at the GHA Powerpoints
 [17] document, amongst others.
 [18] MR JUSTICE LADDIE: He will be in purdah. So you want me to
 [19] rise now and sit at what time?
 [20] MR COX: 2 o'clock, my Lord.
 [21] MR JUSTICE LADDIE: No objection to that, Mr Hobbs?
 [22] MR HOBBS: No, as long as the witness is in purdah.
 [23] MR COX: He most certainly will be, my Lord.
 [24] MR JUSTICE LADDIE: We will rise now.
 [25] (12.50 pm)

Page 94

[1] of goods and services learning more about those
 [2] customers so as to serve them better.
 [3] Q: So it is about the relationship between customer,
 [4] long-term it is hoped, and retailer?
 [5] A: Yes, retailer in that broad sense of the word "retail".
 [6] Q: Does the concept, which consumers know they are buying
 [7] into when they join one of these schemes, make a
 [8] difference to their perception of the scheme? I want
 [9] you to think about this question quite carefully, so let
 [10] me repeat it for you. The concept which customers know
 [11] they are buying into, the nature of the scheme itself,
 [12] does that make a difference to their perception of the
 [13] scheme, the level of comfort they feel with it, for
 [14] example?
 [15] A: Yes, I think it would. I mean, we as consumers have a
 [16] wide range of choice. We can choose, for example, to
 [17] buy into a scheme such as Argos Premier Points which
 [18] does not involve any exchange of information,
 [19] personalised information, and we can choose that sort of
 [20] scheme if we so wish.
 [21] Q: Yes.
 [22] A: We could also choose another that does involve an
 [23] exchange.
 [24] Q: Let us just look at this a little bit more closely, if
 [25] we can. If I, as a card holder or a card purchaser,

Page 96

[1] direct my mind to these things, the structure of the
 [2] scheme I know I am entering in with, the persons I am
 [3] having the relationship with, is that something
 [4] recognised as being important?
 [5] A: I believe it is.
 [6] Q: In the Shell Smart Scheme, the consortium scheme, who
 [7] are the persons with whom the customer has the
 [8] relationship?
 [9] A: With the members of the consortium.
 [10] Q: In a third party scheme, who are the persons or the
 [11] person with whom the customer would have the direct
 [12] relationship?
 [13] A: With the third party supplier.
 [14] Q: Now, let me just see if we can illustrate that a bit.
 [15] Suppose I lost my card, heaven forbid, and on it were
 [16] accumulated hundreds of points that I had exhausted my
 [17] family, trailing round, looking for a Shell forecourt to
 [18] accumulate them for. Who would I telephone if the card
 [19] was a Powerpoints type card?
 [20] A: I would presume, in that case, you would telephone the
 [21] Powerpoints customer service line.
 [22] Q: Indeed, but if I were - and it is a fact, is it not -
 [23] if I were a Smartcard holder and I lost my card, who
 [24] would I communicate with about that?
 [25] A: The Smartcard customer service line.

Page 97

[1] customer may not know - let us say that he acquired his
 [2] Powerpoint card from Boots, and it has the Boots
 [3] trademark on it -
 [4] A: Mmm.
 [5] Q: - and the paperwork that comes with it says, "If
 [6] you have a problem, phone our service centre". He would
 [7] have no idea that he was phoning Powerpoint. He might
 [8] think that he is phoning Boots. He probably does not
 [9] know and would not care, would he?
 [10] A: The only answer I can give to that is that in most of
 [11] those types of situations, even if Boots, in your
 [12] example, had their brand on the card, there would also
 [13] be the brand of the scheme provider, in this
 [14] hypothetical example Powerpoints. So the card would be
 [15] dual branded at least and therefore it would presumably
 [16] have some sort of telephone helpline on it through which
 [17] you would get to someone who could answer your question.
 [18] MR COX: Of course, there is this, is there not: you are
 [19] aware of the announcements, publicity, campaign that was
 [20] launched by Shell when it first rolled out its
 [21] multi-partner consortium scheme? You were aware at the
 [22] time of its publicity?
 [23] A: Yes, I was.
 [24] Q: One of the features that Shell drew powerful attention
 [25] to, in addressing the consumer as it announced it, was

Page 99

[1] Q: Which is based - do you know where?
 [2] A: I am sorry, I do not.
 [3] MR JUSTICE LADDIE: Sorry, can you just stop? You said in
 [4] the Powerpoint one you would phone the Powerpoint
 [5] customer line. Of course, the customer may not know
 [6] that he is phoning Powerpoint. It depends how it is put
 [7] on the card. The card could say, "Phone our service
 [8] centre at such and such a number". He would not know
 [9] he was phoning Powerpoint at all, would he?
 [10] A: Not necessarily, but you would - yes, not necessarily
 [11] I guess, but you would be looking to - I mean, this is
 [12] all very hypothetical because I do not know if
 [13] Powerpoint ever came to fruition, I do not think it
 [14] did.
 [15] MR COX: It did not, no.
 [16] A: In a scheme such as that, you would want to know
 [17] obviously where you could telephone to find out how many
 [18] points you had on the card that you had lost in this
 [19] example. I think, in that instance, you would - other
 [20] schemes of that nature have a central customer service
 [21] point which is of the scheme run by the third party
 [22] provider.
 [23] Q: Yes.
 [24] MR JUSTICE LADDIE: No, I do not think you have answered the
 [25] question I put to you, Professor. I said that the

Page 98

[1] exactly the fact that the relationship was one of a
 [2] consortium, was it not?
 [3] A: I believe it was.
 [4] (2.15 pm)
 [5] Q: Why would it be that somebody would wish to publicise
 [6] and advertise that they were operating it directly as
 [7] membership partners of a consortium? Would that have a
 [8] difference on the impact it made on the consumer?
 [9] A: I did not follow the question, I am sorry, when you
 [10] said -
 [11] Q: Why would it be that somebody would wish to draw that to
 [12] the public's attention?
 [13] A: That it was a consortium-based operation?
 [14] Q: Yes.
 [15] A: My opinion on that would be because that would, in a
 [16] sense, reassure cardholders that their information,
 [17] their data, would be held by that grouping.
 [18] Q: Of course, if you have a third party operator, and
 [19] we are going to go through some of the key and central
 [20] differences in a minute, but, if you have a third party
 [21] operator, he may make available his database to the
 [22] participants but it would not stop him making it
 [23] available to somebody else, would it?
 [24] A: Within the bounds of the Data Protection Act, no.
 [25] Q: No.

Page 100

[1] A: I mean, within the confines of that particular
[2] legislation.

[3] Q: I want to come back, if I can, to this idea because, the
[4] marketing image of a consortium, would you expect it to
[5] be any different from the marketing image of a third
[6] party organised scheme?

[7] MR HOBBS: My Lord, I am afraid I must rise to object.

[8] MR JUSTICE LADDIE: I was wondering when you would.

[9] MR HOBBS: To be perfectly honest, this witness -

[10] MR JUSTICE LADDIE: This is supposed to be a re-examination,
[11] Mr Cox. This sounds to me just like an
[12] examination-in-chief.

[13] MR COX: My Lord, my learned friend has cross-examined on
[14] the reasons why you could not slip a piece of paper
[15] between Powerpoints and Shell Smart and the claimant's
[16] idea. My submission is that re-examination is clearly
[17] permissible when I am addressing the centre and heart of
[18] my learned friend's thrust and attack upon this
[19] evidence.

[20] He has put it to him, and I quote his words, that
[21] "there is no difference of substance", and on another
[22] occasion "no difference at all", between a scheme
[23] operated, such as Powerpoints, by a third party and a
[24] scheme operated as a consortium. I am exploring, for
[25] your Lordship's help and assistance, what the centre of

Page 101

[1] front of you, and particularly tab 3 of that bundle. At
[2] the back, at page 54, you will find a document entitled
[3] "Customer Loyalty Schemes" by a Miss Sue Rayner. Have
[4] you been able to read that?

[5] A: I have read this document in its entirety as - when
[6] it was published by the publishers.

[7] Q: Yes. It is appended, my Lord, to the expert report of
[8] Mr Christian and the witness has seen it, as has,
[9] of course, Mr Hobbs.

[10] If you turn to page 59 of the bundle, it is the
[11] larger number not the smaller, under the title "Building
[12] a Multi-Collection Scheme", do you see the last bullet
[13] on the bottom of page 59:

[14] "Shell has been running various types of loyalty
[15] promotion for the last 20 years, but Shell SMART is the
[16] first one to really bring the Shell organisation into
[17] direct contact with end customers of the retail
[18] business."

[19] Do you see that?

[20] A: I do.

[21] Q: If you turn the page to page 64, the larger number
[22] rather than the smaller, under the title "Communicating
[23] with the customer", do you see the paragraph which
[24] begins:

[25] "This is the first time that Shell has had a

Page 103

[1] the case is for the claimant on that, that there is a
[2] vital and fundamental difference, and in my submission
[3] it arises plainly out of cross-examination.

[4] MR HOBBS: My Lord, quite apart from the leading nature of
[5] many of the questions, as the transcript will show, and
[6] I am seriously concerned -

[7] MR JUSTICE LADDIE: This is not before a jury, Mr Hobbs. Do
[8] not worry about it. If I come to the conclusion that
[9] the questions are too leading, I will just ignore the
[10] answers, so do not worry about that.

[11] MR HOBBS: All right, but I have a more fundamental
[12] objection. The expertise of the witness does not
[13] extend, as I understand it, on anything I have seen or
[14] heard so far, to an ability to give evidence about what
[15] is in the mind of other people. He is not brought here
[16] as an expert in advertising or marketing at all and
[17] there is a fundamental rule, very well-known in criminal
[18] cases as I understand it, that one man is not entitled
[19] to give evidence as to the operation of a healthy human
[20] mind, and I think this re-examination is breaking that
[21] rule.

[22] MR JUSTICE LADDIE: Carry on, Mr Cox.

[23] MR COX: I am very grateful. I shall, of course, take some
[24] care.

[25] Would you turn to the bundle D that you have in

Page 102

[1] direct relationship with the end customer. "They
[2] telephone us!" says Gary Anderton in astonishment.
[3] "We have had to set up a dedicated customer
[4] service ...!"

[5] Then he describes a little anecdote about a
[6] distressed customer who had lost his card with 1500
[7] points:

[8] "I was able to tell him that we would send a
[9] replacement card preloaded with his points. The
[10] customer couldn't believe it; I don't think he believed
[11] that our system could do that. He was so relieved!"

[12] That direct relationship with the consumer, as
[13] you understand third party schemes that we are talking
[14] about, such as Air Miles, which is one of them; is that
[15] right? Would that exist in the same way between
[16] retailer when there was a third party owner and
[17] administrator?

[18] A: Well, no, because the communication and any ingoing or
[19] outgoing communication would be with that third party.

[20] Q: Have a look at page 66 of the document.

[21] Under "Conclusions", you see the paragraph:

[22] "The multi-partner, multi-currency scheme devised
[23] by Shell is unique, and the achievement of co-ordinating
[24] the concepts into a scheme which the customers can
[25] understand and feel comfortable using is almost more

Page 104

[1] impressive than the technical achievement of
 [2] implementing it", which, of course, refers to the
 [3] technology; do you agree with that?
 [4] A: Well, certainly, yes, I would do. The technological
 [5] achievement was considerable in terms of the
 [6] introduction of a Smartcard, but the actual handling of
 [7] the relationships between the members of the consortium
 [8] is difficult enough, as well as, of course, the handling
 [9] of a relationship with the cardholders.

[10] Q: Yes. That is what I want to come on to, please, the
 [11] handling of the relationships between the members of the
 [12] consortium. In a typical third party scheme such as Air
 [13] Miles, or the putative and never-adopted Powerpoints,
 [14] who handles the relationship between the participating
 [15] members?

[16] A: Whichever third party scheme originator is running the
 [17] scheme.

[18] Q: Let us take Air Miles, for example. Who negotiates with
 [19] the members?

[20] A: The participating retailers; it would be Air Miles.

[21] Q: Air Miles. Is there any direct relationship,
 [22] contractual or otherwise, between the members of
 [23] Air Miles?

[24] A: Between the members, no. The relationship, as
 [25] I understand it, is between the retailer and Air Miles.

Page 105

[1] moment ago, the relationships within the consortium,
 [2] mean - well, let me ask you this. If the relationships
 [3] are direct, in other words that each major retailer is
 [4] co-operating and sorting out their problems directly
 [5] with each other -

[6] A: Mmm.

[7] Q: - do you consider that to have any distinguishing
 [8] feature between the relationship they would have in a
 [9] third party scheme?

[10] A: Well, yes, because you have a multiplicity of
 [11] relationships between consortium partners with each
 [12] other. It is a multiplicity of relationships which, in
 [13] a sense, is inherently more complex than a one-to-one
 [14] relationship between, in your example, Air Miles and a
 [15] member of the Air Miles scheme.

[16] Q: Yes. Let me come on to one or two other things, if
 [17] we can. In a third party scheme - let us have a look
 [18] at Powerpoints at file 2.

[19] This idea that we have been dealing with is,
 [20] of course - it is page 857 that I want to deal with
 [21] first with you. We are dealing here with an idea, just
 [22] to recap if we can, of an exclusive consortium of
 [23] non-competing retailers, major high street retailers,
 [24] non-competing in their own fields, issuing and redeeming
 [25] a common currency.

Page 107

[1] Q: Yes. Just have a look, if you would, at volume 10,
 [2] which is, I think, to your side.

[3] A: Volume?

[4] Q: Volume 10. That is section E.

[5] A: Is this file 10?

[6] Q: File 10, yes.

[7] A: Is there a page number?

[8] Q: Page 4555. Do you see that document is a document
 [9] entitled, "Shell UK Limited and John Menzies
 [10] (UK) Limited" -

[11] A: Yes.

[12] Q: - "relating to participation in the Shell Smart
 [13] promotion"?

[14] A: Yes.

[15] Q: If you turn the page, you will see that paragraph 2.1.9
 [16] at 4558, for example, is an agreement between what are
 [17] called participating partners, meaning:

[18] "...retailers and providers of goods and services
 [19] who are participating in the Promotion whether as
 [20] redeemers and/or issuers of Smart Points."

[21] Would there be any need for such a contract and
 [22] such an arrangement directly between the partners in a
 [23] third party scheme such as Air Miles?

[24] A: I do not believe so.

[25] Q: Now, the problems of handling, as you put it just a

Page 106

[1] Let us just focus on the issue of the currency,
 [2] can we?

[3] A: Mmm.

[4] Q: In the consortium model, the arrow immediately to the
 [5] right of the square box, "sells points to", would that
 [6] be present?

[7] A: I do not think so because, in the consortium model,
 [8] surely the consortium would be itself the issuer of the
 [9] points.

[10] Q: Yes. What is happening in this model, it appears, is
 [11] that, as my learned friend put to you, Powerpoints is
 [12] selling its currency to the members, is it not?

[13] A: According to the diagram, yes.

[14] Q: That is what happens in Air Miles, is it not?

[15] A: It is.

[16] Q: As I think we in this country know, the issue of who
 [17] owns a currency can have quite considerable
 [18] significance. Who, if the third party owns the
 [19] currency, fixes its value?

[20] A: In terms of the redemption, that would be the third
 [21] party.

[22] Q: Because the currency can have different values. For
 [23] example, one retailer could issue at one purchase so
 [24] many points; another retailer a slightly different
 [25] value. Is that right?

Page 108

[1] **A:** Indeed it is, depending on the margin, the profit margin
[2] they have to play with.

[3] **MR JUSTICE LADDIE:** Sorry, just a second.

[4] Professor Worthington, how can you say that it is the
[5] third party that sets the value? Does it not depend
[6] upon the relative strength of their bargaining position?

[7] If Greenshield Stamps is desperate to have Harrods
[8] as a customer, to take it as an example, then Harrods
[9] has the negotiating power to say what - it is not
[10] a priori, surely, or is there some special rule of
[11] commerce that applies in this field that does not apply
[12] everywhere else in the world?

[13] **A:** I think, even if Harrods had been a member of
[14] Greenshield Stamps, there was nothing to stop Harrods
[15] issuing Greenshield Stamps according to their own rules,
[16] but the redemption was all done through Greenshield
[17] itself and they set the values of the redemption. If
[18] you wanted to redeem your Greenshield Stamps for a water
[19] carafe, it was X amount of Greenshield Stamps, whether
[20] they were acquired at Harrods or AN Other retailer.
[21] It was the redemption value that is set by the third
[22] party; how many points, stamps, per item.

[23] **Q:** And how many Greenshield Stamps are issued by Harrods
[24] per purchase is up to Harrods?

[25] **A:** Indeed it is.

Page 109

[1] **Q:** The currency.

[2] **A:** - the currency of issuing, having retailers buy the
[3] stamps from them.

[4] **Q:** Right, so they had to buy the stamps?

[5] **A:** Mmm.

[6] **Q:** Much, as is here contained, referred to with the idea of
[7] buying the points?

[8] **A:** That is correct. There is a sale and purchase.

[9] **Q:** Can we look at this. We have examined a number of
[10] points. One is that the members are not in a direct
[11] relationship; there is no need for any contract between
[12] them.

[13] The second is that the marketing image, the
[14] consortium idea itself has a value and apparently was,
[15] as you were aware, presented by Shell as having a
[16] value -

[17] **A:** Mmm.

[18] **Q:** - in achieving a comfort level. The third is that the
[19] currency has to be purchased; do you agree?

[20] **A:** Yes.

[21] **Q:** The fourth is that the value of the currency is, to an
[22] extent, fixed by the third party?

[23] **A:** In its redemption terms.

[24] **Q:** In its redemption terms. The fifth, in relation to the
[25] database and information, though it may be made

Page 111

[1] (2.30 pm)

[2] **MR COX:** Let us just move on a little from that, if we can,
[3] because these are matters of some importance, it may
[4] be. This, I think, follows from what you have said:

[5] there is obviously, and if we look at the Powerpoints
[6] presentation at page 864, there is, in the intervention
[7] of a third party, a cost, is there not? For example, at
[8] the bottom of the page, under "Network Member Benefits",
[9] there is "access to the Powerpoint database", which is
[10] expressed as being pay for access rather than ownership,
[11] "at low cost".

[12] **A:** Mmm.

[13] **Q:** So they would have to buy it?

[14] **A:** That is the inference from this statement, yes.

[15] **Q:** Now, in the same way, when they bought the currency, how
[16] would the third party make their profit?

[17] **A:** From a number of directions one could suppose or
[18] suggest. One would be from charging the participating
[19] companies for the buying the points or stamps off them,
[20] and another one, as is demonstrated here, could be
[21] through charging them to access data.

[22] **Q:** Yes. How did it happen, for example, with Greenshield
[23] Stamps?

[24] **A:** There was no data involved in that case. It was merely
[25] through -

Page 110

[1] available to the participants, the ownership of the
[2] database resides with the third party, does it not?

[3] **A:** That is true.

[4] **Q:** I want to deal with some of the other schemes then.

[5] You had a chance to look at the GHA Powerpoints document
[6] in a little bit more detail, I hope; is that right?

[7] **A:** That is correct.

[8] **Q:** Do you have any further comments that you want to make
[9] about that now that you have had a chance to read it?

[10] **A:** Yes, I do. It was not clear to me - and again going
[11] back to page 857 - where, as I read it initially, the
[12] idea was that there would be various gift catalogues

[13] from each retailer, and yet on the diagram on 857

[14] it would appear that Powerpoints handles the

[15] administration of the system and the catalogues, so that

[16] whereas I imagine previously one could have gone to each

[17] retailer and redeemed your points via the catalogue in

[18] that retail outlet, the circular diagram on 857 seems to

[19] imply that you would have had to have gone to Powerpoint

[20] to redeem the points you collected, or gone through

[21] them, or whatever.

[22] **Q:** Albeit, if you look at 858, each party is seen to have a
[23] different catalogue.

[24] **A:** Indeed, but my reading of 858 initially was that, having
[25] collected points, you could also redeem them at that

Page 112

[1] very retailer, at their outlets, through their
 [2] catalogue.
 [3] Having read the document in full for the first
 [4] time, it is not clear to me whether that actually was
 [5] the case or whether you would have had to have gone to
 [6] Powerpoints to effect the redemption against whatever
 [7] catalogues were available.
 [8] Q: Yes.
 [9] MR JUSTICE LADDIE: It could be worked either way, could it
 [10] not?
 [11] A: It could be worked either way. In that sense, the two
 [12] diagrams we are looking at are somewhat in conflict in
 [13] that they appear to give -
 [14] Q: Or neither is sufficiently specific.
 [15] A: Indeed.
 [16] Q: That is what it comes down to. You could either do it
 [17] centrally or have separate catalogues in each of the
 [18] partners in partnership?
 [19] A: Yes, you could.
 [20] Q: Yes, I see.
 [21] MR COX: Again, what I want to ask you generally, if I may,
 [22] is this. Looking at this scheme now, do you consider
 [23] that there is a difference in substance or principle
 [24] between this Powerpoints proposal and that which is the
 [25] Shell Smart Scheme?

Page 113

[1] Would you look down the page to the second last
 [2] paragraph:
 [3] "The idea is to create ..."
 [4] Do you see that?
 [5] A: Mmm.
 [6] Q: "The idea is to create a brand so powerful that card
 [7] owners will shop exclusively at organisations involved
 [8] in the Smart scheme. In addition to the consortium
 [9] partners, Shell is seeking up to 20 associate partners,
 [10] which will provide and redeem Smart points."
 [11] Do you see that?
 [12] A: I do.
 [13] Q: Again, does that conform to your understanding of the
 [14] intention and evolution of the Shell Smart Scheme?
 [15] A: Yes, it does, in that it was intended to cover a fairly
 [16] high proportion of every person's wallet or purse spend.
 [17] Q: Could you turn now to 4638? The Financial Times of
 [18] 12th March 1997, "Shell launches smart card revolution":
 [19] "Shell yesterday announced a landmark development
 [20] in the use of microchip smart cards with news that a
 [21] consortium of retailers is joining the oil company's
 [22] loyalty scheme."
 [23] Further on:
 [24] "The smart scheme, which could revolutionise
 [25] shopping on the high street, will be launched in

Page 115

[1] A: The difference, I think, is still there in principle in
 [2] terms of who would own the relationships and, having had
 [3] the chance to look through the information over the
 [4] break there, there may be indeed a difference in
 [5] substance in the way that the redemption is fulfilled,
 [6] which is, as we have discussed, still relatively unclear
 [7] in what is merely a proposal.
 [8] Q: Do you consider ownership to be mere bagatelle, or
 [9] something significant?
 [10] A: I personally consider it to be very significant.
 [11] Q: Is it significant not only among the members, the
 [12] partners themselves, but also for the consumer?
 [13] A: I believe that is the key - a key issue: how
 [14] comfortable we feel with other people holding
 [15] information about ourselves.
 [16] Q: Could I ask you to look at one or two other documents.
 [17] If you turn now to file number 10, starting off please
 [18] with page 4688, this is an article from
 [19] The Sunday Times, dated 21st July 1996, dealing with the
 [20] Shell Smart Scheme. It begins with the introduction
 [21] that Shell is seeking up to six partners to invest in a
 [22] Smartcard consortium:
 [23] "The new company, specialising in customer loyalty
 [24] programmes, will operate as independent business and may
 [25] be floated on the market in a few years."

Page 114

[1] Scotland on Friday and rolled out throughout the rest of
 [2] Britain in the autumn. It links high street retailers
 [3] Dixons, Currys, Victoria Wine, Vision Express,
 [4] John Menzies and The Link with Commercial Union,
 [5] the RAC, Hilton Hotels and Shell.
 [6] "Eventually the Smart consortium aims to cover
 [7] 70 per cent of consumers' weekly shopping", and it
 [8] describes certain talks with Sainsburys and Lloyds Bank.
 [9] If you turn towards the end of that article, four
 [10] paragraphs from the end:
 [11] "About 140 loyalty schemes operate in the UK, most
 [12] of which are single company programmes using magnetic
 [13] strips. Supermarkets have been particularly aggressive
 [14] in the use of loyalty schemes to lock in customers in a
 [15] fiercely competitive market. Tesco, Sainsbury and
 [16] Safeway have all linked up with banks or building
 [17] societies to offer loyalty club members financial
 [18] services such as credit and debit facilities, as well as
 [19] product discounts.
 [20] "However, Mr Gary Anderton, manager of Smart, the
 [21] operating company for the brand, claimed the Smart
 [22] loyalty programme broke new ground. 'No one has anything
 [23] like this,' he said. 'We are the first multi-partner
 [24] programme in the world to bring both earning and
 [25] spending of points together into one group of

Page 116

[1] companies?"

[2] Do you see that?

[3] A: I do.

[4] Q: I will not take you to it all, but were you aware of

[5] this publicity when it came out at the time?

[6] A: I was.

[7] Q: As it occurred to you then, did it seem to be something

[8] distinctly different from schemes that were around?

[9] A: In the sense that it involved a consortium of retailers

[10] in separate market sectors. Many of the other previous

[11] schemes in this country had been single company schemes.

[12] Q: Yes. Insofar as the difference is adverted to in the

[13] announcements and words used by Shell, they emphasise,

[14] do they not, the consortium principle?

[15] A: Yes, they do, certainly in the use of "multi-partner

[16] programme".

[17] Q: Bringing together points into one group of companies.

[18] If they had simply been signed up to an Air Miles

[19] principle, a third party operated scheme, could they

[20] have made the claims for newness that they did make?

[21] A: I do not think they could have done because in many ways

[22] it would have been an updating of a Greenshield Stamps

[23] type of situation with a more modern technology.

[24] Q: Yes. Could I just ask you one more thing, which is

[25] based upon something that may feature in other evidence

Page 117

[1] Q: Let us assume that somebody runs a car, has a Shell

[2] garage next door -

[3] A: Mmm.

[4] Q: - has an Esso garage next door but buys all his food

[5] and everything else from British Home Stores.

[6] A: Mmm.

[7] Q: Is this right: in theory, he could spend not a penny at

[8] Esso -

[9] A: Mmm.

[10] Q: - and acquire all the currency from British Home

[11] Stores?

[12] A: That is correct.

[13] Q: In theory, everybody could do that -

[14] A: Mmm.

[15] Q: - so that one member of the consortium ends up selling

[16] nothing, but having to redeem the currency -

[17] A: Mmm.

[18] Q: - which will not make it terribly happy.

[19] A: Indeed.

[20] Q: How is that sorted out?

[21] A: Because, I guess, in both theory and in practice, for

[22] every one person that you have described who shops

[23] entirely at BHS but redeems entirely at Esso, there is

[24] another person who shops entirely at Esso and redeems

[25] entirely at BHS.

Page 119

[1] because, of course, ordinarily your evidence would come

[2] at a different stage, Professor Worthington,

[3] you understand, and -

[4] MR HOBBS: I hope this is not breaking new ground.

[5] MR COX: No, my Lord. I hope not because it is adumbrated

[6] in - may I just have a word with Mr Hobbs, my Lord, to

[7] make sure it is not a question that we ...

[8] I have asked Mr Hobbs; I am denied. I will leave

[9] it at that. Thank you, Professor Worthington.

[10] (2.45 pm)

[11] MR JUSTICE LADDIE: Before you leave, I have three questions

[12] to ask you.

[13] In the Smart consortium, let us concentrate on two

[14] members - not the Smart consortium, but a consortium

[15] like Smart?

[16] A: Mmm.

[17] Q: Assume that two members were Esso and British Home

[18] Stores.

[19] A: Mmm.

[20] Q: You could acquire currency at Esso or British Home

[21] Stores or any other members of the consortium.

[22] A: Mmm.

[23] Q: You could sell, or you could spend the currency in any

[24] member of the consortium; correct?

[25] A: Mmm.

Page 118

[1] Q: So -

[2] A: It averages out.

[3] Q: I see. All right.

[4] MR COX: My Lord, may I -

[5] MR JUSTICE LADDIE: No, just wait, Mr Cox.

[6] MR COX: Forgive me.

[7] MR JUSTICE LADDIE: You said, in answer to a question put by

[8] Mr Cox, who owns the relationship is critical to members

[9] of the public?

[10] A: Mmm.

[11] Q: Is that not dependent on what the public are told,

[12] because they may not know who owns a relationship?

[13] A: And, indeed, many members of the public may not want a

[14] relationship with their suppliers of goods or services.

[15] I understand the question, obviously.

[16] People may not understand - my personal opinion

[17] on this is that many consumers do not understand the

[18] amount of data that is being held on them by companies,

[19] and in that sense they are, yes, unconcerned, but

[20] I think as this information potentially in years to come

[21] is used, I think our levels of concern will rise. That

[22] is my opinion.

[23] Q: There may be people who are unconcerned, but is it not

[24] also true that they may not realise that there is a

[25] difference between the members of the consortium and the

Page 120

[1] person who owns a relationship, depending upon what they
 [2] are told; is that not right?
 [3] **A:** I follow that, yes, indeed.
 [4] **Q:** So you may have something owned by a third party but
 [5] members of the public have no knowledge that it is
 [6] actually separate from the members of the consortium; is
 [7] that not right?
 [8] **A:** Yes, that could be the case. If we take Air Miles,
 [9] there may be some people who would imagine that that is
 [10] owned and operated by the members of the partners who
 [11] subscribe to Air Miles.
 [12] **Q:** Would you look at the very last document that was put to
 [13] you by Mr Cox, page 4638.
 [14] **A:** 4638?
 [15] **Q:** Yes. Can I ask you to look at the penultimate column in
 [16] this article:
 [17] "However, Mr Gary Anderton, manager of Smart, the
 [18] operating company ..."
 [19] **A:** Mmm.
 [20] **Q:** That company could be entirely independent or it could
 [21] have been owned by Shell, one or the other; is that not
 [22] right?
 [23] **A:** Yes.
 [24] **Q:** The perception of the public would be dependent upon
 [25] what they are told.

Page 121

[1] a loyalty scheme and you felt you were a suitable
 [2] provider of goods and services, you would want people to
 [3] know that it was your loyalty scheme.
 [4] **Q:** Yes. Thank you very much. My Lord, that is all.
 [5] **MR JUSTICE LADDIE:** Thank you very much, Professor.
 [6] **A:** Thank you.
 [7] (The witness withdrew)
 [8] **MR COX:** My Lord, Professor Worthington is, of course, heard
 [9] out of the ordinary turn and I am grateful to Mr Hobbs
 [10] for not contesting that because ordinarily I would have
 [11] called him together with other expert evidence.
 [12] **MR JUSTICE LADDIE:** Yes. By the way, of course each witness
 [13] who finishes in the witness box is automatically
 [14] released. You do not need to ask for it.
 [15] **MR COX:** I am very grateful. My Lord, my next witness will
 [16] be Mr Donovan, please.
 [17] JOHN ALFRED DONOVAN (sworn)
 [18] Examination-in-chief by MR COX
 [19] **MR JUSTICE LADDIE:** Please take a seat.
 [20] **THE WITNESS:** Thank you.
 [21] **MR COX:** Mr Donovan, could you take from the carousel to the
 [22] right of you bundle C1, please? In there, at tab 1,
 [23] you should, I think, find a witness statement which is
 [24] signed by you at the end; is that right?
 [25] **A:** That is correct.

Page 123

[1] **A:** Yes, it would, about what is the relationship of Smart
 [2] as an operating company to ... mmm.
 [3] **Q:** Thank you very much. Yes, sorry, Mr Cox.
 [4] **MR COX:** Save only that in this article, of course, they are
 [5] being told - but I think it is a matter of comment
 [6] rather - that it is Shell who have launched the
 [7] revolution and the multi-partner programme.
 [8] Professor Worthington, I should have asked you
 [9] perhaps, and perhaps I need not now, about the - it is
 [10] said by his Lordship that the public would not
 [11] necessarily know. It would, of course, depend on
 [12] whether it is made a feature of the advertising of that
 [13] scheme that it was a consortium; is that right?
 [14] **A:** Again, I keep saying "yes" to everyone, but very often
 [15] people - I would contend that loyalty programme
 [16] providers, be they third party or in-house, particularly
 [17] those who are in-house and coming from the company
 [18] itself, really, if they wish to gain the trust of
 [19] customers, then it is important to let customers know
 [20] from whom this scheme is emanating, and it would be
 [21] almost - not foolish, but it would not be good practice
 [22] perhaps to disguise, if it was your company's scheme, to
 [23] disguise from whence it was coming.
 [24] My theme on this again is relationships and trust
 [25] between consumers and providers, and I think if you had

Page 122

[1] **Q:** I think it is right to say that you have read that
 [2] statement; indeed, I think you prepared it?
 [3] **A:** Correct.
 [4] **Q:** Does your Lordship have it?
 [5] **MR JUSTICE LADDIE:** I did have it. I hope I have not left
 [6] that at home as well.
 [7] **MR COX:** We may be able to provide your Lordship with a
 [8] copy.
 [9] **MR JUSTICE LADDIE:** I know I have certainly read it.
 [10] **MR COX:** My Lord, would it help to have a copy?
 [11] **MR JUSTICE LADDIE:** It was a thin bundle, was it not?
 [12] **MR COX:** I think it is probably a yellow bundle.
 [13] **MR JUSTICE LADDIE:** I am sorry, it is at home.
 [14] **MR COX:** Can I give your Lordship pro tem a copy at least?
 [15] (Handed)
 [16] My apologies. I am sorry that it is not bound,
 [17] my Lord, if you can make do for now.
 [18] **MR JUSTICE LADDIE:** Do not worry. That is very silly of
 [19] me.
 [20] **MR COX:** Do you confirm that the contents of that are true
 [21] to the best of your recollection and knowledge?
 [22] **A:** I do.
 [23] **Q:** Would you wait there, Mr Donovan?
 [24] Cross-examination by MR HOBBS
 [25] **MR HOBBS:** I think my learned friend said just now to you

Page 124

[1] that the statement that we are looking at was prepared
[2] by you; is that correct?

[3] A: It is true.

[4] Q: That is your typewriter, is it not, your own printer,
[5] and you wrote this statement yourself, did you not?

[6] A: No, it is not my own. It was sent by e-mail.

[7] Q: I am not quite following you.

[8] A: It was sent over the Internet by e-mail, so it was not
[9] my printer.

[10] Q: I see. Right. Now, what I would like to begin with,
[11] please, if I can, is a document I would like you to look
[12] at in volume E5. Could you turn in that, please, to a
[13] page which carries the number at the bottom 2375.

[14] A: Yes. I have file 4.

[15] Q: You should have file 5.

[16] A: I cannot find - hold on a sec. Sorry. Two thousand
[17] and?

[18] Q: The page is 2375.

[19] A: Right, I have it.

[20] Q: Do you recognise that document, Mr Donovan?

[21] A: Yes, I do.

[22] Q: This, as we see, is June and July, some time in June
[23] and July 1993; correct?

[24] A: Correct.

[25] Q: This is a transcript of part of a conversation that

Page 125

[1] Q: Right. First of all, may I ask you this. This is
[2] plainly an incomplete transcript. Did you make a tape
[3] recording of the whole of the conversation?

[4] A: No.

[5] Q: When did you decide to switch the tape recorder on?

[6] A: Because I already had it set up because I had been
[7] speaking to Mr Lazenby and, when the gentleman I was
[8] speaking to started making certain comments about him,
[9] I decided to put it on.

[10] Q: Right. For what particular purpose were you contacting
[11] Senior King in June or July of 1993?

[12] A: This was after the Nintendo claim had arisen - or Shell
[13] had launched a Nintendo promotion on, I think, 18th June
[14] 1993.

[15] Q: Am I right in thinking that Senior King had no
[16] involvement whatever in the Nintendo promotion?

[17] A: Correct.

[18] Q: Am I right in thinking that you made contact with this
[19] gentleman from Senior King with a view to finding out
[20] what information you could, from these people, hostile
[21] to Mr Lazenby?

[22] A: No.

[23] (3.00 pm)

[24] Q: Is this an accident then that you decided to switch this
[25] on and have this conversation that we see recorded in

Page 127

[1] you had and that you tape-recorded with a man from
[2] Senior King; correct?

[3] A: Correct.

[4] Q: Although it is indicated in the typescript there that
[5] that is Mike Seymour, in fact it was someone called
[6] Fairhurst, was it not?

[7] A: Correct.

[8] Q: Right. Let us get our frame of reference clear. In the
[9] middle of 1993 you had effectively been more than six
[10] months ended on your business relationship with Shell,
[11] had you not? It was over in 1992?

[12] A: No.

[13] Q: All right.

[14] A: No, no, the business relationship was still going on.
[15] I was regularly phoning Mr Lazenby.

[16] Q: Were you working for Shell at all during 1993?

[17] A: No. I was in regular contact with them.

[18] Q: For what purpose?

[19] A: Pursuing the proposals that I put to them.

[20] Q: But to no avail, I think?

[21] A: I was still waiting to hear from them as to what
[22] they were going to do.

[23] Q: When was the last time that you worked - when I say
[24] "you", I mean you or your company - for Shell?

[25] A: 1991, I would guess.

Page 126

[1] this transcript?

[2] A: No, it was because of the comments that he was making
[3] about Mr Lazenby.

[4] Q: Yes, and how did those comments come to be made in a
[5] conversation with you?

[6] A: The reason for the phone call was because I had put a
[7] Megamatch proposal to Mr Lazenby and got his agreement
[8] to approach Woolworth with it for a joint partnership
[9] promotion, and when I contacted Woolworth they told me
[10] that another agency had been in there with the same
[11] idea.

[12] Q: Which year are you speaking about then?

[13] A: 1992.

[14] Q: How is it that you come to ring Senior King in June
[15] or July of 1993?

[16] A: Well, as far as I was aware, up to that stage I had an
[17] ongoing relationship with Shell, putting up proposals
[18] that they were interested in and that I thought were on
[19] hold with them -

[20] Q: You still thought -

[21] A: - and then when the Nintendo - when I opened the
[22] Daily Mail on 18th June and I saw the Nintendo promotion
[23] in there, then of course I was very interested in the
[24] circumstances and I reflected on what had happened with
[25] Woolworth. I spoke to Mr Paul King, the former National

Page 128

[1] Promotions Manager of Shell, and he gave me the
[2] telephone number for Mr Mike Fairhurst, and I phoned
[3] Mr Fairhurst and asked him about the Woolworth
[4] situation.

[5] Q: You have mentioned Mr Paul King's name and it would be
[6] appropriate, I think, to get the facts straight on that
[7] at this stage.

[8] Mr King had left his employment with Shell at the
[9] end of 1992, had he not?

[10] A: Correct.

[11] Q: Upon leaving his employment with Shell, he in fact wrote
[12] to you or your company and asked you whether you would
[13] employ him; correct?

[14] A: I do not think the letter said that. I think he wanted
[15] advice. He was thinking of starting up his own
[16] consultancy. I would have to read the letter again.

[17] Q: Mr Roberts will help me to find the letter for you, but
[18] my recollection is that he contacted you in writing and
[19] asked whether there would be an employment opportunity,
[20] and you wrote back and said words to the effect that in
[21] the prevailing economic climate the answer would be no,
[22] unfortunately. Do you remember?

A: That may be the case. As I say, I would have to read
the correspondence.

[25] Q: I will take you to it in a second. In fact it is right,

Page 129

[1] Q: You were in communication with Mr King after he had left
[2] Shell; correct?

[3] A: Yes.

[4] Q: Right. Amongst the things that you communicated with
[5] him about, you communicated with him, did you not, on
[6] the subject of the multibrand loyalty game that Shell
[7] was planning during 1991, 1992, 1993, 1994, did you not?

[8] A: No. No, I did, I think, discuss my proposal to Shell
[9] with him at that - I met him twice after he left Shell,
[10] soon after he left Shell: once at his leaving do, and
[11] secondly at a restaurant with another gentleman called
[12] John Chambers, and Mr King was interested in starting up
[13] his own consultancy and he wanted advice from us, and
[14] during that second - the meeting in the restaurant,
[15] I believe that the proposal to Shell was mentioned.

[16] Q: You did, in fact, discuss it with him on that occasion
[17] and on other occasions, did you not, after 1992?

[18] A: I have met with Mr King a number of times over the
[19] years, probably the last time about two years ago, and
[20] he would have been aware of this litigation.

[21] Q: Because you would have made him aware?

[22] A: Yes.

[23] Q: And you would have discussed the subject matter of the
[24] litigation; correct?

[25] A: I mentioned it to him and I thought that he understood

Page 131

[1] is it not, that you kept in contact with Mr Paul King
[2] after he had left Shell?

[3] A: He kept in - well, you could say that, but he actually
[4] contacted - he wrote to me, he telephoned me.

[5] I actually met with him after he left Shell. I went to
[6] his leaving do, if you like, when he left Shell.

[7] Q: It was to him that you turned when you wished to make
[8] contact with Mike Fairhurst of Senior King; correct?

[9] A: I knew that Mr King had appointed Senior King some years
[10] earlier.

[11] Q: And you wanted him, Mr King, to provide you with the
[12] name and the contact number; correct?

[13] A: Correct.

[14] Q: That is right, and that is what led to this conversation
[15] in June or July of 1993?

[16] A: That is correct.

[17] Q: Right. In your relationship with Mr King, and Mr King,
[18] of course, had been an insider at Shell until the end of
[19] 1992, you did, did you not, after he had left Shell,
[20] discuss with him the Smart scheme in its evolutionary
[21] stages? You asked him for information about it, did you
[22] not?

[23] A: Can you rephrase that? Can you say that again?

[24] Q: Yes, I will take it up in small morsels.

[25] A: Right.

Page 130

[1] what I was saying and what we were talking about, but
[2] later on I found out from him that he has no
[3] recollection of his last years at Shell because of
[4] medicine that he was on.

[5] Q: In fact, what you are referring there to is his
[6] illness -

[7] A: Correct.

[8] Q: - during the last two or three years of his employment
[9] at Shell, are you not?

[10] A: Correct. But I did not know about that until after
[11] he had left Shell.

[12] Q: All right. In this portion of transcript that we have
[13] here, do you know the contents without me taking you
[14] through it piece by piece? Can you recollect the nature
[15] of this document?

[16] A: Yes.

[17] Q: Right. Let us try to keep it as simple as we can. You
[18] are asking for information from him and what excites
[19] your interest is that he starts to speak ill of
[20] Mr Andrew Lazenby, and that prompts you to switch the
[21] tape recorder on?

[22] A: Correct.

[23] Q: Right. You had, at this stage, a very strong personal
[24] animosity towards Andrew Lazenby, did you not?

[25] A: Not at that stage, no.

Page 132

[1] Q: At what stage did you acquire your strong personal
[2] animosity towards Mr Andrew Lazenby?

[3] A: After we had sued Shell one, two, three times, and
[4] I still do not have a strong personal animosity towards
[5] him. I am not very happy with what has happened, but it
[6] does not go a lot further than that.

[7] Q: It does not? You really would not then be happy to see
[8] him lose his job? It is not something you would wish to
[9] see happen?

[10] A: That is not within my control, is it, really.

[11] Q: I did not ask you that. Surely you would be as happy as
[12] could be if one of the consequences of this litigation
[13] was that Mr Lazenby lost his job?

[14] A: I do not think that is the case, no.

[15] Q: Why is it that in your campaigning materials you
[16] frequently go on to say, as you have done, that you are
[17] surprised that Shell is still employing Mr Lazenby
[18] notwithstanding its statement of general business
[19] ethics?

[20] A: Well, you have to remember that I am not the sole person
[21] involved in writing those leaflets.

[22] Q: You are one of them?

[23] A: I do not have the ultimate right as to what goes in
[24] there. I can complain about it, but it was in my
[25] father's name and he holds stronger views than I do.

Page 133

[1] A: It was not - it was because he started saying this.
[2] I did not ask him to. He started making comments and
[3] naturally I was interested in view of what had just
[4] happened.

[5] Q: Right. We can see for ourselves what is said here, but
[6] one of the things you have learned at this point in
[7] time, as a result of this conversation, is that they,
[8] that is Senior King, believe they have some claim
[9] themselves in respect of the multibrand loyalty scheme.
[10] Do you remember learning that in this conversation?

[11] A: Yes, it was mentioned.

[12] Q: Right. For example, on 2375, the page we have open,
[13] he is starting to tell you, in that second response that
[14] you have marked "SEY":

[15] "He has turned round all sorts of things that
[16] we've put forward .. and in particular this one ..
[17] I mean I can't say too much about it cause obviously its
[18] (sic) in the hands of the lawyers.

[19] DON: Right."

[20] A: Correct.

[21] Q: You say, "Right", and then just below that:

[22] "SEY: If that comes out I mean we actually
[23] exposed a lot of confidential information we also put a
[24] lot of .. there was a very big document ...", and so on
[25] and so forth.

Page 135

[1] Q: You have written letters and signed them yourself, have
[2] you not?

[3] A: Yes.

[4] Q: In which you make the point, to anyone who will bother
[5] to read the letters, that you are astonished that Shell
[6] continues to employ Mr Lazenby despite its statement of
[7] general business ethics?

[8] A: That is true.

[9] Q: Right. Therefore you would be perfectly happy, indeed
[10] you would be delighted, to see Mr Lazenby by lose his
[11] job, would you not, as a result of this litigation?

[12] A: No, I would not. No.

[13] Q: Really?

[14] A: No.

[15] Q: You were prompted to switch the tape recorder on in this
[16] conversation here and we can see for ourselves what you
[17] said. You exchanged views with Mr Fairhurst, did you
[18] not, on what you both seem to have thought about
[19] Mr Lazenby?

[20] A: Yes.

[21] Q: Do you remember this?

[22] A: Yes, I do.

[23] Q: Your interest was aroused because Mr Fairhurst was
[24] willing, as you perceived it, to say bad things about
[25] Mr Lazenby, and that is what excited your interest; yes?

Page 134

[1] You know what he is talking about there, do you
[2] not? He is talking about Senior King's involvement in
[3] the multibrand loyalty scheme; correct?

[4] A: Senior King's involvement in a loyalty scheme, yes.

[5] Q: Yes, the one which you now know has matured into the
[6] Shell Smart Scheme. That is what he is talking about to
[7] you here?

[8] A: Yes.

[9] Q: You knew, did you not, that Fairhurst, of Senior King,
[10] perceived on behalf of Senior King that they had a claim
[11] in respect of the Shell multibrand loyalty scheme? You
[12] knew that, did you not?

[13] A: No, I did not, no. How would I know that?

[14] Q: He is just telling you here in this conversation, and if
[15] you turn to page 2377 you are, in fact, recommending
[16] specialist counsel to him. Look at 2377.

[17] A: But he did not disclose what the idea was that he was
[18] concerned about. I did not know what the concept was
[19] that he was talking about at all at that stage.

[20] Q: You knew that he was talking about the loyalty scheme?

[21] A: No, I did not, no.

[22] Q: I thought you said a moment or two ago that you did know
[23] that he was talking about the multibrand loyalty scheme?

[24] A: No, I did not know that. No, no -

[25] MR COX: My Lord, I have to say that I did not understand

Page 136

[1] him to say that and I have been listening to the
 [2] answers. Certainly, unless your Lordship has any
 [3] different recollection, there is no such -

[4] **MR JUSTICE LADDIE:** Whether that is what we understood or
 [5] not, I think he has now said he did not intend to.

[6] **MR HOBBS:** All right. This conversation ends on the basis
 [7] that you will get in touch with one another again;
 [8] correct?

[9] **A:** Correct.

[10] **Q:** Did he get in touch with you subsequently?

[11] **A:** I think that he did.

[12] **Q:** In what connection did he get in touch with you?

[13] **A:** About Woolworth.

[14] **Q:** Are you saying that you were at no stage aware that his
 [15] company, Senior King, claimed to have rights in respect
 [16] of the multibrand loyalty scheme that Shell turned out?
 [17] (3.15 pm)

[18] **A:** I did not have a clue about that, other than that he
 [19] thought that Mr Lazenby was turning around ideas that
 [20] his company had put forward. I did not know what those
 [21] ideas were.

[22] **Q:** You did know, did you not, from Mr Paul King that
 [23] Senior King were people who were involved in the work
 [24] that was done in relation to the Shell Multibrand
 [25] Loyalty Scheme?

Page 137

[1] **Q:** That is the letter that you just referred to where you
 [2] sent out to various people a request for expert witness
 [3] opinions?

[4] **A:** That is correct.

[5] **Q:** And this letter is dated 8th November 1994?

[6] **A:** Correct.

[7] **Q:** You are saying that it was only when you received
 [8] information back from Senior King that you became aware
 [9] of Shell's multiparty loyalty scheme; is that correct?

[10] **A:** I did not become aware that it was a multiparty loyalty
 [11] scheme, no. He did mention the Shell Smart Scheme in
 [12] his report.

[13] **Q:** In his report. Okay. Let us look at this document on
 [14] 4298. To how many people did you send this document,
 [15] approximately?

[16] **A:** I would guess at twenty.

[17] **Q:** Twenty?

[18] **A:** Yes.

[19] **Q:** What was the purpose of sending this document out?

[20] **A:** To try to find one or two experts quickly.

[21] **Q:** Right. Was that your only purpose?

[22] **A:** (Pause). It may not have been. It may be that I wanted
 [23] other agencies to know that I was - the circumstances
 [24] that I was in with Shell.

[25] **Q:** You wanted to humiliate Shell by means of a sort of

Page 139

[1] **A:** No.

[2] **Q:** You did not know that?

[3] **A:** No, I did not know. Mr King never give me any
 [4] information about what was happening at Shell, other
 [5] than staff changes and so on.

[6] **Q:** When did you first become aware that Shell was working
 [7] upon a Multibrand Loyalty Scheme?

[8] **A:** (Pause). I first became aware of Senior King's
 [9] connection with a Shell loyalty scheme - I did not know
 [10] at that time that it was a multiparty - when I sent a
 [11] fax out to a number of advertising and promotional
 [12] agencies and said that I was involved in potential
 [13] litigation with Shell and I was looking for expert
 [14] witnesses. I got a response from Mr Steve King of
 [15] Senior King and, when he supplied an expert report, it
 [16] mentioned the smart loyalty scheme in there.

[17] **Q:** Right. -

[18] **A:** But at that stage it still was not - it never mentioned
 [19] it was a multiparty scheme.

[20] **Q:** I shall return to that topic with you. Would you
 [21] therefore, in view of what you have just said, take out
 [22] volume 9B. Keep the volume you already have in front of
 [23] you and take out volume 9B. In that volume would you
 [24] please turn to page 4298.

[25] **A:** I have that.

Page 138

[1] "round robin" letter, did you not?

[2] **A:** I do not think at that time that that was fair, no.
 [3] I do not think it was for that purpose. Later on, yes,
 [4] but not at that stage.

[5] **Q:** How much later on?

[6] **A:** I would have to look at the documents.

[7] **Q:** Look at the penultimate paragraph on that page:

[8] "Given the importance of the issue at stake and
 [9] your agency's reputation and experience, we wonder if,
 [10] for an agreed fee, you would be prepared to provide our
 [11] solicitors with an impartial one-page expert opinion.
 [12] We are also approaching oil company promotion managers
 [13] to obtain opinions from the client perspective."

[14] Do you see that?

[15] **A:** Yes.

[16] **Q:** What was the purpose of that?

[17] **A:** The same thing, but we did not do that. But I had it in
 [18] mind that other petrol companies, petrol station
 [19] promotion managers, would have experience and might be
 [20] prepared and then, when I gave it further thought,
 [21] I decided that it was not right.

[22] **Q:** You are saying you did not do what you said you were
 [23] actually doing in this letter?

[24] **A:** Correct. I did not do that, no.

[25] **Q:** Is that something you often do: write letters saying you

Page 140

[1] are doing something and then not do it?
 [2] **A:** It is not often, but I have done it on other occasions.
 [3] **Q:** Look at the last paragraph:
 [4] "If you are willing to provide your services, we
 [5] would supply a detailed briefing on a confidential basis
 [6] with copies of our proposal to Shell, relevant
 [7] correspondence, tape transcripts, a joint opinion from
 [8] specialist counsel, expert opinions already obtained.
 [9] You would probably find some of this information to be
 [10] invaluable as far as your own business is concerned.
 [11] Please note that, due to a disputed secrecy agreement
 [12] between ourselves and Shell, we cannot give you any
 [13] information until such time as you are formally
 [14] retained. Let me know ASAP if you are interested."
 [15] You wanted to, in fact, take other people into
 [16] your confidence relating to this dispute, did you not?
 [17] **A:** If they were willing to supply expert witnesses, expert
 [18] witness statements or reports, I would have to do that.
 [19] **Q:** Turn to page 4301, a few pages on beyond this document.
 [20] Do you see that memo there?
 [21] **A:** I do.
 [22] **Q:** Do you recognise that document?
 [23] **A:** I do.
 [24] **Q:** Do you remember that conversation?
 [25] **A:** I do.

Page 141

[1] **A:** They were considering that, yes.
 [2] **Q:** Who told you that?
 [3] **A:** Andrew Lazenby. But not a multiparty scheme, just a
 [4] Shell-only Smart Card loyalty scheme.
 [5] **Q:** Right. Let us just turn over again to page 4312 in this
 [6] file. Do you recognise this document?
 [7] **A:** I do.
 [8] **Q:** This is the expert opinion that was provided to you by
 [9] Steven King; correct?
 [10] **A:** That is correct.
 [11] **Q:** And it is the one foreshadowed by the telephone
 [12] conversation in the letter we were just looking at.
 [13] When you received this, if not before, you saw, did you
 [14] not, that he was giving information to you about the
 [15] work that Senior King had done in relation to the
 [16] Multibrand Loyalty Scheme?
 [17] **A:** That is correct.
 [18] **Q:** And this appears from page 4314 and into 4315. If we
 [19] look at 4314, he is dealing, in the fourth
 [20] paragraph, with his company having had firsthand
 [21] experience of working with Shell and Andrew Lazenby?
 [22] **A:** Yes.
 [23] **Q:** All right?
 [24] **A:** Yes.
 [25] **Q:** Then he goes on to explain broadly at a general level

Page 143

[1] **Q:** Here you have Senior King coming back to you. It is
 [2] Mr Steve King of Senior King and you are reporting him
 [3] as making the statement that:
 [4] "There were no problems at all until
 [5] Andrew Lazenby took over as Promotions Manager."
 [6] There is a reference to a visit to France?
 [7] **A:** Yes.
 [8] **Q:** Then there is a reference to David Watson. Then you
 [9] say:
 [10] "Happy to write expert opinion ... no fee
 [11] required! May sue Shell themselves over card scheme."
 [12] Do you see that?
 [13] **A:** Correct.
 [14] **Q:** Are you saying you did not know at that
 [15] stage - November 1994 - that Shell were proposing a
 [16] card scheme which we know -
 [17] **A:** I did know that there was a prospect of a loyalty card
 [18] scheme because Andrew Lazenby had mentioned that to me
 [19] himself.
 [20] **Q:** When do you say that?
 [21] **A:** November 24th 1992, and that it would probably be a
 [22] Shell-only scheme.
 [23] **Q:** You are saying that you were told by Andrew Lazenby in
 [24] November 1992 that they had a proposal to run a card
 [25] scheme?

Page 142

[1] what their involvement was. Then he goes into more
 [2] detail in those numbered paragraphs 1, 2, 3 and 4 at the
 [3] bottom of 4314. Do you see that?
 [4] **A:** I do.
 [5] **Q:** Then at 4 he says:
 [6] "The only available solution was the Smart Card
 [7] which featured a microchip." Right?
 [8] **A:** Correct.
 [9] **Q:** He says:
 [10] "They recommended Shell should move swiftly to a
 [11] pilot scheme to test market Shell Smart."
 [12] He goes on at the top of page 4315:
 [13] "Along with several agencies, we were invited to
 [14] present specific proposals for an electronic loyalty
 [15] scheme. The Shell Smart promotion now launched is
 [16] remarkably similar to our confidential presentation
 [17] called Onyx." Right?
 [18] **A:** Yes.
 [19] **Q:** Then in his very last paragraph:
 [20] "The reader of this opinion should be aware that
 [21] we are considering our position with regard to any
 [22] breach of confidential information or copyright in
 [23] regard to the recent presentation to Shell regarding
 [24] Shell Smart."
 [25] **A:** Correct.

Page 144

[1] Q: The fact of the matter is, is it not, that you knew
 [2] before you received this letter from Senior King that
 [3] Senior King's dispute or potential dispute with Shell
 [4] related the loyalty card scheme, did you not?
 [5] A: I knew that from the telephone conversation I had had
 [6] with him.
 [7] Q: That is the one I showed you in the other volume, is it?
 [8] A: With Mr King, when he took up the invitation to supply
 [9] the expert report.
 [10] Q: I put it to you that in fact in 1993, in the
 [11] conversation I showed you the tape recording of, you
 [12] knew, either then or not long afterwards, that Shell had
 [13] a proposal to bring out a Smart Card Multibrand Loyalty
 [14] Scheme?
 [15] A: No.
 [16] Q: I put it to you that you knew at that stage?
 [17] A: I did not know.
 [18] Q: Right. You did not know?
 [19] A: I definitely did not know.
 [20] Q: If you care to close up bundle 9B and turn to bundle E6,
 [21] please. In bundle E6 would you please turn to
 [22] page 2712. Do you recognise that document?
 [23] A: Yes, I do.
 [24] Q: This is another of your tape recorded conversations.
 [25] This time it is with Mr Watson, David Watson, of Shell

Page 145

[1] Q: You in fact got that information from Senior King, did
 [2] you not?
 [3] A: I first got it through Mr Lazenby.
 [4] Q: You in fact got that information from Senior King, did
 [5] you not?
 [6] A: I got it from Senior King first when I spoke to
 [7] Mr Steve King when he responded to my fax.
 [8] Q: In order to be able to make this statement when you
 [9] did - on 1st November 1993 - you were basing yourself
 [10] on information you had received from Senior King, were
 [11] you not?
 [12] A: No.
 [13] Q: You had had a conversation, had you not - and I have
 [14] shown you the earlier transcript - with Senior King and
 [15] you knew they were in a dispute or potentially in a
 [16] dispute with Shell, did you not?
 [17] A: I knew from Mr Fairhurst that he was making accusations
 [18] that several ideas had been turned around by
 [19] Mr Lazenby. He never, ever mentioned loyalty schemes at
 [20] all. The first I knew about loyalty schemes from
 [21] Senior King was from Mr Steve King when he phoned.
 [22] Q: I put it to you that in fact, not only did you recommend
 [23] them to go to specialist counsel - being the specialist
 [24] counsel that you were using, or proposing to use - but
 [25] that you discussed with them at some stage prior to this

Page 147

[1] and it takes place on Monday, 1st November 1993. Do you
 [2] remember this conversation?
 [3] A: Yes, I do.
 [4] Q: Turn to page 2716. Do you have that?
 [5] A: Yes, I do.
 [6] Q: Look about eight lines from the top. This is you
 [7] speaking -
 [8] A: Yes.
 [9] Q: We have a reference to the NASA Space Centre in Florida
 [10] and Professor Steven Ward King, a chap whose name you
 [11] know:
 [12] "I got approval from both of them to put a
 [13] proposal up to you but of course it was thwarted by what
 [14] has happened here. It is probably too late in any
 [15] event. But I understood that you are going to run this
 [16] new scheme with the Smart Cards fairly early next year,
 [17] in any event. So that really we would be out of the
 [18] running, would we not, for any promotion of games?"
 [19] Do you see that?
 [20] A: Yes.
 [21] Q: You knew, did you not, they were proposing, and it was
 [22] their proposal at that stage, to bring out a Smart Card
 [23] scheme next year? You knew that, did you not?
 [24] A: I knew that, yes, because Mr Lazenby had told me that,
 [25] or he thought it likely.

Page 146

[1] telephone conversation the nature of their dispute with
 [2] Shell, or their prospective dispute with Shell?
 [3] A: The first time I became aware of the loyalty scheme - a
 [4] Shell loyalty scheme from Senior King was in that
 [5] telephone conversation with Mr Steve King.
 [6] Q: What do you say the source of this information was here
 [7] on page 2716?
 [8] A: The gentleman sitting in front of
 [9] you: Mr Andrew Lazenby.
 [10] Q: He told you, did he, that they were going to run the
 [11] scheme out in 1994? He told you that, did he?
 [12] A: I cannot remember his exact words, but I was left with
 [13] the impression that Shell were about to make a
 [14] fundamental decision on their long-term plans. It would
 [15] probably be a stand-alone Shell loyalty scheme. So it
 [16] was no surprise when Senior King mentioned that to me.
 [17] (3.30 pm)
 [18] Or when Mr Watson mentioned it in that telephone
 [19] conversation.
 [20] Q: What do you mean "when Mr Watson mentioned it"?
 [21] A: When it was raised in the telephone conversation with
 [22] Mr Watson that you have just been referring to.
 [23] Q: But it was not just raised: you raised it. You
 [24] mentioned it.
 [25] A: When I mentioned it.

Page 148

[1] Q: I ask you again: what do you say the source of your
[2] information was?
[3] A: The same answer as I have given twice before:
[4] Mr Andrew Lazenby, who is sitting in front of you.
[5] Q: You say he told you that in, what, 1992?
[6] A: 24th November 1992. Which was the last meeting I had
[7] with him.
[8] Q: Right. This is not true, is it, Mr Donovan?
[9] A: It is true.
[10] Q: In fact you had had conversations during 1993 with
[11] Senior King and you had had conversations with
[12] Mr Paul King, had you not? And, from either or both of
[13] those sources, you learned what Shell's intentions were;
[14] correct?
[15] A: The only information there is about that is what you
[16] have seen. Mr Paul King never gave me any information
[17] about inside matters at Shell. He is a man of the
[18] highest integrity.
[19] Q: What did you talk about then, when you discussed this
[20] Multibrand Loyalty Scheme with him? What did you talk
[21] about with him?
[22] A: I only mentioned to him that litigation was likely.
[23] Q: When did you mention that to him?
[24] A: I would guess probably early in 1997.
[25] Q: Are you saying that you did not discuss with him at any

Page 149

[1] to your multibrand loyalty proposal?
[2] A: Correct.
[3] Q: Right. You are here, in this letter
[4] of 19th November 1993, putting down a marker, are you
[5] not?
[6] A: It was a throw-away comment on the end of the letter.
[7] Q: No, it was not, Mr Donovan. This was a clear calculated
[8] statement intending to put down a marker, was it not?
[9] A: But, if that had been the case, I would probably have
[10] gone to a bit more trouble about what I said. I was
[11] concerned because we had put a number of ideas up to
[12] Shell and we had had problems with it and, therefore,
[13] I added that to the end of the letter, which was really
[14] about Make Money.
[15] Q: This is in fact the multibrand proposal in which you
[16] envisaged that Make Money goes into Megamatch mode,
[17] yes? The joint promotion. That is what you are talking
[18] about, right?
[19] A: Yes.
[20] Q: You are talking about here in fact what we know from
[21] other circumstances is Concept Four, are you not?
[22] Whereby the common currency: points, vouchers, tokens
[23] and so forth are collected or awarded at outlets
[24] belonging to the various types of retailer participating
[25] in the activity. Yes?

Page 151

[1] stage between 1992 and 1997 the Multibrand Loyalty
[2] Scheme?
[3] A: Only on the occasions that I have mentioned, which was
[4] when he left Shell.
[5] Q: I am afraid I have to go to another bundle. Would you
[6] take volume E7, please. In that bundle would you please
[7] turn to page 2976. Do you remember this letter?
[8] A: I do.
[9] Q: Can I take you, please, to the third block paragraph:
[10] "Like Andrew Lazenby, you expressed some doubt
[11] over our proprietary claim to the Megamatch concept
[12] involving retailers in different trades participating in
[13] a single promotion with a common promotional currency.
[14] Please note that I am in possession of a multitude of
[15] documents regarding presentations and contact with Shell
[16] over several years which confirm our right of that
[17] concept. These proposals also cover promotional schemes
[18] whereby the common currency: points, vouchers, tokens
[19] et cetera are collected or awarded at outlets belonging
[20] to the various types of retailer participating in the
[21] activity."
[22] Do you see that?
[23] A: I do.
[24] Q: You have said yourself in your witness statement that
[25] this reference in those last four lines is a reference

Page 150

[1] A: Yes.
[2] Q: This is a reference to Concept Four, is it not?
[3] A: Correct.
[4] Q: You are doing this for a reason, are you not?
[5] A: Well, there must have been a reason to put it there.
[6] Q: There must be, must there not?
[7] A: What had happened is Mr Lazenby, in a telephone
[8] conversation with him, had mentioned or claimed that he
[9] could run Make Money and the Megamatch scheme without us
[10] if he wanted to. So I suppose that, in my mind, I was
[11] wondering what else he might do or claim rights to and
[12] so I mentioned that on the tail of the letter.
[13] Q: This in fact follows on, does it not, from that
[14] reference in the last tape recorded conversation
[15] with Watson. What you are doing here is putting down a
[16] marker in relation to a scheme which you anticipate is
[17] going to roll out in 1994; correct?
[18] A: The scheme I anticipated was going to be launched in
[19] 1994 was the Shell-only loyalty card scheme.
[20] Q: You anticipated at the date of this letter that there
[21] would be a Smart Card scheme rolled out by Shell in 1994
[22] which was based on or involved in some way Concept
[23] Four. That is what you thought?
[24] A: No.
[25] Q: You did not?

Page 152

[1] A: No.
 [2] Q: I put it to you that what you are doing here is putting
 [3] down a marker; do you agree?
 [4] A: Yes.
 [5] Q: Right. And I put it to you that you have two big
 [6] problems: the first problem you have is that you know at
 [7] the date of this letter that Senior King is claiming
 [8] rights over it. What do you say to that?
 [9] A: No, I did not know that, no.
 [10] Q: I put it to you, secondly, that you have another
 [11] problem: you do not know the precise format in which the
 [12] scheme is going to roll out at the date of this letter.
 [13] So you want to bide your time to see what the scheme
 [14] looks like when it comes out?
 [15] A: No, I had no idea that Shell were already working on
 [16] such a scheme. I knew they were thinking about a
 [17] Shell-alone scheme. I had no idea they were working on
 [18] a multiparty scheme.
 [19] Q: You were in fact waiting to see what was going to come
 [20] out in 1994 and the purpose of this letter was to
 [21] gingerly state your position without committing yourself
 [22] too far at this stage; correct?
 [23] A: Incorrect. Not true.
 [24] Q: When the Shell Smart Scheme rolled out in 1994, you were
 [25] watching it like a hawk, were you not?

Page 153

[1] Q: And you were aware by then that they were making claims
 [2] over it?
 [3] A: Yes, because that was a month later.
 [4] Q: Right. You yourself, in the letter which I think we
 [5] still have open, had put down a marker in respect of
 [6] that Smart Card Scheme?
 [7] A: No, sir, not that Smart Card Scheme. A Shell-only Smart
 [8] Card Scheme. In fact I am not sure if I knew it was
 [9] Smart Card or not. I knew that Shell were thinking
 [10] about running a loyalty scheme on their own.
 [11] Q: Mr Donovan, you foresaw when you wrote this letter
 [12] of 19th November 1993 that there would be a scheme, a
 [13] Smart Card Scheme, from Shell which you perceived might
 [14] involve Concept Four?
 [15] A: No, I did not know.
 [16] Q: Why did you write then in terms of Concept Four at the
 [17] bottom of that letter of 19th November?
 [18] A: Because it was closely related to Megamatch. It worked
 [19] on the same sort of principle: a Shell-led consortium of
 [20] major retailers using a common currency. And because
 [21] often, when we have talked about Megamatch, it has led
 [22] us to think about the other scheme and it did on this
 [23] occasion. Because I had written down about Megamatch,
 [24] I added that to the end of the letter. I did not have a
 [25] clue what Shell were doing. I did not know -

Page 155

[1] A: No, sir, I was not.
 [2] Q: You were not?
 [3] A: No. I did notice it had been launched and it was
 [4] exactly in the sort of mode I had expected, or
 [5] Mr Lazenby had informed me about. Which seemed to be a
 [6] Shell loyalty scheme.
 [7] Q: What, you really took no particular notice of the
 [8] scheme?
 [9] A: No, because I was totally focused on suing Shell on the
 [10] other ideas.
 [11] Q: When, to the best of your recollection, did the Shell
 [12] Smart Scheme roll out in 1994?
 [13] A: I think it was in October.
 [14] Q: We have already established from the other documents
 [15] that, by the back end of 1994, you know - because you
 [16] have seen a sort of draft expert opinion from
 [17] Senior King - that Senior King have claims that they
 [18] wished to make in relation to that scheme?
 [19] A: Can you say that again? Sorry.
 [20] Q: You were aware, were you not, by the time you received
 [21] back from Senior King that draft expert opinion, that
 [22] they were making claims over the Shell Smart Scheme?
 [23] A: That was in November 1994, was it not?
 [24] Q: Yes.
 [25] A: Yes.

Page 154

[1] Q: I put it to you that you did foresee, based on
 [2] information you received, either from Paul King or
 [3] Senior King or both, what was about to happen in 1994?
 [4] A: I did not know. I only knew - I did not know about the
 [5] multiparty scheme, I only knew about the Shell-alone
 [6] scheme.
 [7] Q: You must have been extremely interested to see what the
 [8] configuration of the Shell Smart Scheme was when it
 [9] rolled out in 1994? You must have been, Mr Donovan?
 [10] A: I was - as I say, I was absolutely focused on the other
 [11] disputes with Shell at that time. There was a lot of
 [12] activity on the other cases and I do remember seeing an
 [13] article about it. But what I read just confirmed what
 [14] I had expected from what Andrew Lazenby had said to me.
 [15] Q: You read many documents, did you not, in your usual
 [16] promotional magazines which you read? You read many
 [17] documents relating to the Shell Smart Scheme?
 [18] A: I do not know. I certainly read one.
 [19] Q: You read more than one in 1994. It was one of the major
 [20] events in the field of promotions in 1994, was it not?
 [21] A: It was a major event, but I certainly read at least one
 [22] article. I cannot remember how many I read. I do not
 [23] think it was a lot of them. I certainly read one.
 [24] Q: In fact you read quite a few journals, because it is one
 [25] good way of keeping up with what is going on in your

Page 156

[1] industry, is it not?

[2] **A:** It is standard practice that my father would read
[3] newspapers et cetera and anything to do with Shell, he
[4] would cut it out and bring it to my attention. The same
[5] with some trade magazines.

[6] **Q:** And you would do the same: you would read the trade
[7] magazines yourself and anything to do with Shell, you
[8] would cut it out, would you not?

[9] **A:** I was so busy with what we were doing on the other
[10] disputes with Shell that I left that to my father. But
[11] he certainly passed at least one article to me about the
[12] Smart Scheme.

[13] **Q:** In fact the true position is that you and your father
[14] were watching it extremely closely and you saw the
[15] write-ups that appeared in relation to it in the
[16] mainstream promotional magazines, did you not?

[17] **A:** As I have said, I did see at least one article. It
[18] could have been more than one but I can only remember
[19] one for definite. I certainly read something that
[20] outlined the scheme and, from what I saw, it was not the
[21] scheme that I put up to Shell.

[22] **Q:** What was it lacking?

[23] **A:** It was not a multiparty scheme. It was not a scheme
[24] where a number of major retailers in the High Street
[25] were all issuing and redeeming a common currency.

Page 157

[1] concerned about those also. I think, by that time,

[2] I had had a letter from Mr Lazenby on Megamatch that
[3] said that he had been talking to a variety of potential
[4] partners direct, which concerned me a great deal.

[5] Because I had put the idea to him in confidence and
[6] I had no idea that he was out contacting other people.

[7] **MR JUSTICE LADDIE:** Mr Hobbs has put to you that, at the
[8] time of writing this letter, you had in mind that a use
[9] of Concept Four might be about to take place and you
[10] were worried about that?

[11] **A:** I understand. No, that was not the case. The letter
[12] was about Make Money first of all, because my suspicions
[13] had been aroused by the number of times that Mr Lazenby
[14] had raised the subject and said that they could run it
[15] without us and, since I had mentioned Megamatch, which
[16] was a similar principle, I added that.

[17] **MR JUSTICE LADDIE:** What you said before was that it was a
[18] sort of throw-away at the end of the letter?

[19] **A:** Yes. If I had seriously thought that they were
[20] producing that concept behind the scenes, I would have
[21] been more specific in what I said in the letter.

[22] I would have said Concept Four in there. I did not
[23] because I did not think - I did not know that was
[24] happening.

[25] **MR JUSTICE LADDIE:** Could you tell me: why did you underline

Page 159

[1] **Q:** When do you say you first realised that that is what the
[2] scheme would become?

[3] **A:** It was in July 1996.

[4] **Q:** You realised that in July 1996?

[5] **A:** Yes. I think it was 21st July there was an article -
[6] I think it was in The Sunday Times Business Section
[7] - that my father drew to my attention.

[8] **Q:** Would you, please, now -

[9] **MR JUSTICE LADDIE:** Just before you do that, are you
[10] finished with this letter, Mr Hobbs?

[11] **MR HOBBS:** Yes.

[12] **MR JUSTICE LADDIE:** So I get all the answers in one place,
[13] Mr Donovan. As I understand it, at the time of this
[14] letter of 19th November 1993 you were in dispute with
[15] Shell?

[16] **A:** On the Nintendo claim.

[17] **MR JUSTICE LADDIE:** What, to put none too fine a point on
[18] it, you thought they had double-crossed you?

[19] **A:** Correct.

[20] **MR JUSTICE LADDIE:** And, by this time, you had come to the
[21] conclusion that Mr Lazenby was not to be trusted?

[22] **A:** I was very concerned about that. Not only on the
[23] Nintendo, but also in telephone conversations he had
[24] mentioned other proposals that I had put to him which
[25] was Make Money and one called Megamatch and I was

Page 158

[1] the word "also"?

[2] **A:** Just to stress that that was the case.

[3] **MR JUSTICE LADDIE:** You were stressing that you had rights
[4] on Concept Four as well?

[5] **A:** Yes.

[6] **MR HOBBS:** I said that I thought I had finished on that
[7] letter. I have one question to ask you on this letter:
[8] can you offer my Lord any explanation as to why, in this
[9] letter, in this context, you did not refer to the fact
[10] that Shell had taken an option on your multibrand
[11] loyalty proposal?

[12] **A:** Because, as I say, the main subjects of the
[13] letter - well, the number one subject was Make Money.
[14] The second subject was Megamatch and that was - because
[15] I was talking about Megamatch, I decided to make a
[16] reference to the other concepts as well.

[17] **Q:** It is your case, as I understand it, having heard it
[18] opened by your counsel, that you are saying that there
[19] was an option in place over the proposal which is being
[20] referred to in those last four lines?

[21] **A:** That is correct, yes.

[22] **Q:** Yes. Can you offer my Lord any explanation as to why
[23] you should refer to the proposal and not go on to
[24] mention the existence of the option that you now say
[25] Shell had in respect of it?

Page 160

[1] A: As I say, it was not a thought out - it was something
 [2] I just put at the tail end of the letter and I never
 [3] gave it a lot of thought. If I had given it any
 [4] thought, I would have spelt out more precisely what
 [5] I was talking about: that it was Concept Four
 [6] et cetera. My main interest was Make Money and
 [7] Megamatch.
 [8] Q: I put it to you that in fact what you are doing here is
 [9] putting down a warning sign to Shell and that the very
 [10] fact that you proposed to warn them off from the use of
 [11] the Concept Four is inconsistent with your position that
 [12] they had an option to use it?
 [13] A: I was only reminding them that the concept belonged to
 [14] Don Marketing, as did Megamatch and Make Money. Or, in
 [15] the case of Make Money, it was a joint rights
 [16] agreement. You have to remember that I was being told
 [17] that, although we had a joint rights agreement on Make
 [18] Money, that that did not count and that Shell could run
 [19] that without me, or without the company.
 [20] Q: You understood what I just put to you, did you not?
 [21] That in fact you are treating this as a letter of
 [22] warning to Shell and that is not consistent with your
 [23] story that there was an option in Shell's favour under
 [24] that proposal?
 [25] A: As I say, it was not the main subject of the letter. It

Page 161

[1] Q: Sales Promotion Magazine?
 [2] A: Sales Promotion Magazine I have read.
 [3] Q: Forecourt News?
 [4] A: Forecourt News for periods of time, yes.
 [5] Q: The Shell Smart Scheme received, on its roll out,
 [6] coverage in all journals of that kind, did it not?
 [7] Because it was an event of importance?
 [8] A: It probably did. As I said earlier, I can certainly
 [9] remember reading at least one article.
 [10] Q: Turn to the second page of this article, which is about
 [11] "Shell Gets Smart" and it is the Smart Scheme. Look at
 [12] 4315/B at the bottom on the left-hand side. It says at
 [13] the bottom of that left-hand column:
 [14] "For the future too Shell is considering extending
 [15] the scheme to third party retailers inviting
 [16] non-competing stores to join in with issuing points or
 [17] Air Miles via the same cards and infrastructure. 'The
 [18] technology is very flexible, so this is quite possible'
 [19] adds Anderton."
 [20] Do you see that?
 [21] A: I do.
 [22] Q: You knew in 1994, did you not, that there was in fact an
 [23] intention to use the Shell Smart Scheme on a consortium
 [24] basis? You knew that?
 [25] A: No, I did not know.

Page 163

[1] was not even the second most important subject. It was
 [2] just a tail end comment, just to remind them that we
 [3] held the rights to that concept, that it belonged to
 [4] Don Marketing.
 [5] Q: We go into 1994. You can close up that file and restore
 [6] it to the carousel.
 [7] (3.45 pm)
 [8] I would like you, please, to take out volume 9B.
 [9] Please turn to page 4315/A.
 [10] A: I have that.
 [11] Q: Do you recognise this document?
 [12] A: No - from the last few days I have seen some cuttings
 [13] from this magazine but I had never heard of that
 [14] magazine before.
 [15] Q: Really? Are you quite sure about that?
 [16] A: Absolutely.
 [17] Q: What magazines have you heard of? In the promotions
 [18] field of course.
 [19] A: Marketing, Marketing Week, Promotions and Incentives,
 [20] Incentive Today.
 [21] Q: Campaign?
 [22] A: Campaign I certainly know of. I have not read it for
 [23] years.
 [24] Q: Precision Marketing?
 [25] A: I know of it. I have never read it.

Page 162

[1] Q: When you learned, as you did, at the back end of 1994,
 [2] through that draft expert opinion, that Senior King were
 [3] in dispute or about to become in dispute with Shell, you
 [4] had discussions with them, did you not?
 [5] A: Yes, I spoke to them over the telephone.
 [6] Q: And you wanted to know more about the nature of the
 [7] dispute that was brewing between them and Shell, did you
 [8] not?
 [9] A: Not to any degree. We did discuss it and I recommended
 [10] the lawyers that we were using.
 [11] Q: The reason you discussed it was because it was in the
 [12] draft expert report they had sent you?
 [13] A: Correct.
 [14] Q: Correct, and what you did was to discuss the ins and
 [15] outs of it with them, did you not?
 [16] A: Not to any degree, because I was focused on what was
 [17] happening with the Nintendo dispute and Make Money,
 [18] which was the reason for contacting them.
 [19] Q: I put it to you that you did in fact discuss this with
 [20] Senior King. It was one of the reasons that brought you
 [21] into contact with them in the first place and you
 [22] discussed the nature of their dispute; correct?
 [23] A: The loyalty scheme was discussed. The multiparty scheme
 [24] was never discussed.
 [25] Q: In that connection, you discussed with them the nature

Page 164

[1] of their work for Shell; correct?
 [2] A: Not to any degree.
 [3] Q: You did discuss the nature of their work for Shell when
 [4] they were providing proposals for Shell?
 [5] A: Not much beyond you can see with the document that he
 [6] provided.
 [7] Q: You did. You discussed the information with Senior King
 [8] people, did you not?
 [9] A: I did.
 [10] Q: Right. In those discussions you learned from them, did
 [11] you not, that the work that they had done had been work
 [12] in connection with a proposed multibrand loyalty card
 [13] scheme? You learned that?
 [14] A: No, definitely not.
 [15] Q: What do you say they told you about their work for
 [16] Shell?
 [17] A: Not very much.
 [18] Q: I did not ask you that. What do you say they actually
 [19] told you?
 [20] A: Not much beyond you can see in the document that they
 [21] supplied.
 [22] Q: How much beyond what I see in that document?
 [23] A: I cannot recall. I was focused on our disputes with
 [24] Shell and the report that he was supplying. The Smart
 [25] Scheme came up in conversation because he had put it in

Page 165

[1] for the letter. Since I had mentioned Megamatch, I went
 [2] on to mention the other scheme.
 [3] Q: Can you close up that file you had open. Can you please
 [4] now take the bundle marked B, core bundle, trial
 [5] bundle B.
 [6] A: I have that.
 [7] Q: Would you, in that bundle, please, turn behind tab 3.
 [8] Do you recognise that document?
 [9] A: Yes, I do.
 [10] Q: This is the document we know in this case as the Funding
 [11] Deed?
 [12] A: Correct.
 [13] Q: This is a document with which you are closely
 [14] familiar, am I right?
 [15] A: Yes, I am.
 [16] Q: Remind yourself, please, of clause 3C on the second
 [17] page of that document at the bottom.
 [18] A: Yes.
 [19] Q: You understand the general tenor of what is said there,
 [20] do you not?
 [21] A: I do.
 [22] Q: It was your understanding at the time, was it not, that
 [23] the funding for the litigation provided by this deed was
 [24] on the basis that all disputes were upfront and in the
 [25] open between yourself and Shell?

Page 167

[1] that report, but it was not discussed at any length. As
 [2] far as I was concerned, it was the scheme I was
 [3] expecting to see and, since he thought that it was based
 [4] on the proposal that he had put to Shell, I recommended
 [5] that he contact Mary Vitoria QC.
 [6] Q: I put it to you that in fact you learned from your
 [7] discussions with Senior King by, at the very latest, the
 [8] end of 1994 what the precise nature of the scheme was?
 [9] A: I did not.
 [10] Q: I put it to you that you made it your business to find
 [11] out precisely what the nature of the scheme was in the
 [12] market place by reading all the relevant journals and
 [13] making whatever enquiries you thought were appropriate?
 [14] A: I had no idea that Shell had been working on the
 [15] multiparty scheme. I was never given any information to
 [16] that effect.
 [17] Q: So it is just a coincidence that you wrote that letter
 [18] in November 1993 to Watson referring to Concept Four?
 [19] A: It was not a coincidence. It was because of what
 [20] Mr Lazenby had said about the Megamatch scheme: that he
 [21] could run it without us. Even when he was aware of the
 [22] long history with that proposal and that it was put to
 [23] him in confidence. He had also been mentioning Make
 [24] Money. I thought that something may have been imminent
 [25] with either of those promotions and that was the reason

Page 166

[1] A: I only went on the wording of this document and that
 [2] I was not aware of any other potential claims other
 [3] than that we had already issued proceedings or had been
 [4] discussed with Mr Lazenby.
 [5] Q: Right. You did not, at this stage, hint or suggest that
 [6] you had any claim against Shell in respect of its Smart
 [7] Card Scheme, did you?
 [8] A: No, because I did not know that I had one.
 [9] Q: What you in fact knew was that Senior King was making a
 [10] claim in respect of the Smart Card Scheme?
 [11] A: I knew that they were thinking of doing that.
 [12] Q: You had had a draft expert report from them at the back
 [13] end of the previous year?
 [14] A: Correct.
 [15] Q: Right.
 [16] (4.00 pm)
 [17] You did not feel able, did you, to unveil your
 [18] claim in those circumstances?
 [19] A: I did not know there was a claim at that time.
 [20] Q: I put it to you that you knew perfectly well what Shell
 [21] was doing with its Smart Card Scheme, but the reason you
 [22] stayed silent was because you knew there was an
 [23] unresolved claim by Senior King over the concepts which
 [24] lie behind that scheme?
 [25] A: At some point I had spoken to Steve King of Senior King

Page 168

[1] and I got the impression from him that he probably would
 [2] not pursue the claim with Shell because he was worried
 [3] about the effect on his other clients and, therefore,
 [4] I did not know what really was happening. I thought
 [5] they probably would not go forward with it.

[6] Q: The truth is that you in fact maintained contact with
 [7] Steve King and you wanted to know what progress, if any,
 [8] he was making with his claim, did you not?

[9] A: No.

[10] Q: In fact you learned eventually that his claim was not
 [11] proceeded with, did you not?

[12] A: As I just said, I got the impression from Mr King that
 [13] they probably would not proceed with it.

[14] Q: Would you please keep the document that we have open in
 [15] bundle B - keep bundle B on one side and would you for
 [16] one moment, please, look at volume E10 first of all.

[17] A: I have that.

[18] Q: Would you please turn to the page stamped 4505 in that
 [19] volume?

[20] A: I have that, yes.

[21] Q: Here is a letter from Senior King dated 5th June 1995 to
 [22] Dr Faye, the Chairman of Shell Oil UK. Do you see that?

A: I do.

Q: The letter says:

[25] "Dear Dr Faye, it is a matter of record that the

Page 169

[1] A: No, I have not.

[2] Q: Really?

[3] A: Absolutely.

[4] Q: Have you made notes of them?

[5] A: No, I have not, no.

[6] Q: Really?

[7] A: No.

[8] Q: Are you sure?

[9] A: Absolutely.

[10] Q: You see, you appear, from all these files here, to have
 [11] a strong proclivity for making contemporaneous notes and
 [12] for making tape recordings when you believe you are
 [13] going to learn useful information. Are you seriously
 [14] saying that you made no notes of any of your
 [15] communications with Senior King?

[16] A: Only the one you have seen and the transcript that you
 [17] have seen. I do not normally tape people's
 [18] conversations. I went out of my way to tape the
 [19] conversations with Mr Lazenby and with Mr Watson because
 [20] of the events. I had the equipment set up when
 [21] Mr Fairhurst called me and, because of things he started
 [22] to say about Mr Lazenby, I turned the machine on. It
 [23] must have been very close to when I had been talking to
 [24] Mr Lazenby.

[25] Q: We have open a letter of 5th June 1995 on 4505. Just

Page 171

[1] initiative strategy and full promotional systems
 [2] recommendation for a major Smart Card promotion came
 [3] from Senior King in 1992, 1993 and 1994 when we worked
 [4] closely with Andrew Lazenby. It is our view, having
 [5] taken professional advice, that it would be helpful to
 [6] all parties to ensure clarity of title and rights to all
 [7] our recommendations in this respect. In the interests
 [8] of avoidance of any future dispute, we are therefore
 [9] willing to transfer all our rights in all our
 [10] recommendations to Shell in this area of activity for a
 [11] single nominal charge of £100,000."

[12] You knew, did you not, from discussions with
 [13] Senior King that they were making this claim?

[14] A: I knew that they were considering making a claim and at
 [15] some stage I was told that he probably would not go
 [16] ahead with it.

[17] Q: It was not an accident that you learned that they were
 [18] not going ahead with it, because in fact you wanted to
 [19] maintain close tabs on the progress of their claim, did
 [20] you not?

[21] A: No, I have not spoken to them regularly. I have never
 [22] met with Mr Steve King. I have spoken to him from time
 [23] to time, probably - maybe two or three times over those
 [24] years.

[25] Q: Have you tape recorded those conversations?

Page 170

[1] turn to the preceding page, 4504. That is an invoice or
 [2] a demand - an application for payment - which was
 [3] enclosed with the letter you have just looked at with me
 [4] on 4505. That contains the statement that:

[5] "During 1992, 1993 and 1994 Senior King carried
 [6] out a series of projects that reviewed forecourt
 [7] promotional strategy and promotional technology ..."

[8] You can see:

[9] "... this included a detailed analysis of Swipe
 [10] Cards, Smart Cards and alternative advanced technology
 [11] code name Cipher. The agency was then requested to
 [12] prepare specific recommendations for the use of advanced
 [13] technology in forecourt promotions by Andrew Lazenby.
 [14] The subsequent presentation and strategy using advanced
 [15] technology Smart Cards included detailed promotion
 [16] mechanics, costings, concept boards, test markets and
 [17] all analysis and technology support, including
 [18] installations and data base management."

[19] Are you saying that you did not know this was the
 [20] nature and contour of Senior King's claim against Shell?

[21] A: I did not know the details. I have never seen these
 [22] documents until they came from Shell's discovery.

[23] Q: It was a matter of great interest to you, was it not, to
 [24] know they had this dispute with Shell?

[25] A: It was a matter of great interest that someone else

Page 172

[1] seemed to be in similar circumstances with the same
 [2] Shell manager and that might be going to sue Shell. We
 [3] thought that that might help us.
 [4] Q: And you wanted to know whether it would help and you
 [5] wanted to know the details, did you not?
 [6] A: I did not have the details beyond what you have seen.
 [7] Q: You wanted to know the details to know whether it would
 [8] be of assistance to you? You made enquiries of
 [9] Senior King, did you not?
 [10] A: The enquiries with Senior King started out as Woolworth.
 [11] Q: Is the answer to my question: yes, you did make
 [12] enquiries of Senior King with a view to ascertaining the
 [13] nature and details of their claim against Shell?
 [14] A: There is very little beyond what you have seen on that
 [15] note.
 [16] Q: How much more beyond what I have seen in that note -
 [17] A: Very little.
 [18] Q: - is there. You keep saying "very little". Give me
 [19] some details of what that "very little" consists of.
 [20] A: I cannot recall. As I have said before, my focus of
 [21] attention at that time was on my disputes with Shell and
 [22] how Senior King, the similar fact evidence, might help
 [23] us. I never discussed the details. I thought it was a
 [24] Shell stand-alone scheme and that it was not the same
 [25] scheme that I had put to Shell.

Page 173

[1] matter?
 [2] A: Yes.
 [3] Q: He - Senior King - presses his claim against Shell UK
 [4] in October. If you would look, please, to the
 [5] penultimate paragraph on 635, he states what his
 [6] position is:
 [7] "Our response to this briefing outside of the
 [8] retainer arrangement was a presentation made in
 [9] October 1991 with detailed proposals for the promotion
 [10] mechanic and software which would optimise the Smart
 [11] Card and Cipher, providing Shell with a flexible
 [12] promotion software package enabling more than one
 [13] promotion to be run."
 [14] All right. You see he is pressing his claim?
 [15] A: Yes.
 [16] Q: If you turn to page 634, 20th November 1995, it is from
 [17] Mr Pirret to Graham Senior of Senior King?
 [18] A: Yes.
 [19] Q: Was Graham Senior the man you spoke to at Senior King?
 [20] A: No.
 [21] Q: You will see from this letter that Mr Pirret declines to
 [22] accept the claim that has been made against Shell and
 [23] his position is in the last paragraph:
 [24] "I must reiterate that Senior King has no
 [25] intellectual right or other interest in the Shell Smart

Page 175

[1] Q: You thought that Senior King could provide you with what
 [2] you have just described as "similar fact evidence", did
 [3] you not?
 [4] A: Correct.
 [5] Q: Therefore you wanted to know what the nature of their
 [6] claim was, did you not?
 [7] A: This was if they went forward with it. But I never got
 [8] into any details of it, because he had put down his
 [9] account in that report and he never mentioned - there
 [10] was no mention of multiparty. I do not think that was
 [11] ever discussed with him at all.
 [12] Q: When do you say you discovered that they were not going
 [13] ahead with their claim against Shell?
 [14] A: I do not know when that was.
 [15] Q: Think hard and try and remember as to when you learned
 [16] that information?
 [17] A: I could take a guess at it. I would guess in 1995.
 [18] Q: Yes. Now, with that guess, would you please turn to
 [19] volume E2. In E2 I would like you, please, to turn to
 [20] page 635. Here is a letter from Senior King to
 [21] Mr Pirret. You know who Mr Pirret is within Shell?
 [22] A: I do.
 [23] Q: This letter is on October 12th 1995 and it is pursuing
 [24] the matters that were raised in that letter we were just
 [25] looking at in the other file. This is pursuing that

Page 174

[1] promotion and that no payment is due or payable by Shell
 [2] in respect of the work carried out by Senior King, nor
 [3] any recommendations made by them in relation to
 [4] Project Onyx."
 [5] It was about this time, was it not, Mr Donovan,
 [6] that you knew that Senior King were not going to go
 [7] forward beyond that?
 [8] A: I do not know exactly what time that was. I think it
 [9] probably was in 1995.
 [10] Q: Right. I think you would agree, looking at these
 [11] letters, would you not, that the most likely timing for
 [12] that was the back end of 1995?
 [13] A: It may well have been.
 [14] Q: Right. The position that we arrive at then is that, by,
 [15] let us say, the back end of 1995 you have reached a
 [16] position where you know that there is a Shell Smart
 [17] Scheme out there in the market place. You know that;
 [18] correct?
 [19] A: I knew from October 1994. Probably I read an article.
 [20] I think they launched the pilot scheme in Scotland, if
 [21] my memory serves me correctly.
 [22] Q: It is the case, is it not, that, by 1995, you were aware
 [23] that they were going to launch it and run it as a
 [24] Multibrand Loyalty Scheme?
 [25] A: Sorry, can you repeat the date?

Page 176

[1] Q: I am saying - I said by 1995. Did you, during 1995,
 [2] know that -
 [3] A: No.
 [4] Q: You say no?
 [5] A: About the multiparty scheme? No, I did not know until
 [6] I read the article in The Times on 21st July 1996.
 [7] Q: So, on your version of events, it is July 1996 that
 [8] changes your whole perspective in relation to the Shell
 [9] Smart Scheme; is that correct?
 [10] A: The Shell Multiparty Scheme, yes.
 [11] Q: That is because, up until that particular point in time,
 [12] you say that you had no knowledge and no expectation
 [13] that it was going to be a multiparty scheme?
 [14] A: Correct.
 [15] Q: You know that I do not agree with you on that and that
 [16] I put the contrary case to you. You know that, do you
 [17] not?
 [18] A: I do.
 [19] Q: Tell me this then: knowing, as you say you did, in
 [20] July 1996 that you had a claim, can you tell my Lord why
 [21] it is that you said nothing about that claim to Shell
 [22] until 1997?
 A: You are saying from September 1996 until March 1997 -
 Q: I believe the date of your article -
 [25] MR JUSTICE LADDIE: I think you just said 21st July.

Page 177

[1] was at a much later date. I believe after - it may
 [2] have been from that article that their name was
 [3] mentioned in it actually. So it would have been
 [4] 21st July 1996 and then I made enquiries. I went to the
 [5] British Library and checked publications et cetera and
 [6] I found out that they had launched a pilot operation in
 [7] mid-July 1995.
 [8] Q: You went to the British Library?
 [9] A: Yes, I did.
 [10] Q: You need a member's ticket, do you not, to get into the
 [11] British Library?
 [12] A: You do not have to have - you just sign up for the day.
 [13] Q: And did you?
 [14] A: I did.
 [15] Q: You were that interested to know what the details were
 [16] that you went to the British Library?
 [17] A: Yes. Because I knew I had signed this Funding Agreement
 [18] with Shell on 6th July 1995 and, therefore, I wanted to
 [19] know - since that article said that John Menzies was
 [20] part of the scheme I wanted to find out more about it.
 [21] Q: What you wanted to know was whether the public
 [22] announcement of John Menzies' involvement postdated that
 [23] Funding Deed, did you not?
 [24] A: Yes. I wanted to find out exactly - well, whatever
 [25] information I could about it. Because John Menzies was

Page 179

[1] A: 21st July, there was a mediation coming up for the Now
 [2] Showing and Nintendo dispute. I think it was in
 [3] September and I asked - I obtained advice about it and
 [4] I was told that I did not have a claim because they had
 [5] not launched the scheme.
 [6] MR HOBBS: I am not following you, and the reason I am not
 [7] following you is because I understood you to have known
 [8] in July 1996 that it was a multibrand/multipartner
 [9] scheme?
 [10] A: Correct, but the article was about the plans to set up a
 [11] consortium. Dr Faye was making presentations to various
 [12] major companies and after that I think a consortium was
 [13] set up called Project Rainbow. But there was no
 [14] scheme. It was all in the planning stage.
 [15] Q: Are you saying that you believed that the very thing
 [16] that you feared was going to happen had happened, but
 [17] that you felt you had no claim to bring forward?
 [18] A: I sought advice on it and I understood that I had no
 [19] claim against Shell. That there would be no - it would
 [20] not be right to commence an action against them or
 [21] approach them about it because they had not actually
 [22] launched the scheme.
 [23] Q: When, to your knowledge, did John Menzies become
 [24] involved in the Shell Smart Scheme?
 [25] A: I now know of course when they became involved, but it

Page 178

[1] mentioned in there.
 [2] Q: At what point in time did you go to the British
 [3] Library? This must have been, on your version of
 [4] events, in 1996?
 [5] A: After that date.
 [6] Q: The reason you went there with that motive in mind was
 [7] to find out whether you could set up a story that your
 [8] knowledge of Menzies' involvement postdated that Funding
 [9] Deed; correct?
 [10] A: No, not correct. I went there to try to find out when
 [11] John Menzies had become involved in the scheme.
 [12] Q: Because, if you found out that it was prior to the date
 [13] of the Funding Deed, your perception of it was that you
 [14] would not be able to raise that claim?
 [15] A: I knew I would have to get legal advice on it. I knew
 [16] it could be a factor.
 [17] (4.15 pm)
 [18] Q: In fact you knew prior to 1996 that there was a
 [19] consortium proposal and you knew that the scheme was
 [20] capable of being run on a consortium basis?
 [21] A: I did not know until 21st July 1996.
 [22] Q: I put it to you that the only thing holding you back
 [23] from making the claim over the scheme that you have now
 [24] subsequently gone on to make was your knowledge that
 [25] Senior King was making a claim over the same concept?

Page 180

[1] A: No. Senior King's claim, if they had have made
 [2] one - and they were talking to Shell soon after
 [3] October 1994. That was when Shell had launch a
 [4] stand-alone scheme, not the multiparty scheme. So their
 [5] claim was in respect of the original scheme.
 [6] Q: Do you still have volume B open in front of you, on your
 [7] bench?
 [8] A: Yes, I do.
 [9] Q: Would you turn behind tab 4, please. Do you recognise
 [10] this document?
 [11] A: Yes, I do.
 [12] Q: Turn behind tab 5 and I will ask you whether you
 [13] recognise that document. The two documents go
 [14] together.
 [15] A: Yes, I do.
 [16] Q: We can agree, can we not, that this letter agreement
 [17] behind tab 4 and this order made by the court, which
 [18] appears behind tab 5, this is the material which
 [19] compromised the litigation and the dispute that you had
 [20] had in two actions. One relating to - well, you can
 [21] tell me.
 [22] A: Now Showing and Nintendo.
 [23] Q: I put to you what in fact the position is is this: you
 [24] bided your time, you waited until you knew that
 [25] Senior King was out of the way, you waited until you had

Page 181

[1] A: 21st July 1996.
 [2] MR JUSTICE LADDIE: That one only talked about plans?
 [3] A: Correct, sir, yes.
 [4] MR HOBBS: Take volume E10, please. In that volume please
 [5] turn to page 4689.
 [6] A: I seem to have the wrong file, sorry, what was the ...
 [7] Q: E10.
 [8] A: Page number?
 [9] Q: 4689.
 [10] A: I have it now.
 [11] Q: Do you recognise that document?
 [12] A: I do.
 [13] Q: This is the thing that you put forward as the source of
 [14] your information. It is The Sunday Times Business
 [15] Section.
 [16] A: That is correct.
 [17] Q: You are referring to the fact that it says in July 1996
 [18] "Shell Plans Smart Card Consortium"?
 [19] A: Correct.
 [20] Q: You are saying that, at some later point in time, you
 [21] went to the British Library and checked out when
 [22] John Menzies became part of that scheme?
 [23] A: That is correct.
 [24] Q: Turn to 4584 in that volume.
 [25] A: Can I say I have just seen - there is where I got it

Page 183

[1] entered into these settlement agreements with Shell;
 [2] yes?
 [3] A: No -
 [4] Q: And then, and only then, did you unveil your claim to
 [5] Shell in relation to -
 [6] A: Senior King was not a factor at all. I had already
 [7] heard that they were not going forward with their claim
 [8] because they were worried about the effects it would
 [9] have on their other clients. As far as I was concerned,
 [10] I was advised that we would not have a claim unless
 [11] Shell was successful in its plans to set up a
 [12] consortium.
 [13] Q: What do you mean "successful in its plans to set up a
 [14] consortium"?
 [15] A: Because, at that time, they were talking of approaching
 [16] potential partners. I did not know what had been
 [17] happening behind the scenes. I only knew what it said
 [18] in that article.
 [19] Q: Would you, please, take volume E10.
 [20] MR JUSTICE LADDIE: Mr Donovan, you said that you saw an
 [21] article -
 [22] A: Yes.
 [23] MR JUSTICE LADDIE: Which you took advice in relation to?
 [24] A: Yes.
 [25] MR JUSTICE LADDIE: What time did you see that article?

Page 182

[1] from in the middle of this second column. It mentions
 [2] John Menzies. It says:
 [3] "The retailer link-up agreed last summer ..."
 [4] So I obviously wanted to find out more about that.
 [5] Q: Have a look, please, in the same volume at 4584. Do you
 [6] have that?
 [7] A: I do.
 [8] Q: Is that Customer Loyalty Today?
 [9] A: It is.
 [10] Q: Is that a journal you recognise?
 [11] A: It is.
 [12] MR JUSTICE LADDIE: 4584?
 [13] MR HOBBS: Customer Loyalty Today. That is a magazine you
 [14] have seen before, is it not?
 [15] A: Yes, I have.
 [16] Q: Do you see the headline there in the July/August 1995
 [17] edition "Menzies Launches Shell Smart into the British
 [18] High Street."
 [19] Do you see that?
 [20] A: Yes.
 [21] Q: Unless you want to read over that material, now, in the
 [22] same bundle, would you turn to 4625A.
 [23] A: I have that.
 [24] Q: Do you see the heading there, from Retail Automation?
 [25] A: I do.

Page 184

[1] Q: September/October 1995 "Menzies goes Smart with Shell".

[2] A: I do.

[3] Q: There was no secret about Menzies' involvement, was there?

[4] A: I have only seen this particular Retail Automation
[5] within the last few days and I did find a couple of
[6] articles in the - or at least one I think - Marketing
[7] Magazine.

[8] Q: I put it to you that in fact you knew perfectly well of
[9] Menzies' involvement more or less about the time it
[10] became public in 1995?

[11] A: I did not know.

[12] Q: I put it to you that you knew and I put it to you that
[13] you in fact bided your time before you moved a muscle
[14] until you knew that Senior King was not pursuing its
[15] claim over the concept and you waited until after there
[16] was the settlement agreement with Shell that we were
[17] just looking at?

[18] A: No, that is not correct.

[19] MR HOBBS: Would your Lordship find that a convenient
[20] moment?

[21] MR JUSTICE LADDIE: Yes. No pressure on you, Mr Hobbs, but
[22] just tell me how much longer you expect to be with this
[23] witness.

[24] MR HOBBS: I will guess half a day. It could be less, but

Page 185

[1] has known for several days exactly the batting order of
[2] the first four witnesses. He has had the opportunity of
[3] preparing his cross-examination. But I have no idea at
[4] all at the moment who I shall be confronting.

[5] MR JUSTICE LADDIE: You just work on the assumption that you
[6] are going to face them all simultaneously on the first
[7] day. If that has caused you enormous inconvenience, as
[8] I have already said, and it is costing your clients a
[9] farthing more and I consider that is unreasonable, it
[10] will be visited in costs.

[11] There we are, Mr Hobbs.

[12] MR HOBBS: It could not be clearer, my Lord.

[13] MR JUSTICE LADDIE: Thank you.

[14] (4.30 pm)

[15] (The court adjourned until 10.30 am
[16] on Thursday, 17th June 1999)

Page 187

[1] I guess half a day.

[2] MR JUSTICE LADDIE: Thank you.

[3] MR COX: May I enter this caveat; I still have not been
[4] given any indication which witnesses will be called.

[5] MR JUSTICE LADDIE: Mr Hobbs is keeping his cards close to
[6] his chest. He knows the possible repercussion in costs,
[7] but he can, at the last minute, choose not to call a
[8] single witness. He may say he has no claim to answer.

[9] It is up to him.

[10] MR COX: That is perfectly true. But, on the assumption -

[11] MR JUSTICE LADDIE: It is not the normal way of progressing,
[12] I understand.

[13] MR COX: On the assumption that the matter reached to his
[14] case, then I must confess that I understood that I would
[15] know.

[16] MR JUSTICE LADDIE: I am sure Mr Hobbs will take your
[17] concerns to heart. If he does not, I will take your
[18] concerns to heart and Mr Hobbs will pay the price. I do
[19] not think I need to say any more about it than that, do
[20] I, Mr Hobbs?

[21] MR HOBBS: Not at all. While my learned friend is on his
[22] feet, can I ask whether it is still intended to call all
[23] the plaintiff's witnesses that I have seen statements
[24] from?

[25] MR COX: I will consider that overnight. My learned friend

Page 186

[1] PROFESSOR WORTHINGTON (sworn)

[2] Examination-in-chief by MR COX 36

[3] Cross-examination by MR HOBBS 38

[4] Re-examination by MR COX 94

[5] JOHN ALFRED DONOVAN (sworn) 123

[6] Examination-in-chief by MR COX 123

[7] Cross-examination by MR HOBBS 124

Page 188

