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DON MARKETING U.K. LIMITED

Plaintiff

- and -

SHELL U.K. LIMITED

Defendant

SHELL U.K. LIMITED
STATEMENT OF CASE

This document is intended to put forward Shell's defence to the claims being brought against it by Don Marketing U.K. Limited, and it and the documents that accompany it are solely for use in the mediation due to take place on the 5th and 6th September 1996.

We have obtained the promotion agency internal telephone directory maintained by the Promotions Department of Shell, which contains telephone numbers for eighty promotions agencies. Those are just promotions agencies which used to make contact with Shell on a regular basis. That in itself is an indication of the extent of promotions being put forward.

The accompanying documents comprise:-

- A. Pleadings in the two actions, now consolidated into one.
- B. Documentation in the Nintendo action.
- C. Documentation in the Now Showing action.
- D. Quantum documentation and general documents.

This document describes in some detail Shell's defences to the claims. The aim of going into the defences in this detail is to limit the amount of time that is required in general sessions in the mediation.

The documentation in the accompanying lever arch is divided into sections. Each document will be referred to in this Statement of Case by a divider number which



is the number of the appropriate divider in the lever arch.

Two actions are being run by Don Marketing U.K. Limited (Don) against Shell U.K. Limited (Shell) in the Chancery Division of the High Court of Justice. They relate to two entirely different disputes, different subject matters, but the same involved parties.

There is a third dispute of which the mediator may become aware. We will deal with this very briefly. Many years ago, Don Marketing U.K. Limited was involved with Shell U.K. Limited in a promotion known as "Make Money".

This was originally a promotion run for Shell in America in 1967 and subsequently re-run for Shell in the early 1980s. Shell proposed to use this promotion again in 1994. Unbeknownst to Shell Personnel handling Make Money 1994, an agreement had been reached between Don and Shell many years ago granting joint proprietary rights to the concept. Proceedings were served on Shell by Don in 1994 and concluded immediately by a payment of £60,000 plus VAT by Shell to Don to purchase the proprietary rights for the concept known as Make Money. Shell recognised that Don had perfect rights to claim sums due in respect of Make Money, and the agreed sum was paid within a matter of days of proceedings being issued.

Shell also recognises and acknowledges the long and successful trading history between the two companies. Don have been involved in a number of successful promotions run by Shell, concluding with a promotion known as Star Trek in 1992. Don's considerable assistance in previous years is formally acknowledged by Shell.

GENERAL INTRODUCTION

Shell has approximately 1700 filling stations within the United Kingdom. In common with other major manufacturers, both in the oil retail sector and other consumer sectors, it is constantly on the lookout for promotional and incentive ideas that will increase profit, and in Shell's case, the throughput of fuel from the pumps at their filling stations.



For this purpose, it maintains, and has maintained for a number of years, what is described as a Promotions Department. In that Department are a number of individuals responsible for developing, co-ordinating and generally organising the promotions run by Shell in the United Kingdom.

As will be shown,⁴ that Promotions Department receives understandably a substantial number of promotions ideas and games/incentive ideas on a weekly basis.

Some ideas are simply unworkable. Some are too expensive. Some, however, are considered attractive and are thus either pursued, or kept on file for future reference. Some come from individuals, the bulk from promotions agencies, unsolicited.

There are two parts to the history of Shell's promotional activity.

For many years, Shell considered and occasionally accepted promotional ideas from a variety of individuals and companies, but Shell readily accepts and admits that the bulk of those promotional activities were proposed by Don. The final promotion rum which involved Don was Star Trek in 1992.

Subsequently, in 1993, as will be seen, Shell was pitched with a worked up proposal by an agency called BDP on behalf of their client, Bandai U.K. Limited (being the holding company for Nintendo). "Nintendo" was subsequently run.

In 1994, Shell invited five agencies to tender and pitch with a variety of promotional ideas, and accepted one of those ideas, Now Showing, put forward by one of the tendering agencies.

Later, Shell retained an agency on a full-time retainer, for them to develop promotional ideas and ran them on Shell's behalf.

In general, promotions policy amongst the major fuel retailers in the United Kingdom has changed quite dramatically in the last three years. The shift has been to long-term loyalty bonus schemes, rather than the short-term quick turnover schemes of the late 1980s and early 1990s. Shell's own current



promotion, which has now been running for several years, and which will run for many years to come, is called Shell Smart. This takes the form of a "credit card", with a built-in computer chip, which records on a visit by visit basis points in proportion to the quantity of fuel purchased, these points subsequently being "traded in" either for prizes or alternatively, converted into air miles. In general therefore, there is not now, nor has there been for several years, the desire to become involved in the sort of promotions that Don was so successful in providing in the 1980s. In fact, Shell has now dispensed with its own retained agency, concentrating its efforts solely on the Smart Card philosophy.

Ideas for promotional activity in the early 1990s were many and varied. Common themes abounded. Films were a very common theme; tie-ups with MGM, with Virgin, Blockbuster, the BBC, with ITV, with video retailers, with specialist children's video producers. Other common tie-ups included ferry companies, food companies, fast food outlets, games manufacturers, Green Shield stamps, gardening activities, National Trust activities, charitable events etc. Some proposals were detailed and well thought out. Other proposals amount to single sheets, handwritten, with ideas which can best be described as fanciful. All of these proposals came in to Shell's Promotion Department on a daily basis; Andrew Lazenby, at one time Shell's Promotion Manager, will say that at the time that he occupied that position into the Promotions Department itself came tens of new promotions per week.

The job of a Promotions Manager, and of his staff in the Promotions Department of a major retailer such as Shell is an arduous one. Not only were they responsible for running all promotions being used by Shell at that appropriate time (some of which would be short-term, some of which would be long-term), but also they had to consider new promotions being put forward, meet with potential promotion partners, and promoter companies, and plan future activities on behalf of Shell. In those days, the majority of promotions were short-term. The year was divided into four separate quartiles, and general policy was for a separate promotion to be run in each quartile. On occasions, more than one promotion would be run in each quartile.



In the circumstances, the Promotions Department was not set up to consider each and every written or presented proposal that was put to it in great detail. Inevitably, some proposals if they were new and inventive would be considered in more detail than ones that had either been run before, or that the Promotions Manager or his staff did not consider would be successful. Inevitably it would mean that promotions agencies presenting a quantity of different proposals at introductory meetings would have some remembered; a quantity would not be.

Two Writs exist. The first issued in the Chancery Division of the High Court of Justice on the 21st April 1994 related to a proposal for a promotional game involving the use of Nintendo video games.

The second, issued on the 30th September 1994 concerned a promotion based on a motion picture theme.

The Writ and Statement of Claim for both actions is included at Divider (1). By Order of the Court, these two actions are now consolidated. There is not as yet a consolidated Statement of Claim.

SYNOPSIS OF DON'S CASE

The evidence will show that Don brings its case on two grounds. Legal grounds and Moral grounds. The legal grounds surround the application of the standard terms and conditions of Don, and the phrase contained within all of the Don Marketing proposal brochures which reads:-

"Don Marketing retain full intellectual and proprietary rights to all promotional concepts, designs and all other relevant information detailed in this proposal document and any accompanying visuals".

Don's case is also run on moral grounds. To use John Donovan's own words, it was "not fair" that, as he contends, a proposal was put to Shell by Don and not used, and Shell subsequently used a proposal with a similar prize presented by a rival agency.



SHELL'S DEFENCE

Shell runs its defence on the grounds of Law and Fact.

It is denied that the Plaintiff's standard terms are applicable, but more important it is not, in Shell's contention, possible to protect as confidential information the concept of using Nintendo video games for a promotional game, or the concept of using a motion based picture theme for a promotional game. Protection of such property is simply not possible at Law. The reality is that such a concept is either too commonplace and/or too trivial to constitute confidential information and thus be capable of protection.

In fact in relation to Nintendo:-

- a) The promotion put forward by Don for Nintendo contained a common-themed prize put forward by a number of other agencies;
- b) The Nintendo promotion run by Shell U.K. Limited was not developed by them;
- c) The Nintendo promotion run by Shell U.K. Limited was developed by BDP, whose client was Bandai U.K. Limited (the holding company for Nintendo), they approached Shell, with a fully worked up proposal (which had previously been developed for BP, but dropped at the last minute) not the other way round;
- d) BDP had Nintendo's authority to approach Shell and run a promotion; Don did not.
- e) The Nintendo game run by Shell ran on a completely different mechanic to that suggested by Don (as admitted by John Donovan).

Now Showing, run by Shell was:-



- 1) As a result of an invitation to five independent agencies to pitch with their top five proposals;
- 2) Chosen from an independent agency, being one of their proposals put forward;
- 3) A very common idea put forward by a number of agencies including a number of agencies who pitched as part of the tender process.



NINTENDO

In the late 1980s/early 1990s the games market of the world was dramatically overturned by what was then considered to be an exciting new concept, Nintendo. Nintendo came in a variety of forms. The most common form that became the ambition of every child and young adult to own was the Nintendo Game Boy. Rival competition also existed from Sega, an alternative manufacturer.

As an idea for promotions, it was what the industry described as a "hot property". Nintendo themselves say in a telephone conversation with John Donovan that they were deluged on a weekly basis by companies desperate for a promotional tie-up with Nintendo.

Nintendo Company policy appears to have been not to allow more than one promotion with their product to be running at any one time. Certainly, they granted Shell an exclusive period of time within which to run the promotional campaign that they put forward to Shell.

By late 1991, promotions involving Nintendo were already being run. At Divider (2) there are two such examples. Smiths Crisps were giving away Nintendo Game Boys as prizes. Cadburys Crunchie were doing the same in late 1992.

Andrew Lazenby of Shell and John Donovan of Don corresponded in April of 1992. A copy of that letter (endorsed with Andrew Lazenby's handwritten comments) is at Divider (3). As a result, on the 12th May a meeting took place. At that meeting, Don put forward two ideas. They were both football related. The ideas brochure is contained at Divider (3).

Very shortly after, Don presented a Nintendo-themed promotion. The promotion material is at Divider (4). It is vague, and provides very little information as to exactly what is proposed, presumably because at the time a detailed worked up proposal had not been considered by Don. It is interesting to note an attempt to copyright the "visuals" page, and the various logos and symbols; it subsequently transpired that no permission had been received from Bandai U.K. Limited to run a game of this nature on Shell's behalf.



Discovery has since proved that a proposal was made by Don Marketing to Bandai U.K. Limited on the 29th May 1992, some six days before the approach to Shell. The copy included in Divider (4) which is the copy supplied to us does not have the visuals page with the attempted copyright attached.

Andrew Lazenby will say that he felt this to be too childish at the time, and thus not of interest. Don persisted with alternative proposals. On the same day, the 4th June 1992 a further proposal was put forward by Don relating to a sports theme, Sporting Superstars. A copy of that proposal is in Divider (5).

Two months later, Don put forward a further proposal, expanding the 4th June 1992 sporting proposal, a copy of which is also in Divider (5). This was a more worked up proposal. A worked up proposal for Nintendo, however, was not put forward.

On the 24th November 1992, Don proposed several further and alternative proposals. They included a vaguely defined movie proposal called the Hollywood Collection, and a further concept called "Make Merry" suggesting a link up with Harrods. This is included in Divider (6).

Evidence therefore, that the Nintendo promotion put forward on the 4th June 1992, in a meeting in which it was not the only proposal put forward, and of the proposals put forward at that meeting it was the proposal that was not worked up into anything more definite. Andrew Lazenby will say that he had absolutely no reason to recall that promotion (even if that is a point in issue) when a subsequent proposal for a Nintendo-themed game was put forward by an alternative agency.

Internally, Shell staff also came up with the Nintendo idea, in fact some considerable period of time before Don. In Divider (7) is an internal mail message dated the 24th February 1992 which reads:

"2. Nintendo Games from Gary Keys."

Keys was a Shell employee.



On the 11th November 1992 Business Development Partnership (BDP) approached Andrew Lazenby, the then Promotions Manager of Shell. A copy of that faxed approach (unfortunately not completely legible) is at Divider (8). It related to Nintendo.

Andrew Lazenby's handwritten comments are endorsed on the front of that.

BDP had a fully worked up proposal. BDP were agents appointed by, and thus presumably employed by, Nintendo. BDP had previously prepared and worked up and developed a full scheme for a rival petrol company, BP. Due to reasons unknown to us, that petrol company decided at the last minute to withdraw from the promotion and BDP were presumably requested by their client, Nintendo, to find an alternative use for the promotion. The worked up proposal addressed initially to Andrew Lazenby of Shell was dated the 27th April 1993. A copy is at Divider (9).

Shell were quite naturally concerned that the previous proposed user for the concept, BP, may have rights over the proposal and questioned BDP on this. A response was received on the 12th May 1993 from BDP which said:

"The original concept, as presented to BP, was developed solely by BDP on behalf of their client, Nintendo".

A copy of that letter is at Divider 10.

It is admitted that a letter was received by fax from John Donovan of Don on the 19th February 1993 addressed to Andrew Lazenby. Mr. Lazenby fully accepts that he wrote on that letter:

"Thanks John, I will be back in touch when we have made any further progress. Cheers, Andrew".

That is what is termed a polite response. It was, as will be shown, Mr. Lazenby's standard method of replying to correspondence. It was not, and was not intended to, nor should have, created any impression in Don's mind that they had any



intention of running this proposal. That letter in addition referred to two matters. Mr. Lazenby will say that it was furthest from his mind to develop the Donovan proposal and in fact, at the time of writing that, Don's proposal was not even in his thoughts.

That letter is at Divider (11).

The development of the proposal as a result of the initial "teaser" campaign in November of 1992 by BDP culminated in approximately April 1993 when BP declined to proceed further. Shell had an opening for a short-term promotion, with a very quick lead-in time; the Nintendo proposal put forward in a worked up form by BDP fitted perfectly.

We have made enquiries with BDP as to who else was included in their teaser campaign on behalf of Nintendo in November 1992. A copy of their list is at Divider (12). In addition, also at Divider (12) is a copy of other Nintendo promotions that they ran on behalf of their client, Nintendo, during the years 1991 and 1992.

The Nintendo BDP proposal (which we do not propose to go into in any detail) was developed extremely quickly. Mr. Lazenby's involvement, however, was merely that as Promotions Manager, not in any detail whatsoever "on the ground". As evidence of this, we attach a random selection of contact reports of meetings held with BDP during the frantic development of the Nintendo game for running by Shell. These evidence in Divider (13) that at no time was Andrew Lazenby involved in these meetings, and thus evidence a complete lack of detailed involvement that he had in the development of the promotion.

Don alleges Shell's involvement in the development of the mechanic of the promotion. In Divider (14) is a contact report between BDP and BP at the time that BP were to run the proposal. As can be seen on page 2, at item 3 proposals for the mechanic are those of BDP, using both a scratch card and an everyone wins element.



In Divider (15) is one of the original Game Boy Shell/BDP cards.

In tabular form, the differences between the BDP proposal and the Don proposal are as follows:

| | <u>BDP</u> | <u>DON MARKETING</u> |
|---------------------|--|--|
| <u>Title/ Theme</u> | GAMEBOY | SUPER MARIO LAND |
| <u>Mechanic:</u> | One scratch-off panel | Multiple scratch-off panels |
| Original: | Simple win/lose under the panel | Scratch off the right ones and you win; ie. everyone <u>could</u> win but not everybody wins - there are losers |
| Actual: | Every leaflet has a winning panel | Collector element: collect 8 leaflets and win |
| <u>Prizes:</u> | Nintendo Posters Gameboy Baseball Caps Gameboy Software Gameboy units | Instant cash prizes - "a share of £250k" PLUS: a separate and very complex method for winning Gameboys |
| <u>Timing:</u> | Based on film "Super Mario Bros" opening in UK 12/7/93 | Based on Nintendo ad campaign Q1 or Q4 1993 |
| <u>Proposal:</u> | Worked up proposal, prepared for Nintendo, for use with another oil company 6 weeks to implement. | Speculative concept 10 weeks to implement |

TO CONCLUDE: Don presented a vague proposal to Shell in June 1992 (along with many other proposals) for Nintendo-themed promotions.



Shell were approached by BDP in May of 1993 to run a worked-up Nintendo game, substantially different to the Don proposal, on behalf of their client Nintendo. Nobody in Shell's Promotions Department could have been expected to remember the proposal put forward by Don.

From Andrew Lazenby's point of view, developing and merely approving a promotion are two totally different things.



NOW SHOWING

Film promotions are common. It is one of, if not the most popular medium of entertainment in the modern world, and an inevitable and natural proposal promotional idea. Almost every agency you talk to has at some time proposed a video-themed promotion.

- A. For example, Media Catalyst proposed cinema tickets on the 15th July 1992.
- B. Jackson Brady proposed a link-up with Twentieth Century Fox and video titles on the 22nd July 1992.
- C. BLP Consultancy proposed video vouchers on the 5th May 1993.
- D. International Marketing and Promotions Limited proposed a video tie-up link at the launch of Jurassic Park on the 21st January 1994.
- E. Promotional Campaigns Limited proposed free videos on the 14th February 1994.

This is just a very small selection of the large number of promotions agencies suggesting a link-up with Shell and movies/videos.

Don Marketing proposed a concept that it named The Hollywood Collection at its promotional meeting with Shell on the 24th November 1992. A copy of that proposal is in Divider 6.

This was not a worked up proposal. It was a suggestion that motorists exchange vouchers for movie-related merchandise, to include a variety of merchandise, including drinking glasses, posters, badges, video rental. It was done on the basis of an instant win game, the suggested partners being either Universal, Warner Brothers, Paramount or Fox.

It was an instant win promotion, based on a scratch card, where a scratched panel was removed to reveal a prize symbol. There was also the option of collecting part of the voucher and redeeming a number of those vouchers for



prizes. This in itself was considered complicated.

The final promotion run by Shell was Now Showing. It was a link-up with MGM Cinemas, Cannon Cinemas, Ritz Video and Blockbuster Video. Offered were cinema ticket vouchers, video rental, T-shirts and baseball caps. Vouchers were distributed with every 12 litres of Shell advanced fuel purchased and you collected a number of vouchers which were subsequently redeemed for cinema tickets etc. There was no scratch off, instant win prize mechanic. A copy of the description leaflet is included at Divider (16).

A copy of the completed collector card showing the stick-on tokens (and showing how dramatically different this is from the Don proposal) is also in Divider (16).

However, by this time, Shell's methods of obtaining link-ups with promotion agencies had changed dramatically.

An invitation to pitch was prepared in January 1994. A copy of the agency briefing that formed that invitation to pitch is included at Divider (17). Each agency that pitched was paid their creative expenses, which although deleted from the example provided, were we understand £2000.

Five agencies were asked to pitch. They were:-

- 1) Option One Limited;
- 2) Tequila Limited;
- 3) Promotional Campaigns Limited;
- 4) Powerhouse Consultancy Limited;
- 5) Brunnings Limited.

The invitation to pitch was despatched on the 2nd February 1994.

Pitch presentations were made between the 10th and 14th February 1994. This was some 15 months after the proposal put forward by Don.

As a result of the response to the pitch, (all of which was done under the terms of a confidentiality agreement to ensure secrecy), a decision was taken to run a



proposal based on a link-up with MGM, and a link-up with Blockbuster.

On the 9th July 1994, an agreement was signed with MGM, brokered by the Agency Tequila U.K. Limited.

On the 18th July 1994 an agreement was signed with Blockbuster, brokered by Option One. The promotion that ran was co-ordinated by Tequila U.K. Limited. It ran from the 11th July 1994 to the 2nd October. For each 12 litres of fuel purchased, customers were given one Now Showing collector token, redeemed in the following way:-

| | | |
|---------------------------------------|---|------------|
| Free MGM/Cannon Cinema Ticket Voucher | - | 32 tokens |
| Free Video Rental (New Releases) | - | 20 tokens |
| "Now Showing" T-shirt | - | 20 tokens |
| Free Video Rental (Non-New Release) | - | 15 tokens |
| "Director" baseball cap | - | 10 tokens. |

This promotion was run as a result of an invitation to pitch sent to five independent agencies, and run as a result of a proposal forwarded by one of those five agencies. It is entirely different from the concept put forward by Don, and was entirely independently prepared and run.

At Divider (18) of the lever arch is an extract from Campaigns Magazine, "Business on the Move", September 1994 disclosed by Don. It shows Tequila U.K. as the agency running the Now Showing for Shell as the result of a five-way pitch. A pitch carried out totally independently.



QUANTUM

It will be appreciated that the defence of Shell is such that it is contended that no monies are due to Don as a result of the allegations in relation to the Nintendo and Now Showing promotions.

If that contention is proven to be incorrect, the question of quantum must be considered. It is not denied that in the past, quantum sums paid to Don have been based on a concept fee, and the subsequent commission paid on the print run. To this was added VAT and any additional expenses.

The last campaign with which Don was involved with Shell was the Star Trek campaign in 1992. Commission on print was paid, as was a concept fee, as were expenses.

That method has ceased. The last promotion run on that basis was the Star Trek promotion.

That method of promotion was costing Shell anything up to £300,000 in fees to the promotions agency.

As a decision of the Shell Board, it was felt appropriate to take back control of the promotions run by Shell, and in particular limit the costs which were being incurred, and were thus greatly increasing the cost of the promotions being run.

For this reason, no commission on print has been paid since the Star Trek promotion.

Matters have been dealt with in three ways. In relation to the Nintendo concept, a fee was paid to BDP, as essentially a concept fee. This was not as great a fee as might have been expected in the circumstances, as it is anticipated that a substantial fee had already been paid to BDP by BP as a concept fee, and therefore a reduced concept fee was paid by Shell.

In relation to Now Showing, the five agencies invited to pitch were paid a fee for their creativity at the time of the pitch, and the successful agency was



subsequently paid a concept fee, plus any expenses incurred for the production of T-shirts, posters etc.

Subsequently, an agency, Option One, became Shell's retained agency and was paid an annual retainer fee by Shell in relation to all the work that they did on Shell's behalf.

Quantum has not been dealt with in any detail in the legal proceedings, because the claim in the Statement of Claim is for "an inquiry as to damages". It is an unliquidated demand, and thus quantum will only become relevant if the legal proceedings were to continue and if the claimant, Don, was successful in obtaining an award for an inquiry as to damages. Until that moment, quantum is in effect irrelevant.

It is, however, relevant to the mediation. If the Nintendo and The Hollywood Collection proposals had been accepted by Shell from Don, it is believed that the most that Don would have been paid is a concept fee of £50,000 plus VAT (subject to negotiation) plus any expenses. They would not have been paid a commission on the print run; that practice is eradicated and has been since the conclusion of the Star Trek promotion.

Mr. Donovan himself had a telephone conversation with Mr. Andrew Lazenby at 9.00 am on Friday, the 18th June 1993. Part of that telephone conversation concerned issues of quantum. The parties had got on to discussing the case of Esso v. Glendenning. Mr. Donovan says:

"...I was eventually called in as an expert witness and the case was settled out of Court for £200,000. Esso paid and their agency paid to Glendenning".

Mr. Lazenby replied:

"OK, so what you are saying is you want £200,000?"

Mr. Donovan replied:



"No, I don't want I specifically said earlier on no I am not looking for £200,000 or anything like it".

Shell's contention, and thus its defence, is that Don is entitled to nothing. Nothing that Shell has run has been based on, or taken from any proposals put forward by Don.

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