

CH 1994 D NO

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

B E T W E E N :

DON MARKETING UK LIMITED

Plaintiff

- and -

SHELL UK LIMITED

Defendant

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STATEMENT OF CLAIM

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Royds Treadwell  
2 Crane Court  
Fleet Street  
London EC4A 2BL

Ref: RMW  
Tel: 071 583 2222

Plaintiff's Solicitors

RMW3/005  
30.09.94

CHANCERY DIVISION

B E T W E E N :



DON MARKETING UK LIMITED

Plaintiff

- and -

SHELL UK LIMITED

Defendant

To the Defendant, Shell UK LIMITED whose registered office is situate at Shell-Mex House, Strand, London, WC2R ODX

This Writ of Summons has been issued against you by the above named Plaintiff in respect of the claim set out overleaf.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office mentioned below the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued from Chancery Chambers of the High Court this 30th day of September 1994 .

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Note:- This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with that date unless renewed by order of the Court.  
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IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

## STATEMENT OF CLAIM

### Introduction

1. The Plaintiff is a company incorporated under the Companies Acts 1948 to 1989 which carries on and at all material times has carried on the business of originating, designing, planning and managing promotional games under the trading style Don Marketing. Prior to 1986 the business was carried on by an associated company, Don Marketing Management Limited ("DMML"), under the same trading style.

2. Since about 1981 the Plaintiff or DMML has originated the following promotional games that is to say:-

- (a) "Make Money " 1981
- (b) "Mastermind" 1984
- (c) "Make Merry" 1984
- (d) "Bruce's Lucky Deal" 1985
- (e) "Star Trek: The Game" 1991

and offered the same to the Defendant for use by the Defendant to promote its products through garages and petrol stations and the Defendant so used the said promotional games and each of them in consideration of a fee known as a "concept fee" and a commission based on the cost of printing the promotional material involved paid by the Defendant to the Plaintiff or its said predecessor in business.

3. In addition, DMML originated the promotional game "Let's Go Racing" in 1985 for which the Defendant paid a concept option fee of £15,000. The option was never taken up.

4. Since about 1991 the Plaintiff have offered promotional games to prospective clients in accordance with its Standard Terms and Conditions. The said Standard Terms and Conditions include the following express terms:-

3. (A) TERMS ON WHICH PROPOSALS ARE SUBMITTED TO PROSPECTIVE CLIENTS. All promotional game concepts and ideas submitted to a company, organisation or individual are submitted in accordance with the terms stated on the proposal and on the understanding that they will be considered in strictest confidence and that no use shall be made of the relevant game concepts or ideas, or any game format variation thereof, nor any disclosure made to any third party, without the express prior consent of Don Marketing [ie the Plaintiff]. Designs, formats and mechanics illustrated on visuals supplied with or without a proposal are proprietary to Don Marketing and are provided as initial examples of possible executions of the basic proposed concepts and ideas.

10. No custom usage or course of dealing at variance

with or contrary to the terms and conditions hereof shall constitute a waiver or estoppel with respect to the terms and conditions hereof, and in any event of any conflict with these terms and conditions and any custom, usage or course of dealing, the terms and conditions hereof shall govern.

13. The promotional game concept and any development of it including all print plates, proofs, negatives, positives and computer software, shall remain the property of Don Marketing unless otherwise agreed in writing.

20. EXCLUSIVE AGREEMENTS, PATENT, TRADE MARKS AND COPYRIGHT - Don Marketing retain all proprietary interest in all promotions devised by them or proposed by them whether verbally or in writing. Don Marketing reserve the rights to offer such promotions or similar promotions to other customers. All Don Marketing games are copyright and may also be protected by exclusive agreements with third parties including football pool companies and/or T V networks.

#### Nintendo themed promotion

5. At a meeting held on or about the 4th June 1992 in the offices of the Defendant at Shell Mex House, Strand, London between one John Donovan, the Managing Director of the Plaintiff, and one Andrew Lazenby, the Defendant's Promotional Manager, the Plaintiff disclosed to the Defendant a proposal for a promotional game involving the use of Nintendo video games.

6. The said proposal was disclosed to the said Andrew Lazenby acting on behalf of the Defendant in strict confidence. Further the said proposal was set out in a document entitled "Proposal for a Nintendo Themed Promotional Game" which was handed to the said Andrew Lazenby by the said John Donovan during the said meeting. The front cover of the said proposal document bore the words "Strictly Confidential" and "Don Marketing retain full intellectual and proprietary rights to all promotional concepts, designs and all other relevant information detailed in this outline proposal document and any accompanying visuals. Proposal file Ref: F81" and "Don Marketing Standard Trading Terms & Conditions are available on Request. c Don Marketing UK Limited 1992". Hereinafter the said proposal is referred to as the "Plaintiff's Nintendo Proposal" and the basic concept disclosed therein as "the Plaintiff's Nintendo Concept."

7. Prior to the said disclosure to the Defendant and on or about the 29th May 1992 the Plaintiff disclosed the Plaintiff's Nintendo Proposal in strict confidence to one David Patton, the Product Manager of Bandai UK Limited, the exclusive sales agents for Nintendo games in the United Kingdom, for the purpose of obtaining his approval and permission to use the Nintendo theme for the proposed game.



8. The Plaintiff's Nintendo Concept comprises a family orientated game of particular appeal to children based on the Nintendo video games which were then and still are extremely popular amongst both children and adults, the game being suitable for forecourt promotion of the Defendant's products. The game proposed was an instant win scratch card game having a Nintendo game, and in particular the Nintendo "Gameboy" video game, as one of the prizes and was based on a scratch card.

9. The Plaintiff's Nintendo Proposal disclosed the Plaintiff's Nintendo Concept together with variations thereof and examples of possible executions of the same.

10. The Plaintiff's Nintendo Proposal and the Plaintiff's Nintendo Concept are each confidential information the property of the Plaintiff.

11. The Plaintiff's Nintendo Proposal was disclosed in confidence to the Defendant for the purpose of enabling the Defendant to decide whether or not it wished to use the Plaintiff's Nintendo Proposal and/or the Plaintiff's Nintendo Concept as part of its future promotional activities and for no other purpose.

12. Further the disclosure of the Plaintiff's Nintendo Proposal by the Plaintiff to the Defendant was governed by the said Plaintiff's Standard Terms and Conditions.

13. By a letter dated 19th February 1993 from the said John Donovan to the said Andrew Lazenby, the Plaintiff reminded the Defendant of the Plaintiff's Nintendo Proposal, drew the Defendant's attention to the enormous and increasing popularity of Nintendo games and suggested that the Defendant give further consideration to the Plaintiff's Nintendo Proposal. The said Andrew Lazenby acknowledged the said letter by writing thereon a note saying "Thanks John, I'll be back in touch when we've made further progress. Cheers, Andrew" and sending the said letter so endorsed back to the Plaintiff on or about the 20th February 1993.

14. The Defendant has not approached or asked the Plaintiff for permission to use the Plaintiff's Nintendo Proposal or the Plaintiff's Nintendo Concept.

15. From a precise date unknown to the Plaintiff but in or about June 1993, the Defendant launched and has thereafter continued to run a Nintendo themed forecourt promotion comprising the issuing of games leaflets to purchasers of its products at garage or petrol station forecourts, each leaflet having a scratch area which on removal reveals that the recipient has obtained a prize, the prize being a Nintendo themed article with the or one of the main prizes being a Nintendo "Gameboy" video game. The promotion was structured such that every leaflet provided a prize. Further the Defendant's promotion has been marketed in such a way as to appeal in particular to children. The Defendant's Nintendo themed promotional game has been advertised in "The Funday

Times" being children's section of "The Sunday Times" newspaper.

16. In Action No. CH1994 D No. 2259 between the Plaintiff and the Defendant, the Plaintiff has alleged that the Defendant's said promotion has made use of the Plaintiff's Nintendo Concept and that by using the Plaintiff's Nintendo Concept in its said promotion the Defendant has misused the Plaintiff's confidential information to the detriment of the Plaintiff and that the Defendant has acted in breach of the Plaintiff's said Standard Term & Conditions and in particular in breach of clauses 3 (A) and 13 thereof.

The Make Money promotion

17. The "Make Money" promotion was first offered to the Defendant in or about June 1981 by DMML and it was agreed between DMML and the Defendant that DMML and the Defendant would jointly own the rights in the concept and promotions deriving from it and that the Defendant and DMML would negotiate terms for the use of the concept according to the scale of each game promotion. The said "Make Money" game involved the use of two detachable half notes of "money" on each game card but did not (as did previous such promotions) involve a skill based format having skill based questions. Further the rules of the promotion were such that it complied with current legislation and was not an illegal lottery. For the above reasons, the said concept was extremely valuable.

18. The "Make Money" promotion devised by DMML for the Defendant was run by DMML on behalf of the Defendant in 1984 and was enormously successful.

19. From a precise date unknown to the Plaintiff but from at least about March 1994 the Defendant began preparations to run a "Make Money" promotion based on the original DMML Make Money promotion without making further payment to the Defendant.

20. On about the 6th April 1994 the Plaintiff issued proceedings against the Defendant in Action No. CH 1994 D No. 1927 claiming:-

(i) a declaration that the Defendant is not entitled without the consent of the Plaintiff to carry out a "Make Money" promotion making use of and/or based upon the Plaintiff's Make Money concept.

(ii) an injunction to restrain the Defendant (whether acting by its directors officers servants or agents or any of them or otherwise howsoever) from acting in breach of a contract made orally and in writing between the Plaintiff and the Defendant and evidenced in writing by a letter from the Defendant to the Plaintiff and dated the 3rd June 1981 and a letter from the Plaintiff to the Defendant dated the 5th June 1981 without the consent of the Plaintiff by carrying out a "Make Money" promotion using and/or based upon the Plaintiff's "Make Money" concept or otherwise.

(iii) an inquiry as to damages for breach of contract, costs and further or other relief.

21. The said proceedings were settled on or about the 18th April 1994 upon the Defendant paying to the Plaintiff a substantial sum in settlement of all causes of action in respect of the "Make Money" concept, and upon the Plaintiff releasing the rights in the "Make Money" concept to the Defendant in perpetuity.

#### The Hollywood Collection Proposal

22. At a meeting held on or about the 24th November 1992 in the offices of the Defendant at Shell Mex House, Strand, London between one John Donovan, the Managing Director of the Plaintiff, one Roger Sotherton, the Plaintiff's Marketing Manager, and one Andrew Lazenby, the Defendant's Promotional Manager, the Plaintiff disclosed to the Defendant a proposal for a promotion based on a motion picture theme.

23. The said proposal was disclosed to the said Andrew Lazenby acting on behalf of the Defendant in strict confidence. Further the said proposal was set out in a document entitled "Promotional Proposals to Shell UK Ltd for 1993 Activity" which was handed to the said Andrew Lazenby by the said John Donovan during the said meeting. The front cover of the said proposal document bore the words "Strictly Confidential" and Don Marketing retain full intellectual and proprietary rights to all promotional concepts, designs and all other relevant information detailed in this outline proposal document and any accompanying visuals. Proposal file Ref: G56" and "Don Marketing Standard Trading Terms & Conditions are available on Request. c Don Marketing UK Limited 1992". The said proposal was detailed under the section headed "Q3 Concept Proposal" with a proposed title of "The Hollywood Collection". Hereinafter the said proposal is referred to as the "Plaintiff's Hollywood Collection Proposal" and the basic concept disclosed therein as "the Plaintiff's Hollywood Collection Concept."

24. A second promotional concept under the proposed name of the "Shell Make Merry Collection" was detailed within the said proposal document in a section entitled "Q4 Concept Proposal".

25. The Plaintiff's Hollywood Collection Concept comprises a promotion of widespread appeal involving motorists collecting vouchers exchangeable for movie related merchandise including free cinema tickets and video rentals together with other merchandise suggested at the said meeting to the said Andrew Lazenby by the said John Donovan and the said Roger Sotherton including "film director" T-shirts and hats. Further, at the said meeting the said John Donovan informed the said Andrew Lazenby that contact had already been made with one Derek Mann, Chairman of the Video Trade Association, whose members included the video shop chains trading under the style "Ritz Video" and "Blockbuster Video". The types of merchandise discussed and the disclosure about contact with Derek Mann

were noted by the said Roger Sotherton on the copy of the said proposal retained by the Plaintiff. An optional instant win game element was also detailed in the said proposal together with apt and appropriate prizes.

26. Further at the end of the said meeting the said Roger Sotherton also made the following note on the copy of the said proposal retained by the Plaintiff in the section dealing with the Shell Make Merry Collection Proposal that is to say: "A.L. prefers the originality of the Movie Theme promo, more likely to research and get approval from management than a promo that has been run before".

27. The Plaintiff's Hollywood Collection Proposal disclosed the Plaintiff's Concept together with variations thereof and examples of possible executions of the same.

28. The Plaintiff's Hollywood Collection Proposal and the Plaintiff's Hollywood Collection Concept are each confidential information the property of the Plaintiff.

29. The Plaintiff's Hollywood Collection Proposal was disclosed in confidence to the Defendant for the purpose of enabling the Defendant to decide whether or not it wished to use the Plaintiff's Hollywood Collection Proposal and/or the Plaintiff's Hollywood Collection Concept as part of its future promotional activities and for no other purpose.

30. Further the disclosure of the Plaintiff's Hollywood Collection Proposal by the Plaintiff to the Defendant was governed by the said Plaintiff's Standard Terms and Conditions.

31. By a letter dated the 3rd December 1992 from the said John Donovan to the said Andrew Lazenby, the Plaintiff reminded the Defendant that the instant win game was an optional element of the Hollywood Collection Proposal and could be easily removed from the visuals prior to any research being carried out.

32. By a letter dated 19th February 1993 from the said John Donovan to the said Andrew Lazenby, the Plaintiff reminded the Defendant of the Plaintiff's Hollywood Collection Proposal, drew the Defendant's attention to a communication received from one Ray Rohrbach, the Promotions Manager of Warner Bros. to the effect that Warner Bros. were seeking a UK partner for a joint promotion to promote new film releases. The said letter also reminded the said Andrew Lazenby of a Nintendo themed proposal previously presented to the Defendant under the same terms and conditions as those relating to the Hollywood Collection Proposal. The said Andrew Lazenby acknowledged the said letter by writing thereon a note saying "Thanks John, I'll be back in touch when we've made further progress. Cheers, Andrew" and sending the said letter so endorsed back to the Plaintiff on or about the 20th February 1993.

33. During a telephone conversation between the said John

Donovan and the said Andrew Lazenby held on the 24th June 1993 the said Andrew Lazenby confirmed that he still had possession of the said Proposal.

34. The Defendant has not approached or asked the Plaintiff for permission to use the Plaintiff's Hollywood Collection Proposal or the Plaintiff's Hollywood Collection Concept.

35. On or about 11th July 1994 and prior to the issue of the Writ herein, the Defendant launched and has thereafter continued to run a motion picture themed forecourt promotion under the title "Now Showing The Collector Card" comprising the issuing of collectable tokens to purchasers of its products at garage or petrol station forecourts exchangeable for movie related merchandise including cinema tickets and video rentals. The Plaintiff will, pending discovery, rely on the fact that the Defendant's motion picture themed promotion has been advertised on commercial radio stations.

36. In the premises the Defendant's said promotion has made use of the Plaintiff's Hollywood Collection Concept.

37. By using the Plaintiff's Hollywood Collection Concept in its said promotion the Defendant has misused the Plaintiff's confidential information to the detriment of the Plaintiff.

38. Further and in the alternative by using the Plaintiff's Hollywood Collection Concept in its said promotion the Defendant has acted in breach of the Plaintiff's said Standard Terms & Conditions and in particular in breach of clauses 3(A) and 13 thereof.

39. By reason of the Defendant's misuse of confidential information and/or breach of contract the Plaintiff has suffered loss and damage.

#### PARTICULARS

Pending discovery the best particulars the Plaintiff can give are as follows:-

- (1) Loss of concept fee                      £50,000
- (2) ...% commission on the  
cost of printed materials

40. The Plaintiff is entitled to and claims interest pursuant to section 35A of the Supreme Court Act 1981 or under the inherent jurisdiction of the Court at such a rate and for such a period as to this Honourable Court seems fit.

#### Injunctive relief

41. At all material times the Defendant had acted in flagrant disregard of the Plaintiff's rights in its concepts for promotions suitable for the Defendant as set out above. In support of the allegation of flagrancy the Plaintiff will rely on the following facts and matters:



(a) that it was clear at all times to the Defendant that the Plaintiff claimed proprietary rights in its concept. The Plaintiff will rely on its said Standard Terms and Conditions and upon the confidentiality notice on its Proposal Documents.

(b) that the Defendant started the launch of its "Make Money" promotion some months after a complaint by the Plaintiff that the Defendant was wrongfully making use of the Plaintiff's "Nintendo" concept.

(c) that in about May 1994 the Defendant agreed to enter in good faith into an alternative dispute resolution procedure (ADR) in respect of the Plaintiff's complaint regarding the Defendant's use of the Plaintiff's Nintendo concept but failed to show good faith in the conduct of the ADR in that:

(i) as a condition to its entering into the ADR the Defendant required the Plaintiff to undertake that it would not release any press release or make public any information (except for the purpose of court proceedings) in relation to the Make Money or the Nintendo promotions, or anything to do with the Plaintiff's relationship with the Defendant including its belief that there was a flaw in the Make Money promotion, that it would not raise any questions, points etc at any future Shell meeting concerning the above matters and that the terms of the agreement to enter into ADR be kept private and secret (except for the purpose of Court proceedings) and not to be disclosed to any other party.

(ii) as a condition to its entering into the ADR the Plaintiff required the Defendant to undertake that its entry into the ADR be in good faith and that the Defendant should be represented at the ADR by David Pirrett, The Defendant's General Manager of Retail, or at least one person with authority to compromise the dispute.

(iii) despite the nomination of three possible mediators by the Plaintiff on or about the 25th May 1994 the Defendant did not respond until the 6th June 1994 as to which of three was acceptable to it, namely John Smeddle, an employee of the Defendant.

(iv) despite a request from the Plaintiff's solicitors made by letter to the Defendant's solicitors dated 8th June 1994 that the mediation should take place by the 13th June 1994, the Defendant delayed the start of the mediation until about the 25th July 1994 by inter alia refusing the Plaintiff's solicitors direct contact with John Smeddle (despite repeated requests for such access) so that the Plaintiff's solicitors were unable to

contact him to agree suitable dates with him.

(v) failed to be represented at the said ADR by anyone who had authority to compromise.

(vi) having so failed to be represented at the ADR, the Defendant did not inform the Plaintiff until over one month later, namely on the 30th August 1994, that it had no offer to make to the Plaintiff.

(vii) having effectively gagged the Plaintiff by means of the above undertakings during the course of the Make Money promotion by delaying the start of the ADR and its response thereto until after the end of the said promotion the Defendant ultimately refused to compromise the said dispute.

(d) that on about the 11th June 1994 the Defendant launched its "Now Showing The Collector Card" promotion.

42. The Plaintiff fears that unless restrained by this Honourable Court the Defendant will seek to make wrongful use of other proposals disclosed by the Plaintiff to it under equitable and/or contractual obligations of confidence and in particular that the Defendant will make wrongful use of the Plaintiff's "Make Merry" Proposal disclosed by the Plaintiff to the Defendant on or about the 24th November 1992 as aforesaid and of the Plaintiff's "Mega Match" Proposal disclosed by the Plaintiff to the Defendant in or about May 1984.

AND THE PLAINTIFF CLAIMS:

1. An injunction to restrain the Defendant (whether acting by its directors officers servants or agents or any of them or otherwise howsoever) from misusing the Plaintiff's confidential information in promotional concepts disclosed by the Plaintiff to the Defendant and/or acting in breach of the Plaintiff's Standard Terms and Conditions by making use of such concepts without the express permission of the Plaintiff.

2. A declaration that the Plaintiff's Hollywood Collection Concept was confidential information the property of the Plaintiff and that the Plaintiff's said confidential information was misused by the Defendant.

3. An inquiry as to damages for misuse of confidential information and/or breach of contract with payment of all sums due to the Plaintiff upon taking such inquiry together with interest thereon pursuant to Section 35A of the Supreme Court Act 1981 or under the inherent jurisdiction of the Court.

4. Costs.

5. Further or other relief.

MARY VITORIA

This Writ was issued by ROYDS TREADWELL of 2 Crane Court,  
Fleet Street, London, EC4A 2BL

Solicitors for the said Plaintiff whose registered office is  
situate at 7 Holgate Court, Western Road, Romford, Essex, RM1  
3JT