CHAPTER 6. THE FYFFES –v- DCC AND OTHERS PROCEEDINGS:

6.1 The High Court

6.1.1 The mammoth High Court action of **Fyffes -v- DCC and Others** which began on the 4th December, 2004, ran for eighty seven hearing days and resulted in a judgment by Ms. Justice Laffoy which she delivered on the 21st December, 2005.

6.1.2 The precise findings of the High Court are important to understand and appreciate not only since they have a bearing on the background to my investigation but also because they have determined a specific breach by two of the three companies and Mr Flavin of Section 108 of the companies Act, 1990 and required the three companies to jointly account for the profits which were made under Section 109.

6.1.3 The decision dealt extensively with the provisions of Part V of the companies Act, 1990, as well as the fiduciary duties owed by directors to companies. In the proceedings, Fyffes sought four specific reliefs against the Defendants:-

a) A declaration that the sale by the First and Second Named Defendants of an amount in excess of 31 million ordinary shares in the Plaintiff between the 3rd February, 2000, and the 15th February, 2000 constituted an 'unlawful dealing' within the meaning of Part V of the companies Act, 1990;

b) An Order pursuant to section 109(1)(b) of the Act of 1990 requiring the Defendants and each of them to account to the Plaintiff for any profit accruing to the Defendants from those sales;

c) An account in equity of all profits accruing to the Defendants or each or either of them from those sales; and,

d) Damages and/or compensation for breach of fiduciary duty on behalf of the Jim Flavin.

6.1.4 The reliefs sought at (a) and (b) were founded on alleged breaches of Part V of the 1990 Act and the remedy sought at (b) was a statutory remedy. This was referred to throughout the judgment of Ms. Justice Laffoy as "the statutory claim" in Part II of the judgment. The reliefs sought at (c) and (d) were founded on alleged breaches by Mr. Flavin of his fiduciary duties as a director of Fyffes. The remedy sought at (c) was an account in equity and the remedy sought at (d) was damages or compensation pursuant to the Court's common law jurisdiction. These elements of the claim were referred to as the "non-statutory claim", and dealt with in Part III of the judgment.

6.1.5 Ms. Justice Laffoy noted that the provisions of Part V of the 1990 Act had been repealed by Section 31 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, which came into effect on the 6th July, 2005, insofar as they related to a 'regulated market', but that the repeal did not affect the claims the subject matter of these proceedings. The judgment is primarily concerned with the transactions in 2000, but some background is given on the transactions between the companies in 1995.

6.1.6 Ms. Justice Laffoy described the parties to the proceedings, along with the executives in each company, and the legal advisers and stockbrokers at the relevant times. She also outlined the factual background to the proceedings, setting out the involvement of DCC in Fyffes, from acquiring its original shareholding of 9.46% in January, 1981, to the ultimate disposal of the ordinary shares in February, 2000. She further outlined the fact that it had been the intention of DCC in 1995/1996, following its flotation in 1994, to dispose of its interest in Fyffes when a suitable opportunity arose and that DCC wished to incur the smallest tax liability possible from its own point of view on any disposal.

6.1.7 She recited the fact that the shareholding in Fyffes was owned by DCC S&L both of whom, in August 1995, agreed to sell the shares in Fyffes to Lotus Green in an attempt

to mitigate its tax liability, particularly liability for Capital Gains Tax on a future disposal of the holding. The agreed purchase price was paid by Lotus Green, but legal title was not transferred, so that DCC and S&L remained the registered owners of the shares. Lotus Green then became resident in the Netherlands for tax purposes, and it was acknowledged by DCC that the events the subject matter of the proceedings were wholly tax driven. There was an accretion to the holding in March, 1998, through the medium of a scrip dividend, when the new shares allocated at that time were registered in the name of DCC and S&L.

6.1.8 Thereafter there was no change in the ownership of the holding which comprised ordinary shares and preference shares, until February, 2000, when all of the ordinary shares were sold in three tranches, on the 3rd February, 8th February and 14th February. The three sales, or 'Share Sales' as they are referred to by Ms. Justice Laffoy, grossed €106 million, which resulted in a substantial profit to the DCC Group. Fyffes alleged, in the statutory claim, that the Share Sales were unlawful because of the involvement of Mr. Flavin who, it was said, was in possession of price sensitive information by reason of his directorship of Fyffes. After the Share Sales, Mr. Flavin, who had been a member of the Audit Committee and the Chairman of the Compensation Committee of Fyffes, resigned from the board of Fyffes with effect from the 9th February, 2000.

6.1.9 In considering whether Mr. Flavin was in possession of price sensitive information, Ms. Justice Laffoy had regard to the preliminary results released by Fyffes in December 1999, for the fiscal year ending on the 31st October, 1999, which stated (at page 4 of the judgment), inter alia, that "*profit before tax and exceptional items in that year had increased over the previous financial year by 5.1% to €82.9 million*", and that while turnover had decreased marginally, the total operating profit was €80 million, up 3.8%. The results also recorded that the board believed that the coming year would herald further growth for the company. She also noted that Mr. Flavin had attended a board meeting in Fyffes on the 29th October, 1999, at which the budget for the financial year 2000 was discussed. That meeting set out the anticipated spread of profits for 2000 (excluding exceptionals and amortisation) for each quarter. The First Quarter pre-tax

profit was anticipated as €7.8 million and the Second Quarter cumulative pre-tax profit as €39.4 million. In fact, these predictions were revised downwards by Fyffes Chief Financial Officer after the board meeting, to €4.7 million and €37.9 million, respectively, to reflect more accurately Fyffes recently acquired interest in Capespan, a South African fresh produce group. Between board meetings, members were furnished with monthly management accounts accompanied by some narrative commentary. The management accounts for November, 1999, ("the November Trading Report") were circulated to board members on the 6th January, 2000. Ms. Justice Laffoy quoted from the accounts which showed that Fyffes' trading was considerably worse than anticipated for a number of reasons, including the weaker exchange rate of the euro as against the dollar. A similar trend was seen in the December 1999 management accounts ("the December Trading Report"), which were circulated on the 25th January, 2000. Fyffes embarked on an internet venture in Autumn, 1999, called worldoffruit.com ("wof.com"), which created significant interest in Fyffes activities, in what was colloquially described as "dotcom mania", and to which Fyffes responded.

6.1.10 Ms. Justice Laffoy set out the relevant legislation to the subject matter, namely Council Directive 89/592/EEC of the 13th November, 1989, as implemented by Part V of the 1990 Act. She also had regard to the rules contained in Chapter 9 (Continuing Obligations) and in the Appendix to Chapter 16 (the Model Code) of the Listing Rules of the London Stock Exchange and the Irish Stock Exchange.

6.1.11 In considering the construction of Part V of the Act of 1990, Ms. Justice Laffoy made the following comments at page 32:-

"*It seems to me that this issue falls to be determined by answering three questions:*

(1) Applying ordinary canons of statutory construction, what do the provisions of Part V which create civil liability require the plaintiff to prove in relation to knowledge and intention to use to advantage to establish civil liability?

(2) Is the outcome any different if one interprets Part V in the light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive?

(3) Does the fact that most of the same activities declared unlawful in Part V which give rise to civil liability also give rise to criminal liability vary the outcome?"

6.1.12 Ms. Justice Laffoy noted that the starting point in addressing the first question was Section 109(1), which set out three situations creating civil liability, but which required the plaintiff to an action to prove certain requirements set out in Section 108, specifically subsections (1), (2), (3) and (6). The Judge stated at page 33 as follows:-

"*In treating a person connected with the company who has price-sensitive information, a primary insider, differently from a person not so connected, by imposing a knowledge requirement in the case of the latter before liability arises, is both logical and rational... I can see no basis for implying a requirement of knowledge as to the price-sensitivity of the information into sub-s. (1) or sub-s. (6), nor can I see any basis for implying a requirement as to motivation in using the information.... Where knowledge is not expressly made a requirement, the legislative scheme is that a person deals while in possession of price-sensitive information on pain of illegality unless the factual circumstances come within one of the exceptions, thereby obviating illegality. The fact that the legislature included the exceptions suggests that its intention was that the preceding provisions should be interpreted without any implied qualification as to knowledge or motivation.*"

6.1.13 In relation to the second question, she stated at page 34:-

"*In relation to the mental element, what the Act does is to eliminate the requirement altogether in the case of the primary insider and to impose a less rigorous criterion that 'full knowledge of the facts', which is the Directive*

criterion, in relation to the tippee, but it does so generally, in the sense that, while the primary insider and the tippee is treated differently, all primary insiders are treated the same way, as are all tippees. This approach to transposing a Directive, in my view, is not incompatible with the Directive. Interpreting the provisions in the light of the Directive does not require a different outcome to interpretation in accordance with the normal canons of construction."

6.1.14 Finally, in relation to the third question, she noted that Part V created two separate and distinct sanctions, a criminal sanction and a civil sanction which, "*in the case of civil sanction doubles as a remedy, in relation to the same proscribed activity*." As she was not required to consider whether mens rea was an ingredient of the criminal offence, she declined to do so. In relation to the civil liability she stated, also at page 34, as follows:-

"*The jurisprudence which has developed in this jurisdiction and in other jurisdictions in relation to the common law action for damages for breach of statutory duty, in my view, is neither apposite nor helpful in the construction of the provisions of Part V governing civil liability. The ascertainment of the intention of the Oireachtas as to the factors which give rise to the civil liability are to be found within the four corners of the statute.*"

6.1.15 Ms. Justice Laffoy therefore rejected DCC's submissions as to the necessity for knowledge of and intention to use price-sensitive information. She concluded that, in relation to this part of the claim at least, no issue arose on the statutory claim on those factual circumstances.

6.1.16 She next considered the construction and legal principles in relation to Section 108(3), which deals with attribution. The Judge noted that it was not disputed that, theoretically, a 'tippee' may be a body corporate, but that the source must be a natural person to come within sub-section (1) or (2). She also set out at page 37 that "*the knowledge which the tippee must have is of the facts and circumstances by virtue of which the source is in possession of the price-sensitive information by reason of his*

connection with the company." She held that the application of Fyffes' thesis to the interpretation of sub-section (3) would have the effect of eliding an essential element of the basis of liability under that sub-section; that the tippee is not precluded from dealing under sub-sections (1) or (2), and result in a distortion of the intention of the legislature in enacting sub-section (3), which, she concluded, was not what the legislature intended. She also briefly considered the intention of the legislature in relation to Section 108(6), whose purpose she set out as precluding a company from dealing when any one of its officers is precluded from dealing by virtue of sub-sections (1), (2) or (3). In so doing, she noted, it "*provides an effective means for ensuring that the policy of Part V is not defeated, particularly, given the broad definition of 'officer' contained in s. 107, which includes an employee*." Thus, Ms. Justice Laffoy held that the Plaintiff had not established, on the facts, that DCC was a tippee under Section 108(3), and (at page 38) "*one limb of the fifth proposition on which the plaintiff sought to peg liability under s. 108(6) on Lotus Green was not sustainable*."

6.1.17 In Section F of the judgment, Ms. Justice Laffoy considered the construction and legal principles attached to Sections 107 to 109, in relation to agency and attribution, of the Act of 1990. This, the Judge set out, was directly related to the Fyffes contention that each of the Defendants were liable to account under Section 109(1), independently of any liability each or any of the companies had under Section 108(6). Ms. Justice Laffoy dismissed the need for a special rule of attribution, stating instead at page 39 that "*It is not necessary because Part V makes agents and principals separately liable in different circumstances*." She therefore held (later on page 39) as follows:-

> "*What sub-s. (1) of s. 108 does is to render unlawful dealing by a natural person in shares of a company where, by reason of his connection with that company, the natural person has price-sensitive information. The natural person may deal as agent or principal. In either event the dealing is not lawful. In my view, sub-s. (1) is not open to the construction which it must be given if the plaintiff's proposition is correct: that a body corporate which is the principal of a natural person who deals as agent in contravention of sub-s. (1) by implication is liable*

under s. 109. That construction is not open because the legislature expressly confined liability under sub-s. (1) to natural persons and provided in sub-s. (6) a mechanism for rendering unlawful dealing by a body corporate in situations where it is likely that the body corporate is the principal of a natural person who is in the position envisaged in sub-s. (1), that is to say, has price-sensitive information by reason of his connection with the company."

6.1.18 The Judge further noted that Section 109 did not provide for any freestanding civil liability; liability would only arise where a person had dealt or caused or procured another to deal or communicated information in a manner declared unlawful by Section 108. Thus, each of the companies, she concluded, could only have incurred liability under Section 109(1) if it was involved in an activity declared to be unlawful by Section 108, which she held they had not. In relation to the three sections, she further concluded that the statutory obligation to desist from dealing provided for in subsection (1) of Section 108 was the obligation of a natural person, whether acting as agent or principal, it was not the obligation of a company, whose obligations were provided for in subsection (6).

6.1.19 The central question of what constituted "dealing" for the purposes of Part V was considered in Section G of the judgment. She noted that the wording and physical layout of Section 107 presented difficulties with construction, and agreed with the interpretation of the provision as set out in Cahill on **Corporate Finance Law** at para. 4-08. A significant aspect of the definition which was pointed out by Fyffes was that an action or an activity encompassed within the definition could be performed by a person in the capacity of either principal or agent, which the Judge held herself to have been cognisant of in coming to her earlier conclusions. The pertinent actions in the case, as set out by Ms. Justice Laffoy at page 41/42, were actions in relation to the shares the subject of the Share Sales constituting:-

"*(i) disposing of them,*
(ii) making an agreement to dispose of them,

(iii) offering to make an agreement to dispose of them,

(iv) inducing another person to make an agreement to dispose of them, and

(v) inducing another person to offer to make an agreement to dispose of them, and

(vi) inducing another person to offer to make an agreement to acquire them."

6.1.20 In determining whether there was an inducement, Ms. Justice Laffoy stated, at page 43, that it would be necessary to "*consider the degree of impact the person who is alleged to have induced had on the contracting party.*" She cited the case of **Ryan v Triguboff [1976] 1 NSWLR 588**, on insider dealing in Australia, but ultimately, however, she stated that, in the final analysis, it was a question of fact for the Court whether any of the Defendants dealt, having regard to the definition of "dealing" in Section 107. As to the meaning of "an agreement", in the context of making or offering to make an agreement in the definition of "dealing", it was held (at page 45) that the DCC submissions that those words denoted an agreement "*as a whole or the entire of an agreement, in the sense of all of the essential elements.*" However, she qualified this by stating (also at page 45) that, in the case of the sale of shares in a listed company, the essential elements would be "*identity of the purchaser, the number of shares, the price and, perhaps, the type of shares.*"

6.1.21 In deciding on the application of Section 108(9), Ms. Justice Laffoy set out the legal principles relevant to identifying the circumstances in which a dealing would come within Section 108(9), so that Part V would not preclude effecting the transaction. She concluded that she must apply the section to all of the relevant facts, and in doing so, she should adopt a purposive approach to the construction of Section 108(9), in the light of the mischief, which the Directive was aimed at remedying. She further noted at p. 49 that:-

"*One of the facts to be determined is the capacity in which DCC and S&L entered into the relevant transactions and, in particular, whether, if each company was a constructive or bare trustee as contended by the defendants, it entered into the relevant transaction as agent rather than as principal.*"

6.1.22 The Judge then considered the meanings of the words "cause" and "procure". She stated as follows (at page 50/51):-

> "*In my view, in construing the expression 'to cause or procure' in s. 108(4) it is important to identify the context in which the expression is used. It only comes into play if the person whose activity is proscribed by that provision, the causer or procurer, is precluded from dealing by virtue of sub-s. (1), (2) or (3). Accordingly, it only comes into play in relation to a primary insider whose circumstances fall within the ambit of sub-s. (1) or (2) and in relation to a tippee whose circumstances fall within the ambit of sub-s. (3). In a civil claim founded on Part V it is for the plaintiff to prove the existence of the relevant circumstances having regard to the proper construction of sub-s. (1) or (2) in the case of the primary insider and of sub-s. (3) in the case of the tippee. The plaintiff then has to prove that the primary insider or the tippee, as the case may be, 'caused or procured'. However, consistent with the views I have expressed in relation to the issue of knowledge and intention, as a matter of construction of sub-s. (4) the plaintiff does not have to prove intention or knowledge in relation to the act of causing or procuring in order to establish civil liability under s. 109.*"

6.1.23 She continued on to say that determining whether an alleged causer or alleged procurer had caused another to deal did not entail any complexity, but was merely a matter of common sense. She then set out the test for each word (also on page 51) as follows:-

> "*In my view, the test in relation to 'causing' is whether the alleged causer brought about the dealing engaged in by the other person. The test in relation to 'procuring' is whether the alleged procurer, through effort or endeavour on his part, brought about the result.*"

6.1.24 In considering the issue of shadow directorship as suggested by Fyffes, Ms. Justice Laffoy considered whether a company could, as a matter of law, be a shadow

director. She adopted the decision of O'Leary J. in **Re Worldport (Ireland) Limited (in liquidation) (unreported, High Court, 16th February, 2005)**, which held that the significance of the manner in which the legislature has established the status of office of shadow director in Section 27, the use of the formula that a person who falls within the definition "shall be treated ...as a director for the purposes of the legislation" and that the language was highly suggestive of an intention on the part of the legislature that the concept of shadow director was distinct from, and not merely a sub-set of, the office of director. Mr. Justice O'Leary (endorsed at p. 52) "*found support for that proposition in Part VII of the Act of 1990 in which the application of the provisions of that Part in relation to restriction and disqualification was effected by the terminology that the relevant Chapter 'applies to shadow directors as it applies to directors'*." In considering this with respect to a company, Ms. Justice Laffoy (at page 53) held as follows:-

> "*Interpreting the word 'person' in s. 27 as importing a company is not in any way inconsistent with s. 176 of the Act of 1963. The latter provision precludes a company from having a body corporate as a director; the former identifies the type of person who, by reference to the manner in which he acts vis-à-vis the company, is to be treated as a director. It follows that I consider that DCC could be a shadow director of Lotus Green.*"

6.1.25 She then considered all the elements required by statute to deem a person or a body corporate a shadow director.

6.1.26 The next issue considered by the Judge was that of agency and whether or not DCC and Lotus Green were a single entity (she noted that the position of Lotus Green vis-à-vis S&L was the same). She came to the following conclusions at page 68:-

1. "*As a matter of law, Lotus Green may be regarded as having acted as the agent of DCC in relation to the holding and disposal of the shares in Fyffes, if to do otherwise would lead to an injustice. Whether it should be, depends on whether the inference is factually justified. This is to be determined having regard to all of*

the facts, including the nature of its interests in the shares, and the relationship between Lotus Green and DCC. The views of the human agents of the companies are not in any way determinative of the question.

2. *As a matter of law, Lotus green and DCC may be treated as a single entity as regards the sale of the shares in Fyffes and the generation of the profit therefrom for the purpose of preventing the avoidance of the availability of an effective remedy under s. 109 and thus preventing a injustice to parties with a remedy under s. 109, if DCC is liable to account. It should be so treated if the plaintiff has established that:-*

   (a) An evidential basis exists for finding that, as regards the holding and disposal of the shares, to borrow the terminology used by Murphy J. in the Lac Minerals Limited case, there was a factual identification of the acts of Lotus Green and DCC; and

   (b) Not to so treat the companies would allow the DCC Group to evade its obligations under Part V."

6.1.27 Ms. Justice Laffoy noted that the reality of the situation was that by defending Fyffes statutory claim on the basis that DCC made no profit from the sale of the shares, if DCC was precluded from dealing by virtue of Section 108(6) and Lotus Green was not, the DCC Group would effectively evade liability under Section 109, if the profit generated by Lotus Green on the Share Sales were not treated as the profit of DCC. To recognise this reality, she held, was to give a purposive meaning to Part V in the light of the Directive.

6.1.28 Ms. Justice Laffoy then turned her attention to the construction issues surrounding the remedy claimed by Fyffes under Section 109(1)(b). As a starting point, she set out that, in Section 109, the legislature mandated that a person was liable in accordance with its terms to account in the manner stipulated in paragraph (b). Once liability was established, if there was any profit within the meaning of paragraph (b), the person liable must account. The court, she noted, had no discretion and there was no room for any

principles of equity. The parameters of the account were determined solely by the provisions of the Act on their proper construction. She also considered the meaning of "any profit accruing", although she found herself restricted in her ability to express a view on the matter without straying into issues agreed by the parties *inter se*. She set out the "only" conclusion possible, if a connected person dealt in contravention of Section 108(1), by virtue of Section 109(1), and he is liable to account, as follows (at page 72):-

> "*As the unlawfulness of dealing on his part is founded on his possession of price-sensitive information by reason of his connection to the issuer company at the time of the time of dealing, his liability to account must be related to the price-sensitivity of that information which, for the purposes of establishing his liability, is identified by reference to the statutory hypothesis. The profit for which he is liable to account is so much of the advantage or benefit gained from dealing as flows from his possession of price-sensitive information by reason of his connection with the issuer company, measured by reference to the statutory hypothesis.*"

6.1.29 In relation to the two possible outcomes of dealing, as argued for by the Defendants, which reflected the availability of price-sensitive information, she further set out (also at page 72):-

> "*In my view, the expression 'profit accruing' in sub-s. (1)(b) means any advantage or benefit gained which is measurable by reference to that formula, including what has been termed a negative profit by the defendants. To construe the expression as advocated by the defendants is not open on a proper construction of all of the relevant provisions of Part V. To do so would involve an inconsistency of approach in relation to measuring profit under para. (b) and compensation for loss under para. (a). Further, in my view, it would defeat to a considerable degree the purpose of the Directive.*"

6.1.30 Finally, she considered the final issue of construction in relation to Section 109(1): the meaning of the expression "any profit accruing to the first-mentioned person from dealing", where the person liable is a person who causes or procures another person to deal in a manner declared unlawful by Section 108. While pointing out problems with the way in which the section was drafted, she decided the issue as follows at page 74:-

> "*A purposive interpretation of s. 109 is cumulative. The person who causes or procures is liable both for compensation and to account. The adjustment of set-off mechanism provided for in sub-s. (2) regulates the interface between the two forms of liability where they arise by reason of the same act or transaction. A purposive interpretation of s. 109 is suggestive of an intention on the part of the legislature to capture the profit accruing to the dealer when imposing liability to account on the person who causes or procures, because it is to the dealer that profit from dealing accrues. Such an interpretation is more consistent with the fulfilment of the objective of the Directive than an interpretation which renders the person who causes or procures liable to account only for profit accruing to himself, because the latter, unlike the former interpretation, may not provide any effective sanction or deterrent against unlawful causing or procuring of insider dealing.*"

6.1.31 Ms. Justice Laffoy, in summary, posed a number of questions on which the statutory claim was based. She set these out at page 74 as follows:-

> *"The entire claim is premised on Mr. Flavin having been in possession of price-sensitive information by reason of his connection with Fyffes on the date of the Share Sales. Apart from that overriding issue, the issues that remain on the statutory claim involve the application of the legal principles to the facts and are as follows:*
>
> *(1) Did Mr. Flavin -*
>
> *a) Deal, so that a contravention of s. 108(1) occurred, if the plaintiff has established the overriding issue, or*

b) Cause or procure another to deal, so that a contravention of s. 108(4) arose, if the plaintiff has established the overriding issue?

(2) Given that Mr. Flavin was an officer of DCC and S&L, if the plaintiff has established the overriding issue, were DCC and S&L precluded from dealing by virtue of s. 108(6) or were those companies free to deal by virtue of s. 108(9)? The companies admittedly dealt and the issue is whether they did so in contravention of s. 108(6).

(3) Was Mr. Flavin a shadow director of Lotus Green? If he was, and if the plaintiff has established the overriding issue, Lotus Green dealt (which is admitted) and did so on contravention of s. 108(6).

(4) If DCC and S&L were precluded from dealing by virtue of s. 108(6) -

(a) did Lotus Green Act as agent of DCC and S&L, or should it be treated as having so acted, in relation to the holding and disposal of the shares, or,

(b) should Lotus Green with DCC, and Lotus Green with S&L, each be treated as a single entity in relation to the holding of the shares, the sales thereof, and the profits generated by the sales for the purpose of meeting the liability of DCC and S&L to account under s. 109."

6.1.32 Before attempting to answer any of those questions, she held it necessary to determine some evidential issues. The standard of proof was easily identified, and was not in dispute, as proof on the balance of probabilities, although Ms. Justice Laffoy remained cognisant of the serious nature of the allegations in the case and the adverse consequences of a finding of unlawful dealing, which would not be confined to the financial sphere. She noted two requirements in relation to the discharge of the burden of

proof which were the subject of debate at the hearing of the action, the assessment of expert testimony, and the significance or otherwise of failure to call certain witnesses. The Court declined to draw any inference from the Defendants' failure to call Mr. Kyran McLaughlin on their behalf. Similarly, Ms. Justice Laffoy did not feel that it was material that two non-executive directors of DCC and two Dutch-resident directors of Lotus Green were not called by the Defendants.

6.1.33 In deciding whether Mr. Flavin dealt, Ms. Justice Laffoy set out extensively the relevant facts in relation to each of the three transactions, before stating as follows on page 107:-

> "*The evidence, in my view, clearly illustrates that Lotus Green had no real input into the process whereby the express terms were arrived at. On the contrary, the only reasonable conclusion is that Mr. Flavin controlled the whole process.*"

6.1.34 She then set out the analysis by reason of which she reached this conclusion, and noted that, in reality, it was Mr. Flavin who accepted the offer for the shares, despite the acceptance from Holland at the end, which was described as "*a mere formality*". On page 110 Ms. Justice Laffoy noted that:-

> "*The first sale occurred because it was skilfully negotiated by Mr. Flavin with parties who were prepared to negotiate with him, Mr. McLaughlin and Mr. Barrett, and their nominees, Mr. Godfrey and Mr. Ashmore. The second and third sales followed suit.*"

6.1.35 She also noted, on page 112, that:-

> "*What is significant for present purposes is that, while statutory, regulatory and compliance matters generally were not addressed by Lotus Green, they were addressed by Mr. Flavin.*"

6.1.36 Again on page113, she set out as follows:-

"*What I have attached weight to is the communication between Mr. Flavin and Mr. McCann during 3rd February, including the timing of the despatch, and the wording of, the various drafts, which is only indicative of Mr. Flavin being in control of the process and believing himself that he was in control.*"

6.1.37 Finally, Ms. Justice Laffoy stated that the fact that each offer was at the prevailing market price did not affect the conclusions she had drawn.

6.1.38 In relation to whether Mr. Flavin had authority from the board of DCC, the Judge inferred from the evidence (at page 113) that he must have had "*express approval of the members of the board, although it was not formalised in a board resolution*." She further stated that she was of the opinion that, on the evidence, Mr. Flavin had acted as agent for the DCC Group. In the alternative, if her conclusion was incorrect, she expressed herself as having no doubt that "*on the proper meaning of "induce" in Part V, which is analysed at G. above, he induced Lotus Green to make the three agreements because he exerted influence over Lotus Green and that influence wholly, not just materially, contributed to the acceptance of the offer to buy on each occasion*" (at page 114/115). Ms. Justice Laffoy also set out her belief that the evidence supported a finding that, in addition to dealing, Mr. Flavin both caused and procured the dealing, which resulted in the Share Sales as well.

6.1.39 In describing the relationship between the board of Lotus Green and DCC, Ms. Justice Laffoy found that the former did not act independently of the latter or of Mr. Flavin, due to a number of reasons, including the structuring of Lotus Green on which an 'A' director had "*effectively a right of veto in relation to board decisions, when coupled with the appointment of the Chief Financial Officer of DCC as sole 'A' director*" (page 133) and the manner in which the shares came to be sold in February 2000.

6.1.40 In respect of the exception under Section 108(9) which DCC and S&L relied on as their defence to the claims put forward by Fyffes, Ms. Justice Laffoy found as follows at page 134:-

"*In my view, DCC and S&L cannot avail of the defence provided for in s. 108(9) for the following reasons:-*

(1) DCC and S&L did not participate into the Share Sales as agents for Lotus Green. I have already found that after August, 1995 Lotus Green was the beneficial or equitable owner of the shares, but the legal title remained in DCC and S&L and, accordingly, each held shares as a constructive trustee.... [I]n my view, DCC and S&L were not involved in the Share Sales as agents of Lotus Green. They were involved as principals and were subject to the law, including the provisions of the Companies Acts, and, in the case of DCC, Stock Exchange Regulation.

(2) It would not be correct to characterise the participation of DCC and S&L in the Share Sales as having been pursuant to a specified instruction from Lotus Green. It is true that there was an instruction from Mr. Diepenhorst on behalf of Lotus Green to Mr. Scholefield, in his capacity as secretary of DCC and S&L, to furnish the relevant share certificates to Davy. That instruction issued because executives of the DCC, primarily Mr. Flavin and Mr. O'Dwyer, required it to be issued.

(3) It was not the case that DCC and S&L had not given any advice to Lotus Green in relation to dealing in the shares in Fyffes. On the contrary, I have found the very transactions at issue here were effected because Mr. Flavin, acting as agent for DCC Group of which they were part, decided that they should be effected.

For the foregoing reasons, if Mr. Flavin was in possession of price-sensitive information by reason of his connection with Fyffes on 3rd February, 2000, DCC and S&L were precluded from dealing by virtue of s. 108(6) and s. 108(9) does not afford a defence to them."

6.1.41 In deciding whether Mr. Flavin was a shadow director, under Section 27 of the Act, of Lotus Green, Ms. Justice Laffoy set out her decision in the following terms at page 135:-

> "*Although I have found that Mr. Flavin was responsible for the major decisions made by Lotus Green in relation to the DCC Group shareholding in Fyffes, the election to take the scrip dividend and the Share Sales, I have come to the conclusion that the evidence does not establish that the directors of Lotus Green were accustomed to act in accordance with his directions or instructions.... However, while those instances were probably the most important decisions that were made in the corporate life of Lotus Green up to 14th February, 2000, they were specific instances. The evidence does not establish the level of real influence on an ongoing basis which is a requirement of s. 27*."

6.1.42 She distinguished between the position of DCC and Mr. Flavin, and stated that the former exercised "*a real influence over the corporate of Lotus Green on an ongoing basis*" (page 135).

6.1.43 Ms. Justice Laffoy, in considering whether Lotus Green acted as agent of DCC and S&L, concluded that when Lotus Green dealt, as it admitted it did, "*its dealing related to the beneficial ownership and it dealt as principal*" (page 136). In relation to whether the three defendant companies should be held as a single entity, she held herself satisfied that there was a factual identification of the acts of Lotus Green and DCC and S&L in relation to the generation of the profit from the Share Sales. She ultimately concluded that at page 138:-

> "*[a]s a matter of law and fact, the profit accrued to Lotus Green solely. Therefore, in my view, for the purposes of affording an effective remedy under s. 109, the three corporate defendants should be treated as a single entity.*"

6.1.44 The price-sensitivity issue, which was described as the overriding issue, was dealt with in the judgment in some considerable detail. Having had regard to the facts, the legal principles (which were exclusively from other jurisdictions), the Authorities (which included consideration of the "reasonable investor test") and the submissions of the parties, Ms. Justice Laffoy noted the following points, that in relation to the word "likely" in Section 108(1) a real or substantial risk was required, in relation to the availability of the evidence, she felt that she was only concerned with concept of general availability in the context of the hypothetical component of the test, and that the statutory hypothesis did not envisage the information in issue finding its way into the market in any particular manner; and that materiality must be assessed objectively. She then set out the following principles at page 156:-

(i) *"The information must not be assessed in isolation. It must be assessed in the light of the total mix of information generally available about the company at the relevant date, the date of dealing.*

(ii) *Once the significance of the information is assessed in that manner, the question for consideration is whether, if it had been generally available on the date of the dealing, in the light of its significance the information would have had a substantial or a significant effect on the company's share price. If so, the effect would have been material. The terms 'substantial' and 'significant' are relative terms. The assessment of the share price effect must be made having regard t o all of the factors which have a bearing on the value of the company's shares at the date of the dealing.*

(iii) *Both assessments, the assessment of the significance of the information and the assessment of the impact of the information on the share price, must be carried out objectively. The subjective views of the insider are irrelevant. What this means is that the*

court, in carrying out the assessments, does so from the perspective of the reasonable investor making an investment decision, that is to say, a decision to buy, sell or hold the shares in the company.

(iv) The standard of materiality to be applied is prescribed in s. 108. The question to be addressed is whether it is probable that the impact of the information would have a substantial or significant effect on the share price. In view of the express inclusion in s. 108(1) of the 'would be likely' criterion, it would not be appropriate to apply the 'substantial likelihood' standard applied by the US Supreme Court in the TSC Industries case.

(v) However, the application of the standard may require the type of balancing exercise recognised in the Texas Gulf Sulphur case – weighing indicated probability against anticipated magnitude in the light of the totality of the company activity."

6.1.45 While she declined to profile the "reasonable investor", Ms. Justice Laffoy did, however, state that it must be the sort of investor typically found in the market at the time, which included any "irrational" euphoric tendencies:-

"*If that investor, on the evidence, was one who was anxious to own internet stocks or stocks with an internet element, the likely consequences of such predilection are a relevant factor*" (at page 158).

6.1.46 The Judge also stated that, in applying the price-sensitivity test in Section 108(1), "*it must be assumed that the reasonable investor is aware in a general way that a company must make timely disclosure of non-public, price-sensitive information and that he knows whether, in relation to the information which is the subject of the hypothetical assessment, an announcement has been made or not*" (at page 162), thus the regulatory

requirements and the existence or absence of any announcement both form part of the total mix of the information about the company.

6.1.47 Ms. Justice Laffoy ultimately ruled that the relevant information (i.e. in relation to the profit warning) only became available on the 10th March, 2000, and it was not the information which was alleged to be the price-sensitive information in the proceedings (page 206). She further stated at page 218, in relation to the disclosure obligation on Fyffes itself:-

> "*On an objective analysis, in my view, the evidence of what was said, done and written at the time does not reveal any awareness on the part of Fyffes executives and senior management as of 3rd February, 2000 that, if the information contained in the November and December Trading Reports was generally available, it would have a substantial adverse impact on Fyffes share price.*"

6.1.48 She also considered extensively the actions of Mr. Flavin in seeking advice in relation to the information in his possession, and his understanding of the significance thereof, with specific reference to the Fyffes November and December Trading Reports. In describing Mr. Flavin's discussions with Mr. Scholefield, the DCC Compliance Officer, Ms. Justice Laffoy stated that she was "*not satisfied that it would be a proper inference to draw that Mr. Flavin deliberately misrepresented the import of the documents when seeking advice from Mr. Price and Mr. Scholefield*" (at page 225).

6.1.49 In relation to the contention that the share price movement on or after the 20th March, 2000, was relevant Ms. Justice Laffoy stated as follows at page 229:-

> "*I have come to the conclusion that what happened on and after 20th March, 2000 is not a matter which is of evidential value in applying the hypothesis posited in s. 108(1).*"

6.1.50 In relation to the impact of the "dotcom bubble", the Judge stated that there was coercive evidence that the adverse share price reaction was caused by the negative

trading information contained in the March 2000 Trading Statement. Accordingly she held (at page 232) that Fyffes had not discharged the onus of proving that, "*at the date of the Share Sales, Mr. Flavin, by reason of his connection with Fyffes, was in possession of information which, if generally available, would have been likely to materially affect the share price.*"

6.1.51 Thus, she continued:-

> "*The statutory claim fails because the plaintiff has not established the overriding price-sensitivity issue; the plaintiff has not established that, if the information contained in the November and December Trading Reports was generally available on 3rd, 8th and 14th February, 2000, it would have been likely to materially adversely affect Fyffes' share price.*"

6.1.52 In considering the non-statutory element of the claim for an account in equity, by reason of the fiduciary duties owed by Mr. Flavin to Fyffes due to his directorship therein, Ms. Justice Laffoy set out the applicable legal principles as follows firstly, that if directors make use of information acquired as director for their personal advantage they are held to be in breach of their fiduciary duties to the company and will be liable to account to it for any profits they have made and secondly, the circumstances in which liability for a breach of duty by the fiduciary would extend to a third party so as to render the third party liable to account. Despite a lengthy consideration of this latter point, Ms. Justice Laffoy held that she did not have to decide the complex trustee issues that arose, because on the facts, there was no necessity to do so. In relation to the first point, she concluded as follows (at page 247):-

> "*While the principle of liability to account for knowing receipt of trust property does not come into play on the facts, I consider it appropriate to record that there*

is no evidence whatsoever that Mr. Flavin transmitted the confidential information to the corporate defendants."

6.1.53 Thus, she held, Fyffes had not established any basis for fixing the corporate defendant with liability to account in equity.

6.1.54 In summary, Ms. Justice Laffoy laid out her conclusions at pages 248/249:-

"*Having regard to the manner in which I have construed the provisions of Part V of the Act of 1990, essentially the following three questions remain on the statutory claim:-*

(1) Who dealt in the Share Sales and in what capacity?

(2) Did Mr. Flavin have, by reason of his connection with Fyffes, price-sensitive information on the dates of the Share Sales?

(3) What are the consequences of the answers of the first and second questions?

I have answered the three questions as follows:-

(1) (a) Mr. Flavin dealt as agent of the DCC Group.

(b) DCC and S&L dealt as principals, so they cannot rely on s. 108(9).

(c) Lotus Green dealt as principal.

(2) Mr. Flavin was not in possession of price-sensitive information at the dates of the Share Sales.

(3) Therefore, the dealing was not unlawful under s. 108 and no civil liability to account arises under s. 109. However, I have concluded that, if the dealing was unlawful so as to give rise to a liability to account under s. 109, it would

have been proper to treat the three corporate defendants, DCC, S&L and Lotus Green, as a single entity for the purposes of accounting for the profit accruing from dealing under s. 109. That conclusion is redundant because I have found that the dealing was not unlawful.

In relation to the non-statutory claim, I have found that the plaintiff has failed to establish a breach of fiduciary duty on the part of Mr. Flavin. The plaintiff is neither entitled to an account in equity nor damages or compensation at common law."

6.1.55 Although Ms. Justice Laffoy dealt to a certain extent with the events that happened in 1995, whereby the beneficial ownership of the Fyffes' shares held by DCC and S&L were transferred to Lotus Green, the main focus of her judgment and, indeed, of the evidence before the Court, was concerned with the sale of those shares between the 3rd and 14th February, 2000.

6.1.56 The consideration which she gave to the transactions in 1995 arose, as she made clear on page 122 of her judgment as follows:-

"*The Court is concerned with how Lotus Green operated within the DCC group from May, 1995 to March, 2000 because the plaintiff has been constrained to advance the arguments that Mr. Flavin was a shadow director of Lotus Green, that Lotus Green acted as agent for DCC and S&L in relation to the holding and disposal of the shares in Fyffes and that Lotus Green should be treated as a single entity with DCC and S&L for the purpose of meeting the liability of DCC and S&L to account under s. 109. The plaintiff has been constrained to advance those arguments to counter the defences that Lotus Green has no liability to account under s. 109 because it did not deal unlawfully under s. 108 and that, even if DCC and S&L are liable to account under s. 109, there is nothing to account for, both corporate defendants not having made any profit out of the Share Sales. In broad terms, a fundamental question at the core of the legal issues to which those arguments and contingents give rise is whether, in relation*

to its holding and disposal of the shares, Lotus Green functioned independently of DCC in substance and reality and not merely in form."

6.1.57 At page 133 of her judgment she summarised her view of the factors which suggested that the board of Lotus Green did not function independently of DCC and Mr. Flavin in making decisions of the holding and disposal in Fyffes as follows:-

"(a) The structuring of Lotus Green in such a manner that an 'A' director had effectively right of veto in relation to board decisions, when coupled with the appointment of the chief financial officer of DCC as sole 'A' director;

(b) The manner in which the election to take the scrip dividend occurred in March, 1998; and

(c) The manner in which the shares came to be sold in February, 2000."

6.1.58 It is clear, however, that Ms. Justice Laffoy was only concerned with the events from 1995 onwards insofar as they threw light on the principal issues in the case as to who "dealt" in the shares; whether Mr. Flavin or DCC could be considered to be a "shadow director" of Lotus Green and, ultimately, whether Lotus Green should be considered as part of the one DCC entity for the purposes of any accounting for the profit should a finding of insider dealing be made.

6.1.59 At the top of page 121 in her judgment she stated her position in relation to the notification obligation under Section 67 (and presumably also Section 91) as follows:-

"In my view, the fact that no notification was given does not bear on the issues in this case."

6.1.60 Earlier on page 121 she held, in what must be regarded as an obiter comment, that the advice from William Fry which addressed Lotus Green's duty of disclosure under

Section 67 *"must be seen as advice to Lotus Green as a company in the DCC Group"* and went on to say that "i*n not giving notification under section 67, Lotus Green acted in accordance with the legal advice it obtained. Whether that advice was right or wrong is immaterial. What is material is that its existence explains why Lotus Green did not give notification under section 67."*

6.1.61 For the purpose of my investigation however, and in determining whether there is evidence to suggest that Section 67 (and/or Section 91) was breached, whether the advice was right or wrong is, of course, material, both because it is one of the fundamental matters upon which I am required to form an opinion and report, but also because, assuming that the learned High Court Judge's probative finding of fact is correct, it has a bearing on the culpability of the individual directors and companies who acted on foot of that advice. This is a matter which I will return to in greater in detail when considering the 1995 transactions.

6.2 The Supreme Court

6.2.1 The decision of the Supreme Court in the appeal of the above action was delivered on the 27th July, 2007, and was the subject of four distinct judgments (Denham J., Fennelly J., Finnegan J. and Macken J.) from a five-judge Court. The appeal was brought on a net issue, and most significantly, none of the findings of fact of Ms. Justice Laffoy in the High Court were challenged. In addition none of her legal determinations on the proper construction of the relevant statutory provisions, apart from her adoption of the 'reasonable investor' test were appealed.

Judgment of Ms. Justice Denham

6.2.2 The judgment of Mrs. Justice Denham set out a description of each of the parties and a history of the High Court proceedings. She set out the central issue in the appeal (at page 2) as:-

"W*hether the learned trial judge erred in concluding that the information in the possession of Mr Flavin, relating to the business of Fyffes, on three dates in February, 2000, when Mr Flavin dealt in the shares of Fyffes, was not price-sensitive vis-à-vis those shares.*"

6.2.3 She noted that the High Court concluded that Fyffes had failed to establish a breach of fiduciary duty on the part of Mr. Flavin, and consequently that Fyffes was neither entitled to an account in equity, nor to damages, nor to compensation at common law, and that no appeal had been brought from this decision, so the matter was not before the Supreme Court.

6.2.4 The submissions of Fyffes, that the trial judge erred in three respects, were set out as follows at page 5:-

(i) *"The trial judge failed to draw the correct inferences from a number of critical facts found by her and, in particular, found that the information the subject of these proceedings was not price-sensitive on the basis of conclusions that, properly viewed, did not bear on the price sensitivity of the information at all. Further, her conclusions were inconsistent with her earlier findings.*

(ii) *The trial judge having identified what she stated was the kernel of the price sensitivity issue then failed to assess the information in the possession of Mr. Flavin by reference to that test. Instead she purported to develop a 'reasonable investor' test, by reference to case law which did not support the test as formulated by her. In particular, instead of applying a reasonable investor test to determine the materiality of the information, a different test was posed and applied by the Court. This was a test based upon whether the reasonable investor (had he the information in question at the relevant time) would have concluded that that information would probably impact on Fyffes' share price to a substantial*

or significant degree. This question is significantly different from the question of whether a reasonable investor would have viewed the information as material, and finds no support in any of the authorities. Furthermore, she failed to apply properly the reasonable investor test. Finally, the reasonable investor test is not provided for by statute and is inconsistent with what the Court is required to do under the statute.

(iii) The trial judge failed to pay any regard whatsoever to the actual impact upon Fyffes' share price when the information in the possession of Mr. Flavin on the dates on which he dealt (or information substantially similar thereto) was ultimately released to the market on 20th March 2000. Furthermore, she disregarded the events of 20th March entirely and failed to attach any weight to them, not only in determining the nature and speed of the market reaction to adverse trading news concerning Fyffes."

6.2.5 Ms. Justice Denham noted that Fyffes did not request the Supreme Court to disagree with any findings of primary fact made by Ms. Justice Laffoy, but submitted, on the basis of the facts found, that the determination that the information in question was not price-sensitive was a fundamental error, which arose in the tests applied and the decision to exclude certain evidence, and was reviewable on appeal.

6.2.6 She set out the submissions of the Defendants, who contended that the decision of Ms. Justice Laffoy was correct and should be upheld, as follows (at page 6):-

(a) "The intuitive approach to the price-sensitivity permeates the entire of Fyffes' submissions and is wholly wrong.

(b) DCC did not suggest that appreciation of the total mix of information means that the market already knew precisely how Fyffes was affected by difficult trading conditions in its core business. DCC recognised that the market did not know precisely how currency weakness affected Fyffes or precisely how weak banana prices affected Fyffes. However, DCC submitted that it is only with an appreciation of the total mix of information available in the market,

and the market conditions prevailing at the relevant dates, that one can assess what weight would be attached by the market to the allegedly price-sensitive information. It was submitted that the learned Trial Judge accepted this and carried out her assessment on that basis. The fact that Fyffes' submissions failed to identify the total mix of information available, and the wholly abnormal market conditions prevailing, and advanced the intuitive approach to price-sensitivity, demonstrated the extent to which Fyffes wished to avoid this simple but hugely important proposition.

(c) *It was submitted that there is no escaping the enormous significance of the finding of fact that no director or executive of Fyffes ever entertained the possibility that the November and December Trading Reports contained price-sensitive information. That finding undermines totally the intuitive approach to price-sensitivity advanced by Fyffes both in the Court below and in this Court. It is a finding which prompted the learned Trial Judge to suggest that there was an inherent or fundamental incongruity in the claim advanced by Fyffes. It was submitted that she might have described that claim as opportunistic in the extreme.*

(d) *As to the submissions of Fyffes that inferences drawn were not consistent with the facts, it was submitted that the most striking feature of this aspect of Fyffes' submissions was the continued reliance upon a very small portion of the facts as found by the learned Trial Judge for the purpose of suggesting that the reasons which led her to her conclusions are unsound. The whole approach was consistent with the mistaken intuitive approach to the price-sensitivity. It was submitted to be wrong because it ignored the total mix of information available to the market and the extraordinary market conditions prevailing at the time of the Share Sales.*

(e) *As to the issue of price-sensitivity, it was submitted that this section of Fyffes' submissions is characterised by some very convoluted reasoning. and [sic] that it was also unfair to the learned Trial Judge. It was submitted that she was much more careful and sophisticated in her analysis of the price*

sensitivity that Fyffes' submissions suggest. The emphasis upon what Fyffes describe as the "reasonable investor test" is misplaced because it is not a test in itself and was never expressed as such by the learned Trial Judge, but rather was an approach employed to emphasise the objectivity of the analysis required.

(f) As to the issue of share price movement on or after 20th March, 2000 as a valid proxy, it was submitted that the test adopted by the learned Trial Judge for evaluating an alleged proxy event is the correct test, both in law and in logic. As a matter of fact in this case, there was neither parity of information nor parity of market conditions. That being so, the share price movement on or after 20 March 2000 is not a valid proxy for the application of the statutory hypothesis, and is evidentially irrelevant."

6.2.7 Considering the relevant law to the appeal, Ms Justice Denham noted that the matter at issue was whether there was civil liability for unlawful dealing in shares. She then set out the relevant legislation contained in the Companies Act, 1990 and the Council Directive of the 13th November, 1989, and the "*Relevant Matters*" to any consideration of the terms of Section 108 of the Act of 1990: namely the terms "person", "connected", "dealt" and "securities". She stated the person in issue was James Flavin, on which there was no issue; that Mr. Flavin was connected to Fyffes by reason of his position of a director until the 9th February, 2000, again an undisputed factor; that the High Court had determined Mr. Flavin to have dealt in the shares on the three relevant dates, on which there was no appeal brought; and that the securities in issue was the DCC Group shareholding in Fyffes.

6.2.8 As the information in the possession of Mr. Flavin, contained in the November and December Trading Reports, was central to the appeal Mrs. Justice Denham set it out and considered it in detail, along with the information available generally in the market. She also set out the relevant sections on the information from the judgment of Ms. Justice Laffoy. In relation to that judgment, Mrs. Justice Denham declared herself to be

"*satisfied that the findings of fact on those reports, as stated by the High Court are deducible from the Reports themselves*", but also satisfied that "*the High Court fell into error in the identification and application of legal principles*" (at page 22). In relation to the use of the 'reasonable investor test', she held as follows (at page 24):-

> "*I do not find this to be an appropriate or useful legal tool. There is no reference to the 'reasonable investor' in s. 108(i), or indeed anywhere in the Act of 1990. Nor may it be implied from the Council Directive. It is a method of interpretation which removes the analysis required one step from the law as stated... It is not a legal principle appropriate to the section. Indeed, as it is not expressly or impliedly in the section there would be a danger of legislating on the issue if this test were applied. In addition, there are a myriad of factors and investors in a market, and to choose some or either as representative of a reasonable investor appears subjective and arbitrary.*"

6.2.9 In relation to the manner in which the High Court concluded that the information was not price sensitive and 'offset' the information, Mrs. Justice Denham stated (at page 25):-

> "*I am satisfied that it was erroneous to 'offset' the information against certain factors. Further, even if the factors were 'offset' they would not negate the price-sensitivity of the information.*"

6.2.10 She further held that the market factors which 'offset' the information as decided by the High Court, which included, inter alia, that it was too early in the financial year to make a judgment about the outcome for Fyffes' existing business, was inconsistent with the earlier findings of that Court and contrary to the Reports themselves, which contained information relating to the core business of Fyffes. She also stated that sentiment for wof.com was already in the market, and therefore, in the share price, and reliance on that sentiment would involve "double counting" its influence. She then stated the High Court's regard to the movement in the shares to be a factor on the scene, rather than being in any way determinative. She concluded as follows (at pages 26/27):-

"*The learned trial judge referred to four factors, as set out above, but this is an arbitrary choice. There are myriad of factors at play in a market. Experts analyse and differ each day. I am satisfied that the High Court erred in choosing factors and then applying them to 'offset' the information in the Trading Reports. The information disclosed a risk, and bad news for Fyffes, and this was not altered by making it generally available to the market. Other information, including 'offsets' was already in the public domain.*"

6.2.11 In relation to the importance of the Trading Reports and a common sense approach, Ms. Justice Denham held (at page 27):-

"*There is nothing in the statute that excludes common sense from the analysis as to whether or not information would be likely materially to affect the price of the shares. Consequently, it was an error to exclude common sense from the analysis...The information* [in the Reports] *does require to be considered specifically. The information in the documents disclosed a risk, and this is not altered by putting it in the market.*"

6.2.12 She dismissed any argument in relation to "arithmetic exercise" and the relevance or helpfulness of international jurisprudence.

6.2.13 In relation to the phrase "likely materially" in Section 108, she held the test to be objective, and thus ruled out the inclusion of the views of Mr. Flavin or any other directors. Further, she stated that it was it was erroneous for the High Court to exclude the 20th March Announcement from holding any evidential value, as she said it altered the balance of the evidence, as well as materially affecting Fyffes' share price.

6.2.14 When considering the conduct of the directors of Fyffes (the "fundamental incongruity"), Ms. Justice Denham declared herself to be satisfied that this issue had no

relevance to the issue before the Court. She set out the test envisaged by Section 108(1) of the Act of 1990 as follows (at page 37):-

> "*The test to be applied is objective, not the subjective views of the Directors. Nor, specifically, the subjective view of Mr Flavin. This law protects the market with an objective test.*"

6.2.15 She noted that this was not a case where Fyffes had sold shares on the dates in issue, and therefore there was no evidence available in relation to price sensitive information in its possession on those dates. She further noted the issues which the evidence had disclosed were at the primary concerns of Fyffes' directors on those dates, and stated as follows (at page 37):-

> "*These considerations were not the analysis necessary to determine whether information was price-sensitive. The High Court erred in failing to have regard to this difference, and to the fact that it is possible to have price-sensitive information in advance of announcement. Indeed, it seems reasonable that there is of necessity a time lag between obtaining price-sensitive information and the taking of the appropriate regulatory steps for the market. However, in any such situation there should be an abundance of caution in dealing in shares of the company.*"

6.2.16 In conclusion, Ms Justice Denham set out the test, per Section 108 of the Act of 1990, to be an objective one where the court must consider whether the information would likely materially to affect the price of the shares. She used the 20th March Announcement as a comparator to the Reports as follows (at page 41):-

> "*Once introduced, the fact that the 20th March, 2000 Announcement materially affected the shares was relevant evidence, as was the immediate drop in the share price. This evidence is such that, taken with the findings of fact, it is an inevitable conclusion that the information was price-sensitive.*"

6.2.17 She thus allowed the appeal.

Judgment of Mr. Justice Fennelly

6.2.18 Mr. Justice Fennelly, similarly to Ms Justice Denham, set out the background to the appeal, the facts and the relevant legislative provisions. He also set out the prescient information contained in the November and December Trading Reports, and the conclusions drawn by the High Court, along with the grounds for the appeal. Mr. Justice Fennelly noted the comments of Ms. Justice Laffoy in relation to the so-called "fundamental incongruity" in the conduct of Fyffes, whereby Fyffes contended that the information the subject matter of the appeal was price sensitive yet made no attempt to notify the Stock Exchange of same, and agreed that, if there was one, it was "*just that*".

6.2.19 When considering the statutory interpretation of Section 108 of the Act of 1990, Mr. Justice Fennelly stated that it must be read in conformity with the provisions of the Directive, and that (at page 33):-

> "*The section lays down a single test. That is whether the information alleged to be price sensitive would, if it were generally available, be likely materially to affect the price of those securities. The price is the price on the market. The market is comprised of many investors, wise and unwise, reasonable and unreasonable.*"

6.2.20 In relation to the concept of "dotcom mania", that all parties agreed was relevant to the share price of Fyffes in or around February 2000, and the concept of the reasonable investor, Mr. Justice Fennelly stated that he believed the "reasonable investor" test was inappropriate (at page 33):-

> "*Can one apply the statutory test by reference to a reasonable investor? I do not think so. The court is required to make a judgment as to whether, on the statutory*

assumption, the information in question would have had a material affect on price."

6.2.21 When considering the conclusions of the High Court, he stated (at page 37):-

"*Thus, I find the approach of the learned trial judge surprisingly cautious. To my mind, the November/December figures were such as to cast serious doubt on the prospects of the company, not only for the first quarter, but also, as the learned trial judge herself observed, for the first half and even for the full year.*"

6.2.22 He declared the American authorities cited before Ms. Justice Laffoy to be "*extraordinarily rigid*", and unhelpful in their approaches.

6.2.23 Stating that the Trial Judge was incorrect to exclude the March 2000 Trading Statement from the evidence in the case, Mr. Justice Fennelly held (at page 40):-

"*The question then is whether the learned trial judge was correct, on the facts to exclude the March 2000 Trading Statement from her consideration. I do not think that she was. Both that statement and the November/December trading figures have been set out in full earlier in this Judgment. There is remarkable similarity between their contents. Insofar as they differ, the earlier figures are more detailed. The learned trial judge described them as authoritative, detailed and precise. The March 2000 Trading Statement is expressed in general terms. I am satisfied that they conveyed broadly similar information about the trading experience of Fyffes in the first quarter. The time interval between them was some six weeks. Thus, the later information may be said to be more reliable, but that is all.*

Nor do I see that there was any such enormous change in market conditions as would justify excluding the effect of the March 2000 Trading Statement entirely from consideration... Its release led to an immediate fall of some 15% in the share

price. Nobody has suggested that such a price movement was other than material."

6.2.24 And further, on page 44:-

"*In my view, the events of March 20th were a useful pointer to the likely market effect of the release of trading information of as substantially kind, if it had occurred on the various dates of the share sales in early February.*"

6.2.25 While he gave enormous credence to the efforts made by Ms. Justice Laffoy in her decision, Mr. Justice Fennelly held that she had made two fundamental errors which necessarily affected the decision as follows (at pages 43/44):-

"*In my view, the events of March 20th provide compelling evidence that the November/ Trading Rreports, if generally available on the dates of the share sales, have materially affected the share price.*

The ultimate conclusion of the learned trial judge was necessarily affected by what I have described as two errors: she should have adopted a straightforward test of market effect, without the interposition of the reasonable investor; she should not have excluded the effects of the release March 2000 Trading Statement. Were it not for these two aspects of her Judgment, it seems very likely that her own compelling findings of fact would have led her to infer that the price would have been materially affected.

On this appeal, I would find as a fact that the information contained in the November/December trading figures would, if it had been generally available on

the dates of the share sales, have been likely materially to affect the price of Fyffes' shares."

6.2.26 Thus, he found the information to have been price sensitive within the meaning of the legislation and allowed the appeal.

Judgment of Ms. Justice Macken

6.2.27 Ms. Justice Macken began her judgment by expressing herself to be in agreement with the conclusions and findings of Mr. Justice Fennelly, but that she had a number of additional comments to make.

6.2.28 Ms. Justice Macken set out the test required by Section 108(1) of the Act of 1990 as an objective and simple one. She remarked that none of the relevant Irish or European legislation made reference to a 'reasonable investor' test, as developed by US case law, and stated at page 8:-

"*I am of the view that the 'reasonable investor' test based on the legislation in question as interpreted in the United States jurisprudence is not the appropriate test for assessing whether the price of shares is likely materially to be affected by the information in question, 'material' in the context of Section 108(1) of the Act of 1990 being more akin to 'substantial.*"

6.2.29 She thus concluded that Ms. Justice Laffoy erred in law in the manner in which she defined and applied the appropriate test for the purposes in Section 108(1) of the Act of 1990.

6.2.30 Ms. Justice Macken was careful, too, not to criticise the decision of the High Court, and stated at page 9:-

"*I do not think it is appropriate to look behind the actual definitions given or language used in the Judgment. The learned High Court judge was extremely careful in the construction of her Judgment, and was meticulous in the manner in which she approached her findings, separating those which were findings at face value or of a preliminary nature, for example in relation to the content of the November/December Trading Reports, or her analysis of the evidence, on one hand, and her conclusions reached on questions of law, including definitions, on the other hand.*"

6.2.31 In relation to the March 20th Trading Statement, Ms. Justice Macken dismissed the assistance of the US jurisprudence, saying that they were not of "*telling assistance*". She stated that she agreed with the argument of DCC that it was impermissible to conclude that a mere fall in the price of shares after information is released establishes, ipso facto, the likely effect on the market price of shares upon the hypothetical release of similar or even the same information on the earlier relevant dates (at page 14). She further held (at page 15):-

"*I am of the view that some test must be adopted to ascertain whether events occurring at a subsequent date and affecting the share price of a company, can be used for the purpose of establishing what is required by Section 108(1) of the Act of 1990. That test may be one requiring appropriate parity between two sets of information, but I have reservations about the requirement that the conditions in the market place must be identical.*"

6.2.32 She agreed with the argument of DCC (at page 16) that "*since the March 20th Trading Statement represents, and would be known to the market to represent, the Plaintiff's own statement pursuant to its obligations under the Stock Exchange Rules, it would carry great weight.*" She continued (at page 17):-

"*I am satisfied that, even allowing for any appropriate discounting of wholly dissimilar elements, the degree of functional equivalence between the information*

in the documents being compared, was such that the market reaction to the release of the later March 20th Trading Statement should have been taken by the learned High Court judge as constituting a good pointer for how the market would have reacted to the earlier information, had the latter been released at the sale dates."

6.2.33 In relation to the 'reasonable investor' test applied in the High Court, Ms. Justice Macken stated as follows (at page 18):-

"*It is not the view of the reasonable investor which is the key factor in determining whether the later information lacks parity with the earlier information. Rather this is a fact finding exercise for the court to undertake, so as to enable it properly to assess whether the drop in share price following the release of the later information, constitutes a good pointer to what would have happened in the market at the earlier relevant dates. In my view, interposing the reasonable investor into that exercise was also an error in law on the part of the learned High Court judge.*"

6.2.34 When considering the market conditions, Ms. Justice Macken stated (at page 19):-

"*The test to be applied therefore cannot be based on a requirement that in all circumstances the market conditions must be identical. Provided that there is sufficient and appropriate similarity between the market conditions, the condition of the market after the release of the March 20th Trading Statement was not such as to justify the total rejection of the subsequent immediate and significant fall in share price.*"

6.2.35 And further:-

"*I find that, on the application of the correct test, the market conditions were sufficiently similar to be taken into account. In consequence of the foregoing*

findings, both as parity and as to market conditions, I find that the learned High Court judge erred in law in not taking into account the fall in the share price consequent upon release of the information released on March 20th 2000 on the grounds that it did not represent an appropriate 'proxy'."

6.2.36 Ms. Justice Macken concluded by again agreeing with the judgment of Mr. Justice Fennelly, stating that the information in the November/December Trading Reports would have materially affected the Fyffes' share price and finding that Section 108(1) of the Act of 1990 had been breached by the Defendants. She thus allowed the appeal.

Judgment of Mr. Justice Finnegan

6.2.37 Mr. Justice Finnegan began his judgment by paying tribute to the judgment of the High Court, insofar as it related to all the uncontroverted findings of fact and the majority of the legal issues. He also set out the legislation, the facts, the grounds of appeal, and a brief summary of the information alleged to be price sensitive and the findings of the High Court thereon. In relation to the information contained in the November/December Trading Reports that referred to a number of Fyffes companies he stated (at page 19) that he "*would not consider this information to be material although the same was rather more negative than positive.*" He also noted (at page 20) that:-

"*The learned trial judge concluded that the information available to the directors was of a type and quality that was potentially price sensitive and with this I agree.*"

6.2.38 When considering the appropriate test to apply to determine whether the information would be likely materially to affect the price of the shares, Mr. Justice Finnegan noted that the Respondents were connected with Fyffes and had the information by reason of that connection. He considered the international jurisprudence on the matter and, on the issue of the reasonable investor, while expressing agreement with Ms. Justice

Laffoy that it did not seem necessary to profile a reasonable investor, he stated (at page 24):-

> "*The reasonable man while useful in determining whether or not conduct is properly described as being negligent is helpful here... Yet even the reasonable man test for negligence involves in its application a subjective element in that it still remains a function of the judge to determine what the reasonable man would have foreseen... The judge may be well fitted to identify the conduct to be expected of the reasonable man but may not be fitted by knowledge or experience to fulfil the same function in relation to the reasonable investor.*"

6.2.39 He set out the statutory test, along with the function of the courts in interpreting the section as follows (at page 25):-

> "*The difficulty in using the reasonable investor as a test, and not just to categorise the test as objective, is compounded in that it is, in my mind, impossible to profile the reasonable investor...*"

> "*In my view the test is to be derived directly from statute – if the information that is not generally available, if it were generally available, would it be likely materially to affect the share price. The test is directed to the market effect and not the conduct of a hypothetical reasonable investor. The reasonable investor test appears to me to derive from different legislative provisions where it is necessary for the court to determine if the information is material. In section 108(1) "materially" is not director to the non-disclosed information but to share affectation. The courts function it appears to me is as follows: –*

1. *First to determine the generality or 'total mix' of information generally available.*
2. *To determine the information not generally available but available to the dealer.*

3. *To determine whether that information, if it were generally available, would be likely to materially affect the price of the shares having regard to the total mix of information available in the market. The evidence which would normally be available to the court, and which was available in this case, is the evidence of experts and the evidence of actual market movements upon some or all of the not generally available information becoming available.*"

6.2.40 He concluded his thoughts on this aspect of the matter by stating that the quantification of movement necessary to constitute a material affectation for the purposes of Section 108(1) of the Act of 1990 would depend on the particular circumstances of a case, but for the purposes of the appeal, he was prepared to accept a movement in the order of 10% in the share price was a material affectation.

6.2.41 The "fundamental incongruity", as described by Ms. Justice Laffoy, of the conduct of the directors of Fyffes in alleging that the information in the November/December Trading Reports in the possession of Mr. Flavin was price sensitive, although they did not feel it was so at the time, was briefly considered by Mr. Justice Finnegan. However, he held that (at page 30):-

"*[T]he subjective appreciation of Fyffes' directors will not be determinative as the test applied is an objective one. The subjective appreciation of Fyffes and its directors should go into the mix of evidence available as showing that experienced responsible executive and non-executive directors of a public company had reached that appreciation. The weight to be attached to that evidence will depend on their knowledge and experience and all the circumstances.*"

6.2.42 He also noted the neutral stance adopted by Ms. Justice Laffoy in relation to the conduct of the evidence tendered by Mr. Flavin.

6.2.43 In discussing the evidential value of the events of the 20th March, Mr. Justice Finnegan reviewed the relevant international jurisprudence, but stated (at page 41) as follows:-

> "*I am satisfied that these cases are not authority for the proposition that the court is precluded from looking at post-disclosure share movement as having evidential value in relation to the materiality of the non-disclosed information unless there is parity of that information and the information coming to the market at both relevant dates and the market conditions are the same. In assessing the weight to be attributed to such share price movement clearly the court must have regard to any discrepancies between the non-disclosed information and the information disclosed which affected the market. Again regard must be had to any differences in the state of the market generally and the market for the particular share at the relevant dates.*"

6.2.44 He thus concluded that the events of the 20th March were of evidential value, and should have been taken into account.

6.2.45 Mr. Justice Finnegan reached a similar conclusion in relation to the 20th March Trading Statement, noting that it had been in more general terms than either of the November or December Trading Reports. He held (at page 46):-

> "*Again I think it likely that had the actual figures in the December Trading Report been generally available on 20th March, rather than the more limited information contained in the Trading Statement, the effect on the market would have been even more dramatic. Had the learned trial judge accorded evidential value to the events of 20th March and days following I think it inevitable that she would have come to these conclusions having regard to her finding that the evidence is coercive, that the adverse share price reaction on 20th March 2000 was caused by the negative trading information contained in the March 2000 Trading Statement.*"

6.2.46 And further (at page 49):-

> "*…I am satisfied that had the December figures in particular been available on the dealing date, the 3rd February 2000, and the subsequent dealing dates the share price would have been materially affected.*"

6.2.47 In drawing his conclusions on the matter, Mr. Justice Finnegan stated, in two core points, that the reasonable investor test was inappropriate having regards to the terms of the statute, which clearly called for an objective test, and the 20th March Trading Statement was of material importance due to the market reaction consequent on its release, as follows (at page 51):-

1. *"The 'reasonable investor' concept is derived from the jurisprudence of the United States developed in relation to a quite different statutory regime with differently worded provisions. It is of no assistance in applying the statutory test. As shorthand for describing the test as objective it is unobjectionable. The statutory test is this: if available to the market would the non-disclosed information be likely materially to affect the price of the shares.*

2. *The learned trial judge made clear findings of fact. However she rejected the post-disclosure events of 20th March 2000 and days following as having no evidential value. While expert evidence is of value, where, as here, there are serious conflicts in the same, the court may have to rely on common sense. In this regard post-disclosure market events, properly evaluated, constitute objective evidence. The greater the parity between the information coming into the market in advance of those events and the non-disclosed information and the greater concurrence between market conditions at the date of sale and the date of disclosure the more cogent and compelling that evidence will be. There is sufficient concurrence between the information contained in the November and December figures and the Trading Statement of 20th March 2000 to make the market reaction to the Trading Statement compelling*

evidence as to the manner in which the market would react to the information contained in the November and December figures. The learned trial judge found that the affectation of the share price was due to the disclosure contained in the Trading Statement. She was in error in excluding entirely from her consideration the market events on 20th March 2000 and days following. Had she availed of this evidence, having regard to her findings of fact. It is inevitable that she would have concluded that the non-disclosed information in the possession of the defendants, if available on the market, would have affected the share price and to a material extent: the actual affectation by the Trading Statement was of the order of 15% and the evidence was clear that affectation of the order of 10% is material."

6.2.48 He therefore allowed the appeal.