CHAPTER 11. CONCLUSIONS AND FINDINGS:

After a thorough and detailed forensic investigation lasting nearly eighteen months, I have concluded my inquiries. I have reached a clear view concerning the relevant transactions and, more importantly, a clear view as to the involvement of the officers, directors, employees and advisers of the companies in the transactions.

Before setting out the detail of my findings, I wish to record that each of the individual directors, officers, employees and advisers who gave sworn evidence before me impressed me with their candour and eagerness to assist. The passage of time between the relevant events and the dates of the interviews understandably increased the difficulties for those involved in attempting to remember precisely all that transpired between 1995 and 2000. I was, and continue to be, satisfied that each and every one of the individuals told the truth to the best of their recollection and ability.

I have already remarked in my two Interim Reports that the companies and their legal advisers co-operated with me at all times in carrying out the investigation. No request for documentation was denied and no request for further information was refused. I mention this at the outset because the experience of those conducting investigations under the Companies Act, 1990 is that co-operation in such circumstances is not a 'given', and for experienced practitioners it becomes obvious when companies or their directors and officers are not co-operating with the process. This was not the case in this investigation.

I have divided this penultimate Chapter into three parts.

- Firstly, I have set out my conclusions on the meaning of the relevant statutory provisions and, in particular, Sections 61, 91 and 108 of the Companies Act, 1990 as they relate to the facts as found by me.

- Secondly, I have set out my conclusions and findings in relation to the 1995 transactions.

- And finally, my conclusions and findings in relation to the 2000 transactions.

11. 1 The Statutory Provisions

11.1.1 This part of the Report represents my conclusions as to the proper meaning of the relevant Sections of the 1990 Act. It cannot, of course, be a determinative, let alone a binding, view: I am an Inspector, not a Court of law. In this regard I am very mindful of Lord Denning's comments in ***Re Pergamon Press Ltd [1970] 3 All E.R. 535 at 539*:**

> "*It is true, of course, that the Inspectors are not a court of law. Their proceedings are not judicial proceedings: see Re Grosvenor and West End Railway Terminus Hotel Co. Ltd (1897) 76 LT 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report…They do not even decide if there is a prima facie case…But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company…Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly.*"

11.1.2 The appointment of Inspectors or an Inspector by the court is undoubtedly a more 'invasive' procedure by comparison with some of the other investigatory procedures under the Companies Acts. The investigatory regime exists, in the words of former Chief Justice Keane in ***Dunnes Stores Ireland Company and Others –v- Ryan and Another (unreported, Supreme Court, 1 February 2002)*** at page 26/27 of his judgment:-

'…to ensure that companies incorporated under the Acts do not abuse the privileges which incorporation confers on them to the detriment of their members, their creditors or indeed the public in general."

11.1.3 Since, however, I am required to investigate and report on whether there was evidence to suggest that the companies and individual officers, directors and/or advisers to the companies breached Parts IV and V of the Companies Act, 1990, or any related provisions thereof, it is incumbent upon me to express my opinion on the particular provisions. I propose to deal with the two sets of provisions in Parts IV and V – the notification obligations and insider dealing – in the order in which they appear (or appeared, in the case of Section 108 since it is now repealed) in the Companies Act, 1990. Anyone who understands the Companies Code will know that there is a qualitative difference in seriousness between 'insider dealing' and a failure to notify the disposal or acquisition of an interest in shares. Furthermore, the fact that the Court could have appointed Inspectors without legal expertise does not, I think, make it inappropriate for me to bring my legal experience and expertise to bear on the matters, let alone to reach legal conclusions.

Part IV: Whether the companies were required to notify under Section 67 & 91

11.1.4 In bringing the application for the appointment of Inspectors, the Director referred to the fact that neither DCC nor Lotus Green had, by their own admission, notified the 1995 transactions, whereby Lotus Green acquired the beneficial interest in the Fyffes shares from DCC and S & L, to either Fyffes or the Stock Exchange. This was a 'formal' omission in the case of Fyffes, since Fyffes were aware of the proposed transfer before it took place.

11.1.5 This admission, though not sufficient in itself to warrant the appointment of Inspectors, is a matter upon which I clearly have to report. The Director contended, inter alia, that DCC and Lotus Green breached Sections 67 and 91, respectively, in 1995 by

failing to notify Fyffes and the Stock Exchange of the transfer and, consequently, that the Directors of those two companies breached Section 79 of the Act by operation of Section 241 of the Act.

11.1.6 During the trial of the **Fyffes -v- DCC and Others** proceedings, although not directly relevant to any issue in those proceedings, the companies and Mr. Flavin had conceded that no notification had been made. Clearly, therefore, there was a *prima facie* case for the two companies to answer under Sections 67 and 91 as to why no notification had taken place.

11.1.7 The purpose of this part of my Report is to address the issue as to whether notification was required by either DCC or Lotus Green or both. As appears hereunder, I have come to the conclusion that the advice given by William Fry in 1995 was correct insofar as DCC was concerned, but incorrect in relation to Lotus Green, and that Lotus Green ought to have notified Fyffes and the Stock Exchange of the fact that it had acquired a beneficial interest in a 10.5% stake in Fyffes.

The Key Statutory Provisions in Question

11.1.8 It is necessary to set out the statutory scheme which governed the notification of the transfer or acquisition of interests in shares at the time. The relevant statutory provisions are contained in Part IV, Chapter 2 of the Companies Act, 1990. Part IV of the 1990 Act is entitled '*Disclosure of Interests in Shares*'. Before setting those provisions out in detail it is helpful to summarise their effect. In doing so I recognise that I am, at times, departing from the strict wording of the statute. This is in the interest of attempting to set out a clear overview of what is undoubtedly a complex regime.

11.1.9 In general terms, the provisions place an obligation on a person to notify the relevant company if he or she acquires or disposes of an interest in the voting shares of a public limited company, if the acquisition brings his shareholding to 5% (this was and continues to be the 'notifiable percentage' provided by section 70 (1) of the 1990 Act) or

more of the share capital, and if the disposal brings his shareholding from 5% or over to below 5%. The net question at issue here is whether the transfer of a beneficial interest in 10.5% of the share capital of a public limited company from one company in a group to another triggers an obligation to disclose. It is also important to bear in mind that, in addition to the regime whereby persons who acquire an interest equal to or over the notifiable percentage in shares of a public limited company must notify transactions to *the company*, there is a separate regime whereby persons who acquire shares in public *listed* companies must notify the transaction to *the Stock Exchange* if shareholdings are increased above, or reduced below, certain ratchet levels. The two regimes are separate to the extent that the regime for notifying interests to the Stock Exchange (and which is contained at Sections 90 to 96 of the Companies Act, 1990) gives effect to an EU Directive for the publication of major holdings in listed companies. The regime for notifying interests to the company contained at Sections 67 to 88 does not. The two regimes are however, linked in two ways. First, they are contained in the same Chapter of Part IV of the Companies Act 1990. Second, the statutory mechanism contained at Section 72 of the Companies Act 1990 (and which applies primarily to transactions notified to the company) applies also to the regime which applies to the notification of interests to the Stock Exchange.

The Statutory Provisions

11.1.10 Sections 67 – 72 provide as follows:

67 Obligation of disclosure and the case in which it may arise

(1) Where a person either –

(a) To his knowledge acquires an interest in shares comprised in a public limited company's relevant share capital, or ceases to be interested in shares so comprised (whether or not retaining an interest in other shares so comprised),

or

(b) becomes aware that he has acquired an interest in shares so comprised or that he has ceased to be interested in shares so comprised in which he was previously interested,

then, subject to the provisions of sections 68 to 79, he shall be under an obligation ('the obligation of disclosure') to make notification to the company of the interests which he has, or had, in its shares.

(2) In relation to a public limited company, 'relevant share capital' means the company's issued share capital of a class carrying rights to vote in all circumstances at general meetings of the company and it is hereby declared for the avoidance of doubt that –

(a) where a company's relevant share capital is divided into different classes of shares, references in this Chapter to a percentage of the nominal value of its relevant share capital are to a percentage of the nominal value of the issued shares comprised in each of the classes taken separately, and

(b) the temporary suspension of voting rights in respect of shares comprised in the issued share capital of a company of any such class does not affect the application of this Chapter in relation to interests in those or any other shares comprised in that class.

(3) Where, otherwise than in circumstances within subsection (1), a person –

(a) is aware at the time when it occurs of any change of circumstances affecting facts relevant to that application of the next following section to an existing interest of his shares comprised in a company's share capital of any description, or

(b) otherwise becomes aware of any such facts (whether or not arising from any such change of circumstances),

then, subject to the provisions of sections 68 to 79, he shall be under the obligation of disclosure.

(4) The acquisition by any person of an interest in shares or debentures of a company registered in the State shall be deemed to be a consent by that person to the disclosure by him, his agents or intermediaries of any information required to be disclosed in relation to shares or debentures by the Companies Acts.

68 Interests to be disclosed

(1) For the purposes of the obligation of disclosure, the interests to be taken into account are those in relevant share capital of the company concerned.

(2) A person has a notifiable interest at any time when he is interested in shares comprised in that share capital of an aggregate nominal value equal to or more than the percentage of the nominal value of that share capital which is for the time being the notifiable percentage.

(3) All facts relevant to determining whether a person has a notifiable interest at any time (or the percentage level of his interest) are taken to be what he knows the facts to be at that time.

(4) The obligation of disclosure arises under section 67(1) or (3) where the person has a notifiable interest immediately after the relevant time, but did not have such an interest immediately before that time.

(5) The obligation also arises under section 67(1) where –

(a) the person had a notifiable interest immediately before the relevant time, but does not have such an interest immediately after it, or

(b) he had a notifiable interest immediately before that time, and has such an interest immediately after it, but the percentage levels of his interest immediately before and immediately after that time are not the same.

(6) For the purposes of this section, 'the relevant time' means –

(a) in a case within section 67(1)(a) or (3)(a), the time of the event or change of circumstances there mentioned, and

(b) in a case within section 67(1)(b) or (3)(b), the time at which the person became aware of the facts in question.

69 'Percentage level' in relation to notifiable interests

(1) Subject to the qualification mentioned below, 'percentage level', in section 68(5)(b) means the percentage figure found by expressing the aggregate nominal value of all the shares comprised in the share capital concerned in which the person is interested immediately before or (as the case may be) immediately after the relevant time as a percentage of the nominal value of that share capital and rounding that figure down, if it is not a whole number, to the next whole number.

(2) Where the nominal value of the share capital is greater immediately after the relevant time than it was immediately before, the percentage level of the person's interest immediately before (as well as immediately after) that time is determined by reference to the larger amount.

70 The notifiable percentage

(1) The reference in section 68(2) to the notifiable percentage is to 5 per cent, or such other percentage as may be prescribed by the Minister under this section.

(2) The Minister may prescribe the percentage to apply in determining whether a person's interest in a company's shares is notifiable under section 67; and different percentages may be prescribed in relation to companies of different classes or descriptions.

(3) Where in consequence of a reduction prescribed under this section in the percentage made by such order a person's interests in a company's shares becomes notifiable, he shall then come under the obligation of disclosure in respect of it; and the obligation must be performed within the period of 10 days next following the day on which it arises.

71 Particulars to be contained in notification

(1) Subject to section 70(3) a person's obligation to make a notification under section 67 must be performed within the period of 5 days next following the day on which the obligation arises; and the notification must be in writing to the company.

(2) The notification must specify the share capital to which it relates, and must also –

(a) state the number of shares comprised in that share capital in which the person making the notification knows he was interested immediately after the time when the obligation arose, or

(b) in a case where the person no longer has a notifiable interest in shares comprised in that share capital, state that he no longer has that interest.

(3) A notification with respect to a person's interest in a company's relevant share capital (other than one stating that he no longer has a notifiable interest in shares comprised in that share capital) shall include particulars of –

(a) the identity of each registered holder of shares to which the notification relates, and

(b) the number of those shares held by each such registered holder,

so far as known to the person making the notification at the date when the notification is made.

(4) A person who has an interest in shares comprised in a company's relevant share capital, that interest being notifiable, is under obligation to notify the company in writing –

(a) of any particulars in relation to those shares which are specified in subsection (3), and

(b) of any change in those particulars,

of which in either case he becomes aware at any time after any interest notification date and before the first occasion following that date on which he comes under any further obligation of disclosure with respect to his interest in shares comprised in that share capital.

An obligation arising under this section must be performed within the period of 5 days next following the day on which it arises.

(5) The reference in subsection (4) to an interest notification date, in relation to a person's interest in shares comprised in a public limited company's relevant share capital, is to either of the following –

(a) the date of any notification made by him with respect to his interest under this Part, and

(b) where he has failed to make a notification, the date on which the period allowed for making it came to an end.

(6) A person who at any time has an interest in shares which is notifiable is to be regarded under subsection (4) as continuing to have a notifiable interest in them unless and until he comes under obligation to make a notification stating that he no longer has such an interest in those shares.

72 Notification of family and corporate interests

(1) For the purposes of sections 67 to 71 a person is taken to be interested in any shares in which his spouse or any minor child of his is interested.

(2) For those purposes, a person is taken to be interested in shares if a body corporate is interested in them and –

(a) that body of its directors are accustomed to act in accordance with his directions or instructions, or

(b) he is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of that body corporate.

(3) Where a person is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of a body corporate and that body corporate is entitled to exercise or control the exercise of any of the voting power at general meetings of another body corporate ('the effective voting power') then, for the purposes of subsection (2)(b), the effective voting power is taken as exercisable by that person.

(4) For the purposes of subsections (2) and (3) a person is entitled to exercise or control the exercise of voting power if –

(a) he has a right (whether subject to conditions or not) the exercise of which would make him so entitled, or

(b) he is under an obligation (whether or not so subject) the fulfilment of which would make him so entitled.

The July 21st 1995 William Fry Advice

11.1.11 The William Fry advice was contained in a letter of advices dated the 21st July, 1995, sent by Mr. Alvin Price of William Fry to DCC. The detail of that letter is set out in Chapter 8 and is reproduced in Appendix A Document 44.

11.1.12 In the William Fry submissions responding to my preliminary finding, my attention was drawn to the fact that DCC had taken the advice of its solicitors (William Fry) with respect to the implications arising from these provisions, not only with regard to the 1995 transfer but also in relation to a transaction in 1994 whereby an interest held by DCC in another public limited company, Flogas plc, was transferred to a different DCC subsidiary. I accept that this was the responsible and proper course of action for the companies to take and I also take into account the context of the 1995 advice – including the fact that similar advice had been sought with regard to a transaction the previous year,

as well as the comparative complexity of the tax and company law setting. I have set out, in Appendix I, the William Fry recreation of the advice that Mr. Price believes he gave in August 1994 in the context of the Flogas transaction. I also accept that this is an accurate recreation of the advice then given.

11.1.13 In essence, the William Fry advice was that DCC, S & L and Lotus Green were not obliged to notify the transfer of the beneficial interest in the shares. This was on the basis of a purposive interpretation of the provisions. I was urged to take the view that this advice was '*undoubtedly correct*' or '*at the very least…not…clearly or demonstrably incorrect*.'

11.1.14 For the reasons articulated in more detail below, I take the view that the William Fry advice on this issue was incorrect with regard to Lotus Green's obligations. The reason I do so can be briefly stated: whilst the statutory regime is relatively complex, it cannot be said to be unclear. Accordingly, there was no basis for adopting a purposive interpretation of the provisions, which had the effect of departing from its literal requirements. On a literal reading, the legislation required a holder of 5% or more of the voting share capital in a public limited company (and which had already notified its interest) to notify the transfer of beneficial title to another group company. A literal reading of the legislation also required the transferee to notify its interest under Section 67. In my view, it was also clear that Section 91 had the effect that if a person acquired 10% or more of the voting share capital in a *listed* public limited company he had to notify the acquisition to the Stock Exchange. This may have appeared anomalous, or commercially inconvenient, to the companies and their advisors, but this would not be, in my view, a basis for departing from a literal reading of the provisions and adopting a purposive approach. The meaning of the provisions is clear.

Interpretation of the Relevant Provisions

11.1.15 The advice preceded the implementation of the Interpretation Act, 2005, Section 5 of which gives the purposive reading of acts of parliament statutory

recognition. In summary, it provides that one can have regard to the purpose of the act in interpreting a provision which is anomalous or obscure, or where a literal reading of the provision would lead to an absurdity or fail to reflect the plain intention of the act.

11.1.16 Prior to the implementation of the Interpretation Act, 2005, one could adopt a purposive interpretation of legislation which had a basis in European Law – for example, where the provision in question was enacted to implement a Directive of the European Union. The particular notification provisions at Sections 67 to 72 do not implement an EU Directive. The submissions made to me asserted that the above provisions were enacted to give effect to EU Directive 88/627/EEC ('the Major Shareholdings Directive'). As noted, the associated – but discrete - regime under Sections 90 to 96, requires interests in a publicly listed company at ratchets of 10%, 25%, 50%, 75% to be notified to the Stock Exchange. Section 91 explicitly states that this obligation is in addition to the obligation of disclosure under Section 67. Sections 67 to 72 were not enacted to implement the Major Shareholdings Directive and, accordingly, I am of the opinion that the scope for adopting a purposive approach to an interpretation of the provisions was – in 1995 – limited. Moreover, it was not legitimate to ascertain the purpose of the legislation from the Major Shareholdings Directive.

11.1.17 I accept that there is an overlap between the two regimes in that Section 91(4) provides as follows:-

> *"The provisions of this Chapter shall apply as regards the interests which are to be notified to the Exchange, and the manner in which they are to be so notified, as they apply to the interests to be notified to a company under this Chapter."*

This imports the provisions for the aggregation of interests contained in Section 72.

11.1.18 None of the provisions cited above provide an exception to the notification requirement where either (a) the transferor transfers only a beneficial interest in the

relevant shares or (b) the interest is transferred from one company in a group to another. The William Fry advice effectively sought, by a departure from the literal interpretation and the adoption of a purposive interpretation, to insert such an exception. This was inappropriate as the provisions were not such as to justify a departure from a literal reading of the provisions. The provisions are not ambiguous: there is no express exception that suggests that the provisions do not apply to the transfer of a beneficial interest in shares between members of a group. The literal reading of the provisions (namely that there was no exception to the notification requirement with regard to inter-group transfers of a beneficial interest in shares) did not lead to an absurdity.

11.1.19 The companies' submissions contended that the advice proceeded on the basis that it was anomalous for the inter-group transfer of the beneficial interest to be notified when DCC had already notified its acquisition of the 10.5% shareholding in accordance with the 1990 Act. I conclude, as a matter of common sense, that a public limited company is likely to be more interested in the identity of the beneficial holder of its shares or at least as acutely interested as the identity of the holder of the legal interest. The fact that it is held by one group company rather than another may be of interest for a variety of reasons, not least where the beneficial interest is transferred offshore. Accordingly, I do not agree that the purpose of the legislation is promoted by reading into it an exception to the notification requirement when the beneficial interest is transferred from one group company to another. In my view, the advice was incorrect in asserting that one did not need to notify the intra-group transfer of a beneficial interest in shares. I am, of course, aware that Fyffes knew that it was DCC's intention to transfer the beneficial interest in its shares to a Dutch DCC controlled company. In these circumstances it is difficult to see what prejudice was suffered by Fyffes from the formal failure to notify it.

Obligation of DCC to Notify

11.1.20 The William Fry submissions contended that because DCC had notified its interest in the shares, and because Section 72(2) meant that it continued to have an

interest even after the beneficial interest was transferred to Lotus Green (because Lotus Green was a company in which DCC directly or indirectly held more than one-third of the voting power), there was no obligation on the part of DCC to notify the transfer of the beneficial interest. I am persuaded by this argument and agree with the proposition. DCC, by reason of its direct or indirect holding of the voting rights in Lotus Green, continued to be 'interested in' shares in Fyffes. Accordingly, it did not cease to be 'interested in' those shares having transferred them to Lotus Green.

Obligation of S&L to Notify

11.1.21 William Fry contended that S&L never had an interest in 5% or more of the shares in Fyffes, and therefore it had no obligation under the provisions. On the assumption that S & L was not entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of Lotus Green or DCC, then S&L in 1995 was not 'interested in' 5% or more of the shares in Fyffes by reason of DCC's holding and did not have to notify.

Obligation of Lotus Green to Notify

11.1.22 The key issue is, therefore, whether Lotus Green, by acquiring the 10.5% beneficial interest in Fyffes shares in 1995, thereby acquired 'an interest' in those shares for the purposes of Section 67 (and Section 91). I believe that it did. William Fry advised that a purposive interpretation of the provisions meant that only DCC was treated as being interested in the shares and so Lotus Green did not have to notify its acquisition.

11.1.23 For the reasons set out above, I do not believe that a purposive interpretation was warranted in the light of the clarity of the applicable legislative provisions. The perceived anomaly that a literal interpretation would mean that Lotus Green would have to notify its acquisition, but that DCC would have no such obligation to notify, was not a proper basis for departing from a literal interpretation of the Act, nor a reason for attempting to interpret it by reference to a purposive interpretation. Section

67 was drafted in terms that a person acquiring 'an interest' in shares of 5% must notify and must also notify when he or she ceases to be 'interested in' those shares. Section 72(2) applies so as to deem a person to be 'interested in' shares held by a company in respect of which that person controls one-third or more of the voting power. The effect and meaning of the provisions is clear: there was no basis for a purposive interpretation. I do not consider that one can extrapolate from the carefully drafted provisions of Chapter 2 of Part IV, and in particular Section 72, the proposition that the *purpose* of these provisions is to aggregate all interests in the parent company.

The Import of the Directive on Lotus Green's Obligation

11.1.24 The William Fry submission contended as follows:-

> *"The focus of the [1990] Act and the Directive on which it is based appears, in a corporate context, to be on the aggregate of all interests held throughout a group of companies by attributing all those interests to the parent company."*

11.1.25 In any event, it seems to me from a reading of the Directive that the assertion that the 'focus' of the Directive is 'on the aggregate of all interests held throughout a group of companies by attributing all those interests to the parent company' is a very significant over-simplification of its provisions. This is not explicitly stated anywhere in the Recitals to or in the text of the Directive and is not a proposition that can readily be gleaned from the sophisticated provisions in Articles 7 and 8 which aggregate interests and holdings by reason of controlling and other interests.

11.1.26 I therefore conclude that Lotus Green was required to notify its acquisition of an interest in the Fyffes shares under Section 67 of the Companies Act and to the Stock Exchange under Section 91. DCC did not need to notify Fyffes under either Section 67 or Section 91 because they continued to be 'interested in' the shares by reason of Section 72.

PART V – Whether Section 108 was breached in 1995

11.1.27 It was suggested by the Director, in his application for the appointment of Inspectors, that the intra-group company transfer by DCC and S & L to Lotus Green could have constituted *'insider dealing'* in breach of Section 108 of the 1990 Act. The view was expressed by the Director that (in summary) as both DCC and Fyffes thought that the notification of the intra-group company transfer might have an impact on the share price, the information was thereby price-sensitive within the meaning of the 1990 Act. This was in fact one of the Director's principal arguments in seeking to have an Inspector appointed.

11.1.28 The companies vigorously disputed this and made submissions to me in the course of my investigation to the effect that this could not be so as a matter of law.

11.1.29 I have concluded that the suggestion by the Director that the 1995 transactions could have amounted to a breach of Section 108 of the Companies Act, 1990 does not withstand scrutiny.

Interpretation of Section 108

11.1.30 The prohibition in Section 108(1) provides as follows:-

> *"108(1) It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with a company to deal in any securities of that company if by reason of his so being, or having been, connected with that company he is in possession of information that is not generally available, but if it were, would be likely materially to affect the price of those securities. "*

11.1.31 The important part of the sub-section, for the purpose of considering whether DCC and S & L's contemplation of selling their beneficial interest in the Fyffes

shares to Lotus Green could have breached Section 108(1), are the words *'if by reason of his so being'*. These words are connected to the words *'connected with that company'*. The *'that'* company is, of course, the company whose shares cannot lawfully be dealt in if the person connected with it is in possession of information that is not generally available. But the person has to have the information by reason of his being, or having been, connected with *that* company.

11.1.32 Accordingly, in this instance the information which is alleged to be 'price sensitive' is the contemplation or plan by DCC to transfer its beneficial interest in the Fyffes shares within the DCC Group, and this is not information which the person (in this case Jim Flavin) had 'by reason of his being connected, or having been, connected' with Fyffes. Jim Flavin had the 'information' on the proposed 'dealing' to effect the transfer from DCC and S & L to Lotus Green 'by reason of his being connected with' and, indeed, because he was Chief Executive of DCC.

11.1.33 The dealing by DCC and S & L (or Lotus Green, if Jim Flavin was an officer of Lotus Green) could only have been unlawful under Section 108(6) if the dealing by Jim Flavin under Section 108(1) was unlawful. As he did not have the information by reason of his being connected, or having been connected, with Fyffes, no liability under Section 108 arises.

11.1.34 Indeed, apart from applying the ordinary canons of construction to Section 108(1) and (3), I am of the opinion that Section 108(8) expressly exempts DCC and S & L (or Lotus Green, if Jim Flavin was an officer) from any liability under Section 108(3) where the information in the possession of the officer of the *'first mentioned company'* (in this case DCC or S & L) is *'information that was received by the officer in the course of the performance of his duties as an officer of the first mentioned company and that consists only of the fact that the first mentioned company proposes to deal in securities in that other company.'*

11.1.35 In this case, insofar as it was suggested that there was price sensitive information in the possession of Jim Flavin, it was only of the fact that DCC and S & L proposed to transfer their beneficial interest in Fyffes to Lotus Green i.e. that the companies proposed to deal in securities in Fyffes.

11.1.36 Even if I am wrong in my construction of the above sections, it is difficult to see how a court would construe Section 108 as imposing liability on the companies for the simple reason that it would lead to an absurd result. It would mean that any person connected with the company (Fyffes) would never have been able to deal in its shares if he believed that the ultimate transaction would affect the price of those shares. Such a result could hardly have been intended by the Oireachtas. Every person connected with a company with a substantial shareholding such that its sale would move the price of the company's shares on the market would have been precluded from dealing because that person's own knowledge of his or her intentions would have constituted price sensitive information.

11.1.37 I do not believe that a literal interpretation of Section 108 yields the result suggested by the Director. This view is reinforced on the facts of this case, where such dealing as occurred was entirely inter-group as opposed to an outside sale to a third party.

11.1.38 However, even if there had been a significant price move in the Fyffes shares (had the information become publicly known) which I regard as unlikely, there would be no 'fraud on the market' because whether the price rose or fell as a result of the 'dealing' there would be no net gain or loss within the DCC Group. I have therefore concluded that the 'information' that DCC and S&L intended to transfer the beneficial interest in the Fyffes shares to Lotus Green could not in itself constitute 'price sensitive information' within the meaning of the Section.

11.2. Conclusions and Findings in relation to the 1995 Transactions

11.2.1 Prior to my appointment, the basic facts of the 1995 transactions were known from the judgment of Ms. Justice Laffoy in the High Court proceedings.

11.2.2 The Director, for his part, appointed one of his officers, Mr. Adrien Brennan, under Sections 19 and 21 of the Act, so as to enable the books and documents of Lotus Green to be examined, including the books and documents in relation to the 1995 transactions. In June 2007 Mr. Brennan presented a final draft report into the possible breaches by DCC and Lotus Green of the disclosure requirements under Sections 67 and 91 of the Act. The Director had also obtained Senior Counsel's Opinion to the effect that DCC and Lotus Green had breached their obligations in failing to notify the disposal and acquisition of the interest in the Fyffes shares under Sections 67 and 91 of the Act. In addition, as disclosed by the Director and as recorded in the judgment of Mr. Justice Kelly, the Director sought the views of the Director of Public Prosecutions (the "DPP") on Mr. Brennan's second report as to whether any criminal prosecution was warranted. In October 2007 the DPP indicated that a prosecution would not be warranted.

11.2.3 As appears from 11.1 above I am in agreement with that opinion in relation to Lotus Green's obligations, but not in relation to those of DCC. The legal conclusions I have reached as to the meaning of Sections 67, 91 and, more importantly, 108 have a significant bearing on the findings I can reach as to whether there is evidence to support a finding that DCC and S & L and their respective officers, directors, employees and advisers can have breached any part of Part IV or V of the Companies Act, 1990.

11.2.4 Since, however, my warrant extends to both investigating and reporting on the two sets of transactions in 1995 and 2000, as well as reporting on whether the facts as found justify a finding that individuals may have breached any of the provisions of Parts

IV and V (and any related provisions) of the Companies Act, 1990, I have set out below the facts as found by me concerning the 1995 transactions.

The Purpose Behind the 1995 Transactions

11.2.5 By early 1995 it was clear to all officers and directors (both executive and non-executive) in DCC that the stake of slightly in excess of 10% which it owned in Fyffes was 'anomolous' to their business. From the evidence given to me, there was virtual unanimity on this point. It was equally clear that, whilst there was no immediate intention to sell the stake, DCC were most unlikely to increase their shareholding in Fyffes and that the probability was that they would sell their shares if the right offer came around.

11.2.6 How that offer would arise was, of course, impossible to know, but the consensus of all concerned in DCC was that it was most likely to occur in the context of a takeover or acquisition of Fyffes by a larger multi-national fruit company like Dole or United Brands.

11.2.7 DCC were not actively seeking to sell their stake in Fyffes: it was producing income in the form of a dividend, but it was not a long term 'hold', and, it was inconsistent with the Industrial Holding Company that DCC had become by 1995, since moving in that direction from 1990 in the lead up to its floatation in 1994.

11.2.8 On the basis of the documentary and oral evidence I am satisfied, and I so conclude, that the purpose behind the plan to transfer the beneficial interest in the Fyffes shares to another wholly owned subsidiary in 1995 was exclusively for tax reasons, even though this was described in the Minutes of the meeting of the Board of DCC on the 31st July as 'corporate restructuring'. 'Corporate restructuring' was an understandable euphemism for the tax scheme. DCC would not have wanted the Minutes to record what was, in fact, the express purpose of the scheme.

11.2.9 I am equally satisfied, and I so conclude, that all of the transactions effected in August 1995 whereby DCC and S & L sold their beneficial interest in all of the Fyffes shares and Lotus Green acquired that beneficial interest (with a view to Lotus Green subsequently becoming tax resident in the Netherlands and availing of the "participation exemption" available to Dutch-resident companies) was exclusively for the purpose of the same Capital Gains Tax saving scheme. This meant that tax on any capital gain on a subsequent sale would be avoided by the DCC Group, provided that the rules of the exemption were observed. This conclusion is entirely consistent with what was already known and is entirely consistent with the facts as found by Ms. Justice Laffoy.

11.2.10 Insofar as what was known before I was appointed is concerned, the matter is succinctly set out at page 5 of the judgment of Laffoy J. in **Fyffes Plc –v- DCC & Others** as follows:-

> *"Following the floatation of DCC in May 1994 its holding in the Plaintiff, another public company, was perceived as being anomalous. Its strategy from 1996, and probably from 1995, was to exit Fyffes when a suitable opportunity arose. With a view to mitigating its tax liability, in particular, liability for Capital Gains Tax on a future disposal of the holding, in August 1995 DCC and S&L … agreed to sell the shares in Fyffes … to Lotus Green. The agreed purchase price was paid by Lotus Green but legal title was not transferred so that DCC & S&L remain the registered owners of the shares. Just over a fortnight after the agreement, Lotus Green became resident for tax purposes in the Netherlands … it was acknowledged by DCC in these proceedings that what happened was wholly tax driven."*

11.2.11 Based on my investigation, the only qualification or change I would make to that succinct statement by the learned High Court Judge is that the additional evidence which I heard supports a finding that the strategy to exit Fyffes, when a suitable opportunity arose, preceded both 1996 and 1995, and probably existed prior to the floatation in May 1994.

11.2.12 Ms. Justice Laffoy went on to say at page 16 of her judgment:-

> *"The interest that Lotus Green acquired in the shares came to it in implementation of a tax avoidance scheme. However nothing emerged in these proceedings to suggest that it was other than a perfectly legitimate exercise."*

11.2.13 Seen from the perspective of DCC and its shareholders, it was completely understandable that the executives of DCC would lawfully attempt to minimise DCC's Capital Gains Tax liability when it eventually came to sell its shares in Fyffes.

11.2.14 The tax advisers to DCC, Mr. Wall, Mr. O'Driscoll and Mr. O'Brien, were all of the view that what DCC attempted to do in 1995 in minimising or avoiding Capital Gains Tax, was exactly what other plc's would have attempted to do, or were doing, at the time. The 'Lotus Green Scheme' may have been unique in its detail, but it was typical of the schemes that plc's were availing of to avoid what they saw as a 'double exposure' to Capital Gains Tax.

11.2.15 That 'double exposure' arose because DCC would have paid 40% on the capital gains on the sale of the Fyffes shares and, in turn, its own shareholders would pay another 40% on the gains they made on the sale of their DCC shares. This, according to DCC and its tax advisers, resulted in an effective rate of Capital Gains Tax of some 68%.

11.2.16 The incentive to put such a scheme in place today would be far less with a Capital Gains Tax rate at 20%. More significantly, since in or about 2004, DCC would not have had to avail of a Dutch 'tax haven' for Lotus Green, following the introduction of 'participation exemption' into Irish tax law.

11.2.17 DCC took best advice in relation to the design and implementation of the tax scheme. The potential financial benefit was significant, given that the exposure to Capital Gains Tax in 1995, had DCC then sold its Fyffes stake, was of the order of IR£7 million.

11.2.18 DCC used its tax accountants, Messrs. Coopers and Lybrand, and the leading tax Counsel of the day, the late Tommy McCann S.C., to advise them on the scheme. In addition, they sought a 'second opinion' from SKC/KPMG in the person of the tax partner, Mr. Pat O'Brien.

11.2.19 Having heard detailed evidence from Mr. Fergal O' Dwyer, Mr. Pat Wall and Mr. Terry O'Driscoll of Coopers & Lybrand (now PWC), Mr. Pat O' Brien of Stokes Kennedy Crowley (KPMG) and Mr. Peter Van der Hoeven of PWC Holland, and having considered all of the documentation surrounding the creation and implementation of the tax scheme, including detailed opinions from the late Tommy McCann S.C, I am satisfied that the attempt to avoid paying Capital Gains Tax on the sale of a substantial stake in Fyffes was something that DCC were legally entitled to seek to do. As Mr. Pat Wall observed in his evidence to me:-

> *" tax mitigation in that type of group holding structure would have actually been something that would have exercised the minds of any well run industrial holding company."*

11.2.20 It is also the case that a further consequence of the tax scheme as implemented (whereby only the beneficial ownership of the shares was transferred to Lotus Green with the legal title remaining in DCC plc and S&L Investments Limited) was that stamp duty on the transfer was avoided. Having heard the evidence of the tax advisers and the evidence of Mr. Fergal O' Dwyer, I am satisfied that this was an undoubted benefit but was not part of the central reasoning for the implementation of the tax plan. The potential capital gains tax saving to the DCC Group in 1995 was of the order of IR£7 million. The stamp duty saving in the amount of approximately IR£300,000, though significant, did not feature centrally in the tax planning. This was referenced by Terry O'Driscoll of Coopers & Lybrand in his evidence to me:-

"You could do it and pay the stamp duty and I suppose there was a slight issue of were you better completing the deal with beneficial ownership and paying the stamp duty would it optically look better or whatever."

Sufficient Legal Advice?

11.2.21 Three relatively short letters of advice were received from William Fry during the course of the preparation for the implementation of the 1995 tax saving scheme. When I first read the 1995 transactions documents my initial impression was that comparatively little attention seemed to have been paid to the notification obligations arising under Part IV, Chapter 2 of the Act, compared to the time and effort devoted to the tax plan. It thus appeared to me that, apart from a five line fax from Alvin Price of William Fry, Solicitors, on the 7th April, 1995, no further consideration was given to the matter until the more detailed opinion from Mr. Price in his letter of advices of the 21st July 1995. It also appeared as if this later advice was prompted by the Fyffes intervention in June 1995 when they learned, informally, of DCC's intentions. This was to be contrasted with the extensive advice that was obtained in connection with the structuring of the tax scheme.

11.2.22 As is apparent from the interview summaries, I put this to all of the DCC witnesses who were centrally involved in the implementation of the 1995 transactions and, in particular, to Mr. O'Dwyer, Mr. Scholefield, Ms. Tease and, to a lesser extent, Mr. Flavin. The import of their response was that the tax plan was far more complicated and involved than the potential notification obligation arising under Part IV, Chapter 2 of the 1990 Act.

11.2.23 It was also a matter that I took up with the legal advisers to the companies, who made substantially the same point and explained that the plan which saw the beneficial interest of the shares transferred to Lotus Green was complex, and required the proper and careful implementation of each of several steps. They also emphasised that the tax plan was somewhat novel as there was no immediate third party sale

contemplated. The process by which the scheme was implemented (as was explained in evidence in the High Court and succinctly summarised in the judgment of Laffoy J.) involved, as previously stated, a number of steps and was dependent upon the successful exiting by Lotus Green (subsequent to the sale of the shares) from the DCC Irish Capital Gains Tax group (which included both DCC Plc and S & L Investments) to the Dutch Capital Gains Tax group. That, in turn, was dependent upon Lotus Green establishing tax residence in the Netherlands.

11.2.24 It is also true that a major concern in relation to the tax aspect (explained by Mr. O'Driscoll and Mr. O'Brien in particular) was that, if Lotus Green failed to successfully exit the Irish Capital Gains Tax group, the net effect might have been to crystallise a charge to Capital Gains Tax in August 1995 when, in fact, there had been no disposal outside the DCC group and no profit realised for the group. This concern was reinforced by the evidence of Mr. O' Dwyer and Ms. Tease.

11.2.25 The legal advisers for the company thus submitted that it would be both '*factually inaccurate and unfair*' for me to conclude that the companies failed to pursue the question of the companies notification requirements under the Companies Act with equal care and vigour compared with the tax advice which was sought. They emphasised the fact that DCC, both in 1994, in relation to a separate transaction involving Flogas plc, and in 1995, in relation to the transfer of the beneficial ownership of the Fyffes' shares, sought the advice of its Solicitors in relation to notification. They further submitted that the tax plan was a "*novel, complex and multi-layered plan which required each key element to work and to be in its proper sequence and where each stage required expert scrutiny.*" On the other hand, they submitted that the "*issue of notification under the 1990 Act was an important but much more discreet issue in respect of which DCC had the previous year already sought and received legal advice from William Fry*."

11.2.26 They also referred to the line of questioning pursued by me, which asked why Counsel's Opinion had not been sought in relation to the compliance obligations, when it had been sought in relation to the tax regime. They pointed out that the

suggestion that the advice of Counsel be sought in relation to the tax scheme emanated from PWC, and not from DCC. In his evidence before me, Mr. O'Driscoll confirmed that:-

> "*In general I think we would trigger that opinion. Look for the amounts involved or the complexity or whatever you may be better getting a second opinion here in terms of Counsel's Opinion.*"

11.2.27 Support for this position was provided by Mr. O'Dwyer and Mr. O'Brien in their evidence. Finally, they submitted that in circumstances where DCC sought the advice and input of William Fry in respect of the legal aspects of the plan it would be unfair to conclude that it had failed to pursue the question of the company's notification obligations with equal care and vigour. It was further contended that I was not comparing like with like, since the notification obligations were not considered to be particularly complex or particularly unusual. Apart from the advice given in 1994 and the specific advice given in April and July 1995, Mr. Price also attended the board meetings of the various Group companies in August 1995 but, aside from the issue of notification, no issue arose on any of these legal aspects.

11.2.28 On reflection, I think that the companies' submission about the relative complexity of the tax and notification obligations is well made, and no criticism in fact can be levelled against the companies for devoting more resources and attention to the more complex tax scheme.

11.2.29 I do, however, think that, given the novelty of Part IV of the Companies Act, 1990, it would have been prudent to seek Counsel's Opinion on the matter. Mr. Price was undoubtedly competent enough to provide the advice, but where what was at issue was a relatively complex, if discreet issue, on an untested piece of legislation, obtaining the assurance and insurance of Counsel's Opinion was advisable. Mr. Flavin and Mr. Scholefield said that it never occurred to them to seek Counsel's Opinion, and if Counsel's Opinion was to be sought that they would have expected Mr. Price to suggest

it. Mr. Price, for his part, stated that it was rare in his practice for him to seek Counsel's Opinion in such circumstances, and on such a matter and he was happy, having conducted extensive research in 1994, that he was in a position to advise his clients in relation to the matter.

11.2.30 Be that as it may, written advice was obtained from the companies' Solicitors on the notification issue on two separate occasions in 1995 and once in relation to the issue of insider dealing as follows.

11.2.31 The documentary evidence shows that DCC, through Ms. Tease, a former Company Secretary of the Group (who had stepped down and been replaced as Company Secretary by Mr. Scholefield in January 1995), telephoned Mr. Price in early April 1995 seeking Mr. Price's advice as to whether a transfer of the beneficial ownership of a shareholding in an otherwise notifable amount had to be notified to the relevant company and the Stock Exchange. Ms. Tease, who had not given evidence in the High Court, gave clear and convincing evidence to me that she was aware of the notification obligations and mindful that it may have arisen in the context of what became the 1995 transactions. While she did not remember precisely what prompted her to phone Mr. Price in early April 1995, the fact that she did so is significant and demonstrates that DCC wished to be advised on its legal obligations under the Companies Code, should it decide to implement the tax saving scheme.

11.2.32 Ms. Tease also recollected that, some eight months earlier, a similar issue had arisen in the context of the proposed transfer by DCC to another DCC subsidiary of its stake in another public limited company, Flogas plc. The advice in 1994 was to the effect that no such notification obligation arose.

11.2.33 The reference in Mr. Price's short letter that there was "*no new requirement to notify*" is also significant. Ms. Tease was aware that in August 1991, within five days of the coming into effect of the provisions of Part IV of the Companies Act, 1990, DCC had notified its roughly 7% stake to Fyffes as required by Section 67.

Subsequently, on the 1st December, 1992, on the day following the acquisition by S&L of an approximate 3% stake in Fyffes, Ms. Tease sent a Section 67 Notice to the directors of Fyffes and a Section 91 Notice to the General Manager of the Stock Exchange. The acquisition by S & L, the wholly owned subsidiary of DCC, of an approximate 3% stake increased the combined shareholding of DCC and S&L above the 10% threshold requiring notification also to the Stock Exchange. These three notices are to be found in Appendix F. This was new evidence.

11.2.34 The fact of the 1991 and 1992 notifications and the fact that DCC, through Ms. Tease, had obtained advice from Mr. Price in August 1994 clearly supports the companies' contention that DCC was not only mindful and aware of its obligations, but that they notified when they were advised to do so. It is also, of course, the case that in February 2000 two separate Section 67 notifications were prepared and sent to Fyffes long before any 'insider dealing' controversy arose.

11.2.35 Mr. Price's short letter of advice in April 1995 confirming the telephone conversation he had with Ms. Tease is clear and unequivocal. Whilst it does not set out the basis for the opinion nor quote the relevant sections, it was written confirmation from a trusted and respected commercial lawyer that no new requirement to notify arose where there was no movement of the beneficial ownership of the relevant shares outside the shareholders 100% owned group. Again, the contents of this letter were known prior to my appointment.

11.2.36 Had the matter rested there and had DCC, S&L and Lotus Green proceeded with the 1995 transactions, it is difficult to see how the directors and officers of the companies could have been criticised for not notifying Fyffes or the Stock Exchange of the 9th August, 1995, transfer from DCC and S&L to Lotus Green, even if the advice contained in the short letter from Mr. Price was incorrect. However, the matter did not rest there and the issue in relation to the notification obligations was revisited with Mr. Price in July 1995.

The Fyffes exchange of correspondence

11.2.37 The course of events that lead up to this was as follows: in late May 1995 Mr. Flavin informally mentioned to Mr. Neil McCann of Fyffes (over lunch following a Fyffes' board Meeting) that it was DCC's intention to proceed with a Capital Gains Tax saving scheme involving the transfer of the beneficial interest of the stake to a non-resident wholly owned DCC subsidiary. From this time on Fyffes were aware of the intention of DCC to effect the intra-group transfer. There followed, in June and July, a flurry of correspondence and memoranda as to whether a notification obligation arose under Sections 67 and 91. The contents of this correspondence is recorded in detail in Chapter 8 of this Report. It is clear from Mr. Carl McCann's letter to Mr. Flavin of the 23rd June that his concern was not in relation to whether a Section 67 notification obligation arose, but rather whether Mr. Flavin, as a director of Fyffes, was obliged to notify the Chairman of Fyffes of any prospective transaction involving DCC's Fyffes shares.

11.2.38 The Fyffes memorandum discovered also shows that from at least the 23rd May, 1995, (a month prior to Mr. McCann's letter to Mr. Flavin) Fyffes were aware of the proposed sale. On the 23rd May, Mr. Carl McCann sent a memorandum to his father, Neil McCann, and Denis Bergin referring to the fact that:-

> "*During lunch Jim mentioned that he was transferring his Fyffes' stake to an offshore structure so that they could take advantage of a disposal if it ever arose without needing to pay tax. The essence of such an arrangement, if it works, is that control must be with directors who reside offshore. This implies a technical change of control. Perhaps such an event requires (1) the Chairman's formal approval and/or (2) disclosure which might be self defeating both within terms of its potential affect on our share price (hardly to our advantage) or which might damage its tax effectiveness. Perhaps in any case Jim should be writing to seek permission to make any such change. Maybe he is trying to keep the file right by deeming his casual reference last Thursday to be notice. Would he try to*

construe the fact that you didn't openly disagree to be your technical acceptance??

Perhaps we need to drop him a line to clarify the point that any such change would require his application in writing and your agreement in writing or otherwise.

Let's see what Denis thinks."

11.2.39 A month elapsed before Mr. Carl McCann wrote to Mr. Flavin. It seems that he was prompted to write to Mr. Flavin not by what was said at the meeting in May, but rather by a telephone conversation on the 19th June, on the eve of an Audit Committee meeting of Fyffes due to be attended by Mr. Flavin on the 20th June.

11.2.40 An issue arose at that Audit Committee meeting over the announcement that Fyffes' monthly figures were being consolidated into DCC's monthly figures (albeit several months later) and being presented to the DCC board as part of their package. Those at the meeting, including Denis Bergin and Carl McCann, were rather surprised. Carl McCann's memorandum of the 21st June which was a memorandum "*To DCC file*" referred to this, and also to Jim Flavin's phone call to him on the previous evening at 6.15 p.m., where Mr. Flavin indicated he was planning to transfer ownership of the DCC shares in Fyffes to a '*Dutch BV*'.

11.2.41 Carl McCann recounted that Mr. Flavin sought waiver of any requirement to inform the Chairman and said that his (Mr. Flavin's) advice was there was no requirement to do same. Mr. McCann's note explained that he told Mr. Flavin that he felt that there was a requirement and that he would try to revert to him on that point.

11.2.42 On the same day Mr. Michael Meghen of Arthur Cox, Solicitors wrote to Carl McCann referring to a telephone conversation "*of last week*" in which Mr. McCann asked Mr. Meghen for advice in relation to the "*nature and form of any notifications*

which might be required consequent upon a transfer by DCC of its entire shareholding in Fyffes". Mr. Meghen clearly did not have the detail in relation to what was intended, but requested the detail from Mr. McCann explaining that Mr. McCann would appreciate "*that advice given on the basis of a misunderstanding of what is intended would be of no value.*"

11.2.43 On the 23rd June, 1995, Mr. Meghen wrote to Mr. McCann in response to a phone call he had obtained from Mr. Scholefield in the course of which he, Mr. Scholefield, gave Mr. Meghen a brief outline of what was proposed:-

> *"In essence I understand that the beneficial ownership of the shares in Fyffes Plc currently registered in the name of DCC will be transferred to a non-resident BV. Whilst I do not have detail as to the precise steps which will be involved in the proposed transaction it appears on the face of it that the provisions of Chapter 2 (sic) of the Companies Act 1990 (the Act) maybe applicable.*"

11.2.44 The Chapter 2 he was referring to was, of course, Chapter 2 of Part IV of the Companies Act, 1990. He then referred expressly to Sections 67, 77 and 91. Section 77(2) provides that reference to an "*interest"* in shares is to be read as including an interest of any kind whatsoever in the shares. Mr. Meghen told Mr. McCann that he would be "*interested to know on what basis it has been determined that the proposed transaction does not fall within Chapter 2 of the Act*".

11.2.45 There then followed a series of exchanges between Michael Meghen, Alvin Price, Michael Scholefield, Carl McCann, Jim Flavin and Neil McCann over the following weeks. The primary focus of the Fyffes executives was to ensure that Jim Flavin, as they saw it, would seek the Chairman's permission before DCC could effect any change in their ownership of the Fyffes shares. Mr. Meghen, rightly, focused on the legal obligations which arose under Section 67 and Section 91, as did Mr. Price of William Fry.

11.2.46 On the 19th July, 1995, at the end of the exchange, Mr. Meghen wrote to Mr. Scholefield. This letter was written in response to Mr. Scholefield's letter to Mr. Mehigan of the 11th July in which he enclosed the draft letter proposed to be sent to Neil McCann, who had requested a "*letter of comfort*" from DCC in relation to the proposed transfer. The draft letter from Mr. Scholefield was in the following terms:-

> *"Mr. Neil McCann,*
> *Chairman,*
> *Fyffes Plc. etc.*
>
> *Dear Neil,*
>
> *I have talked to Alvin Price of William Fry about the proposed transfer by DCC within their group of their holding in Fyffes' Plc.*
>
> *Notification obligations in relation to a share transfer lie with the shareholder rather than the company in which the holding is held. It is for DCC to decide whether a notification is required under the Act. Alvin Price is advising DCC that as the transfer is within the same group a notification is not necessary.*
>
> *Yours etc.*
>
> *cc Jim Flavin"*

11.2.47 In his covering note of the 11th July, Mr. Scholefield asked Mr. Meghen to "*consider whether it would be appropriate to send something in the attached form"* to Mr. Neil McCann. On the 19th July, 1995, Mr. Meghen replied to Mr. Scholefield:-

> *"Re: Possible share transfer application of Chapter 2 of the Companies Act 1990.*

Dear Michael

I refer to our telephone conversations of last week in connection with the above and to the draft letter which you forwarded to me under cover of your fax of July 11th. I had cause to speak with Neil McCann on Friday morning on another matter and took the opportunity to bring him up-to-date on my discussions with yourself and Alvin Price. In summary I explained to Neil that Alvin had no fundamental disagreement with the points made in my fax to Carl of June 23rd and I pointed out that it was for DCC to decide whether it is incumbent upon them to make any notification under the Act. In view of my conversation with Neil McCann I do not propose to write to him in relation to this matter unless there are new developments of which he should be made aware.

Many thanks,
Regards.

Yours sincerely,
Michael Meghen"

11.2.48 Insofar as the lawyers were concerned, I think it is fair to say that they agreed to differ in relation to the obligation of DCC to notify under Sections 67 and 91, whilst recognising that it was a matter entirely for DCC to decide whether it would do so. To the extent that it is relevant to my enquiry, Fyffes knew that DCC intended to go ahead with the proposed transaction and that the shares were proposed to be transferred to a wholly owned (Dutch BV) subsidiary.

11.2.49 Although the issue of notification under Sections 67 and 91 was raised by their Solicitor, Fyffes clearly did not welcome the publicity that a notification might bring and its possible impact upon Fyffes' share price. DCC, for its part, were adamant that

Mr. Flavin was not a *"connected"* party with DCC within the meaning of the listing rules and was under no obligation to seek the Chairman's consent before DCC did anything with the shares. It was neither necessary nor appropriate for me to seek to resolve any conflict that may have arisen between Fyffes and DCC on this matter since my investigation is directed to investigating the affairs of the three companies, their officers, directors, employees and advisers and not the affairs of Fyffes or their officers, directors and advisers. I am satisfied however that no one in DCC were aware of the 'effect on price' concern of the Fyffes' Executives referred to in Mr. Carl McCann's May memorandum.

11.2.50 When one stands back from all of this, there is more than a little irony in the fact that there is an the issue as to whether the companies were obliged to serve a Section 67 Notice upon Fyffes, when it is abundantly clear that Fyffes were aware of DCC's intentions.

11.2.51 In any event on the 14th July, 1995, Daphne Tease, at the request of Michael Scholefield, wrote to Alvin Price of William Fry informing him that Michael Scholefield was *"anxious to get a rather more specific letter setting out the situation with regard to Companies Acts, Yellow Book, Blue Book, etc."*

11.2.52 It is also the case that if Fyffes had been, at any time, concerned about the true ownership of the shares registered in the names of DCC and S & L Investments Limited, they were empowered under Section 81 of the Companies Act, 1990, to require DCC plc or S & L Investments Limited to provide written confirmation as to the true ownership under penalty of penal sanction.

11.2.53 I am of the opinion that the deterioration in relations between Mr. Flavin and the rest of the Fyffes' board had a bearing on the positions adopted by both DCC and Fyffes at that time. Mr. Flavin was strongly of the view that, as he did not 'control' DCC, he did not need to seek the permission of the Chairman of Fyffes to deal. Fyffes,

for their part, were of the view that the spirit of the Model Code required Mr. Flavin to do so.

11.2.54 As suggested above, I am also left with the impression that, had Fyffes not made an issue of the notification obligation in June and July 1995, the issue might not have been revisitied by DCC. The views of the four officers of DCC on this point is less than clear. In fairness to them, they stated that they cannot be certain whether Mr. Price would have been asked to provide further written advices in July absent the Fyffes intervention. Mr. Flavin and Mr. Scholefield would certainly wish me to conclude that, regardless of what Fyffes said or did, a detailed letter of advices would have been procured for the DCC board meeting in July 1995 and made available to S & L and Lotus Green.

11.2.55 On balance, I think it is more likely that the issue would not have been revisited. The short advice obtained in April 1995 was clear and unequivocal. However, I do not think that this is very material to my investigation. The important point, from a compliance point of view, is that the companies considered their legal obligations and sought advice as to what they were required to do. I now turn to that advice and whether it was reasonable for the companies and their directors to follow it or not.

The Willima Fry advice of the 21st and 24th July 1995

11.2.56 Mr. Price gave detailed evidence to me in the course of my investigation. He had also given evidence in the High Court proceedings between Fyffes and DCC. Mr. Price is a senior partner in William Fry, Solicitors, with very considerable experience and expertise in company law. He had acted as Solicitor to DCC since the late 1970's and was a respected and trusted adviser. Prior to the enactment of the 1990 Act he was a member of the Law Society Committee that provided advice and guidance on the proposed legislation. It was clear to me from the evidence of the DCC officers and directors that he was, and continues to be, held in very high regard by DCC.

11.2.57 Mr. Price set out, in the course of his evidence, the advice he had given in both 1994 and 1995. The original 1994 advice was no longer in existence having been destroyed in accordance with William Fry document retention practice. It related to another matter of DCC and its shareholding in Flogas plc. Subsequently, at my request, Mr. Price prepared a written memorandum recounting the advice which he believes he gave in 1994 in relation to Chapter 2 of Part IV of the Companies Act, 1990. The recreation of his advice is contained in Appendix I.

11.2.58 To Mr. Price's credit, he was not at any time overly defensive in relation to the advice which he gave, and readily conceded that he may have gotten it wrong. I am satisfied, on the basis of the evidence given to me by him on oath, that Mr. Price believed, and believes, that no notification obligation arose in 1995 and that although he recalls that he perceived that DCC had a preference not to notify, this did not influence the decision he arrived at or the advice that he gave to DCC.

11.2.59 The 1994 transaction on which he was asked to advise concerned an intra-Group transfer of Flogas shares from DCC plc to its wholly owned subsidiary DCC Corporate Partners. The transfer took place in September 1994 and the advice was sought and provided in August 1994, as reflected by a memo dated the 25th August, 1994, prepared by Ms. Tease. She recalled obtaining the advice in 1994 and stated that she regarded the advice given in 1994 as being clear and unequivocal. I accept her evidence in this regard. The internal memorandum from Ms. Tease to Mr. O'Dwyer is dated the 25th August 1994 and is headed:-

> *'Re: Flogas – inter- group transfer of shares – notifiable event?*
>
> *Fergal, Alvin Price has verbally confirmed that an inter-group transfer of shares is not a notifiable event.'*

11.2.60 This memorandum is to be found in Appendix M Document 7

11.2.61 The legal advice given by Mr. Price in 1995, insofar as it is in writing, is contained in the short fax of the 7th April, 1995, and in the two letters dated the 21st July, 1995, and the 24th July, 1995.

11.2.62 When I first read the two page letter of the 21st July I had the impression that Mr. Price was expressing his view in an equivocal manner. Whatever about my impression, none of the directors who received and read the advice believed or perceived it to be in any way equivocal.

11.2.63 Mr. Price was questioned extremely closely in relation to this letter. A number of things can be said about the 1995 advice and the circumstances in which it was sought.

11.2.64 Firstly, at an early stage in the process in April 1995 Ms. Tease, the Deputy Group Secretary, telephoned Mr. Price and sought his advice with regard to the issue of notification of an intra-group transaction. On that occasion she requested and received written confirmation of that advice which came by way of the short fax letter. I am satisfied that it was wholly consistent with the advice previously given in August 1994. It is also measure of how seriously DCC regarded compliance in general that the advice of their Solicitors was sought in April 1995, notwithstanding the clear advice given on the same issue only eight months previously albeit in connection with the shares it held in a different company.

11.2.65 Mr. Scholefield and Mr. Flavin were unable to agree with my suggestion, or could not agree completely, that the request which emanated from Daphne Tease for *"a rather more specific letter"* from Alvin Price on the 14th July, 1995, was prompted by the exchanges which had taken place between Fyffes and DCC between the 23rd June and the 11th July, 1995. Having considered all the evidence, both documentary and oral, I think it is unlikely that Mr. Price would have been asked for a further opinion and DCC would have relied upon the short fax sent by Mr. Price to Ms. Tease on the 7th April, 1995, but for the Fyffes 'intervention'.

11.2.66 The intervention of Fyffes has undoubtedly caused confusion and may have lead to the concern of the Director (and initally of mine) that the decision of the companies not to notify might have been linked to a joint concern of Fyffes and DCC's about the effect that the inter-company transfer might have had on the Fyffes share price. I am satisfied however and conclude that any concern that individual officers or directors of DCC might have had about the impact of the 1995 transfer to Lotus Green on the share price of Fyffes was not the reason for the decision not to notify the transfer.

11.2.67 It does, of course, show that DCC in general, and Mr. Flavin in particular, had a degree of sensitivity to what may have been perceived by DCC as the interference by Fyffes in the internal affairs of DCC.

11.2.68 Nor can any criticism attach to Mr. Flavin or Mr. Scholefield for seeking to have "*a rather more specific letter*" from Mr. Price than the short letter of advices sent on the 7th April.

11.2.69 I now wish to refer to the manner in which the advices were circulated to the board. The DCC plc board meeting in July was convened for the 31st July. About a week prior to the meeting, in accordance with normal practice, the directors were circulated with their board papers which included the Chief Executive's Report. At item 6 of that report under the heading "*Changes in beneficial ownership within the DCC Group of shares held"*, Mr. Flavin reported as follows:-

> *"We are planning to transfer the beneficial ownership in the group's shareholding in Fyffes Plc which is currently held in Ireland to a Dutch subsidiary of DCC. Whilst there is no current intention to dispose of the group's shareholding in Fyffes Plc we have been advised that any gain arising on a disposal of this shareholding would not be taxed in Holland. Appendix 1 contains letters from Alvin Price of William Fry re Companies Act provisions on*

the notification of interests and insider dealing on which I wish to have an agreed board position."

11.2.70 The non-executive directors of DCC, namely the Chairman Mr. Spain, Mr. Barry and Mr. Gallagher, informed me that this was the first notification they had of the proposed Capital Gains Tax avoidance scheme involving the transfer of the beneficial ownership of the group's shareholding in Fyffes to Lotus Green. I accept their evidence in this regard. All three were of the opinion that this is the normal manner in which the executives would bring a proposal to the board. In other words, it would not feature on the agenda of a DCC board meeting until it was ready for them to take a decision.

11.2.71 The paragraph in the Chief Executive's Report contained, what appeared to me to be, the unusual requirement to have *"an agreed board position"* in relation to the Solicitor's advices. There was no such requirement in relation to the tax scheme nor were the details of the advices received in relation to the tax scheme appended to the board papers. None of the directors interviewed, either executive or non-executive, thought that there was anything unusual in this regard. It was pointed out that legal advice on other issues had been obtained and discussed at previous and subsequent board meetings. Copies of previous Minutes in which there was reference to legal advice were furnished to me at my request.

11.2.72 I do not think that anything turns on the request for *'an agreed board position'*. However, it does provide further support for my view that Mr. Flavin was very sensitive to all issues surrounding Fyffes and wished to have unanimous board support for the position he had adopted in refusing to seek the permission of the Chairman of Fyffes for what was proposed.

Consideration of the William Fry 21st July and 25th July Advice at the 31st July DCC Board Meeting

11.2.73 All of the participants at the board meeting of DCC on the 31st July were questioned very closely about Mr. Price's letters of advices dated the 21st and the 25th July, 1995. This is detailed in Chapter 9.

11.2.74 The letter of the 21st July dealt with the notification obligations arising under Sections 67 and 91 of the Companies Act, 1990. This is clear from paragraph 2 of the letter which, although not specifying the Sections, states that "*the question that has arisen is whether this internal move within the wholly owned DCC group must be notified to the relevant* ***plc and the Stock Exchange."***

11.2.75 The second shorter letter of the 25th July dealing with insider dealing referred to the letter of the 21st July and stated that "*for essentially the same reasons"* as were outlined in that letter, *"there will be no question of any criminal or civil liability arising under (the) insider dealing provisions in consequence of the movement of the beneficial ownership of the relevant shares within the wholly owned DCC group of companies."*

11.2.76 Mr. Price chose, in the second letter, not to go into any great detail in relation to the insider dealing implications on the basis that the contemplation of DCC to transfer the beneficial inerest in the Fyffes shares inter-Group could not on its own create *"price sensitive information"* or otherwise DCC would never be free to sell those shares. This was consistent with the advice given and noted by Mr. Scholefield in June 1995. Having regard to the view that I have taken as to the meaning and application of Section 108 in relation to the 1995 transactions, I think that his advice was correct. It reflected his view, although not expressed precisely in these terms, that the transfer of shares from a company to its wholly owned subsidiary for tax reasons could not constitute a "*fraud on the market*", since there would or could be no net loss or gain within a group structure.

11.2.77 For completeness, based on my enquiries, I am satisfied that there was no evidence to suggest that Mr. Flavin had any information, such as adverse (or positive) Fyffes trading information or information concerning a significant Fyffes transaction that

was not in the public domain. And the transfer did not occur in a close period. There was, accordingly, no Fyffes information known by Mr. Flavin which could have constituted price sensitive information, as opposed to information which he had as CEO of DCC, in relation to the consideration by DCC of transferring the Fyffes shares to a wholly owned subsidiary. The fact that Mr. Flavin or DCC might have thought that this might or even would have an effect on the Fyffes share price, if known, does not, in my opinion, make it 'price sensitive' within the meaning of Section 108.

11.2.78 There was no obligation on DCC to tell the market what it was thinking of doing with its shares, other than the obligation of Lotus Green to notify the acquisition of the beneficial interest in the shares to Fyffes and the Stock Exchange. This was primarily for the purpose of ensuring that Fyffes (who in fact knew) and the market knew who the beneficial owners were at any given time, but was not an obligation that arose under Part V of the Act.

11.2.79 As can be seen from the summary of the interviews with the DCC directors, they were asked how they understood the 21st (and 25th) July advices.

11.2.80 Each of the directors of DCC explained, in different ways, that they understood the advice of Mr. Price to mean that notification was not required, because the purpose of the Act was to enable Fyffes (through the Section 67 notification) and the Stock Exchange/public (through the Section 91 notification) to know who the true owners of the particular substantial block of shares were. Mr. Price's advices made the point that Fyffes and the Stock Exchange had already been notified that the shares were owned by DCC. He took the view, as reflected in his letter, that the transfer to Lotus Green, a wholly owned subsidiary, did not change this fact and found support for this construction in Section 72(3) of the 1990 Act (which was in fact the only specific Section quoted in his letter). Each of the directors informed me that they had read both letters from Mr. Price as advising them that no notification was required under either Section 67 or Section 91 and that the proposed transfer of the beneficial ownership of the shares to

Lotus Green did not expose them to any criminal or civil liability for insider dealing. I accept their evidence in that regard.

11.2.81 They rejected the suggestion that Mr. Price's letter of the 21st July, 1995, was somewhat equivocal. Although this was put by me to each of the directors, I think it would, in the final analysis, be unfair to read the letter of the 21st July or the 24th July as advising them that notification of the transactions was required or, even less so, that they needed to be concerned about insider dealing implications.

11.2.82 In these circumstances, a further question arises as to whether it was reasonable for the board to accept this advice. It is beyond doubt that it was correct for them to seek the advice of their Solicitor. Had they not sought advice they would be justifiably criticised for carelessness in failing to ascertain their legal obligations. Having done so, and having consulted the trusted and highly experienced legal adviser who had advised the Group over many years, it was, in my view, reasonable for them to accept the advice that was proffered.

11.2.83 I am of the opinion, as indicated in the first part of this Chapter, that the advice was incorrect as far as Lotus Green was concerned. Clearly this has implications for Lotus Green and potentially for its directors, even though it would be a strong mitigating factor for them to be able to point to the advice which they obtained to the effect that notification was not required. Finally, nothing that came to light on this issue in the course of my investigation was materially different to what was known before my investigation started.

11.2.84 I am further of the view that had Mr. Price advised Lotus Green (or any of the companies) that they were obliged to notify Fyffes under Section 67 or the Stock Exchange under Section 91, notifications would have been made. Mr. Price stated that the simple device of changing the name of Lotus Green to a name with DCC in the title (such as 'DCC Investments Limited') would have allayed most, if not all, of any perception concerns. Mr. Price agreed that there was nothing onerous about notifying.

11.2.85 The fact that there may have been what amounted to an unarticulated preference on the part of the directors not to notify, if they did not have to do so, does not affect the conclusion that I have reached. Whilst it was clear that none of the directors regarded it as being in the interests of DCC that there would be publicity surrounding the transaction, this did not feature in their deliberations and I am satisfied, having pressed the directors and officers and advisers on this point, that the decision not to notify was not motivated by any concern that the Revenue Commissioners might have found out about the matter in August 1995.

11.2.86 I can well understand a public perception of a connection between the failure to notify and the desire to keep the tax scheme secret. However, apart from the absence of any documentary or other evidence to support this, a close analysis would reveal that such a concern has no reality.

11.2.87 Firstly, as the tax advisers made it clear in their advice, it was essential that the Revenue Commissioners found out about the transfer of the beneficial interest to Lotus Green and that Lotus Green had moved its residence to Holland. It is true that the Revenue, in the ordinary course of events, would not have found out, and did not in fact find out, about Lotus Green until it was required to, and did, file its tax return in December 1996. But it is wholly unrealistic to think that, had Lotus Green notified the Stock Exchange of the acquisition of the beneficial interest in its shares within 5 days of the 9th August, 1995, the Revenue Commissioners would have reacted and that legislative change would have been effected prior to the date upon which Lotus Green "*took up residence*" in Holland on the 25th August.

11.2.88 In the normal course of events, the Revenue Commissioners would not have raised an assessment to tax until the shares were sold out of the DCC Group. There was, of course, a risk and a concern on the part of DCC and their advisers that moving Lotus Green from the Irish tax group to the Dutch tax group might have triggered a liability to Capital Gains Tax in August 1995 but, again, the Revenue Commissioners

would not have learned from the Section 91 Notice that it was the intention of DCC to transfer Lotus Green's residence from Ireland to Holland.

11.2.89 For all these reasons therefore, even if DCC's motivation in not notifying Fyffes or the Stock Exchange arose from a desire not to alert the Revenue Commissioners to the tax scheme (which I do not believe it was), there was no reality to this concern because it is unlikely that either a Section 67 notification to Fyffes or a Section 91 notification to the Stock Exchange would have found its way to the Revenue Commissioners and, even if it had, it would not have told them of DCC's intention to transfer the residence of Lotus Green from Dublin to Holland, which didn't occur until the 25th August long after the 5 days allowed for notification. Finally, in the extremely unlikely event that they had found out about the scheme and DCC's intentions, the chances of having legislation enacted, or even attempting to enact legislation, in August 1995, to close the loophole when the Dail was not sitting wrer beyond negligable.

11.2.90 So far in this analysis I have referred to the DCC Group collectively or DCC in particular. There were, of course, separate board meetings of S & L and Lotus Green in August 1995, but the principal decision to effect the transfer was taken at the DCC board meeting on the 31st July. Everything thereafter was the implementation of the board policy of the parent. The Minutes of the meetings of S&L revealed that the advices obtained from Mr. Price were considered and noted. There is no such minute in the Minutes of the meeting of Lotus Green of the same date but I am satisfied, on the basis of the evidence of Mr. Price, who was present at the meeting, that he discussed his advices with Mr. Murray and Mr. Breen, the two directors of Lotus Green present at the meeting.

11.2.91 I am also satisfied that the advice (first addressed to Ms. Tease and then by letter to DCC) was given in the context of the transfer and clearly applied to Lotus Green. Even if the matter had not been discussed at either the S&L or the Lotus Green meeting (which I have found it was), I am satisfied that the advice which was obtained from Mr. Price was, indeed, advice for the DCC Group and that nothing material would

turn on the absence of a separate consideration by the two subsidiaries. This does not, in any event, arise since I am satisfied that both S & L (as recorded in its Minutes) and Lotus Green (by virtue of the presence of Mr. Price who recalls a discussion) considered the advice and were happy to accept it.

11.2.92 Mr. Scholefield, Mr. Murray and Ms. Tease all gave evidence that they, as directors of Lotus Green at the time, were aware that William Fry had given advice on notification. Indeed, Ms. Tease was the recipient of that advice in August 1994 and April 1995.

11.2.93 As will also be apparent from my interviews with the officers and directors concerning the 1995 transactions, I was initially concerned that the manner in which the acceptance by the directors of Mr. Price's advice was recorded was unusual. The Minutes of the board meeting of DCC of the 31st July, 1995, refer to the fact that the directors "*concurred*" with Mr. Price's advice. Although this was an unusual way to describe what directors would normally do when considering professional advice, I do not think it matters, nor does it affect my view that it was reasonable for the directors, having regard to the advice obtained from Mr. Price, to accept that advice.

11.2.94 It was also apparent that the directors of DCC, and in particular the non-executive directors, were concerned to be satisfied that there were sufficient controls in place to ensure that Lotus Green, a company with a single purpose - to hold the DCC and S & L stake in Fyffes - would be run properly and in accordance with the strategic wishes of its ultimate parent. I am satisfied that the "A" and "B" director system which gave their nominee on the board of Lotus Green a veto over any decision that the three Dutch directors might wish to take, provided sufficient control. I am also satisfied that they satisfied themselves that the Dutch nationals who were being nominated as directors of Lotus Green were fit and proper persons to be so nominated and were unlikely to take any decision contrary to their understanding of what the ultimate parent wanted.

11.2.95 In summary, therefore, I am satisfied that, apart from the failure of Lotus Green to comply with its obligations under Sections 67 and 91 of the companies Act, 1990 (which was known before my appointment), there was no evidence of any breach by the other two companies, DCC and S & L, their officers and directors of their obligations under Parts IV and V or any related provisions of the Companies Act, 1990, in effecting the 1995 transactions. Insofar as the directors of Lotus Green (who were directors on the 9th August) were concerned, there was advice from their legal adviser telling them that they were not required to notify. It was reasonable for them to follow that advice.

The Tax Advisers

11.2.96 Having dealt with the position of the officers and directors of the companies and the legal adviser, I wish to finally add that I am satisfied and conclude that none of the tax advisers in 1995, Irish or Dutch, were asked to advise or opine upon anything other than the resilience of the transactions of the 'Lotus Green Scheme' from a tax perspective. In particular, I find that they were not asked for, and did not provide (nor could they have been reasonably expected to provide) advice on any Companies Act 'notification' obligation that may have arisen as a consequence of the tax scheme and the transfer of the beneficial interest in the Fyffes shares from DCC and S & L to Lotus Green.

11.3 Conclusions and Findings in relation to the 2000 Transactions

11.3.1 It has already been determined by the Supreme Court that Mr. Flavin, DCC and S & L breached the provisions of Section 108 of the Act of 1990: Section 108(1) in the case of Mr. Flavin, and Section 108(6) in the case of DCC and S & L.

11.3.2 Mr. Flavin was not an officer or director of Lotus Green. It was held by Ms. Justice Laffoy that he was not a shadow director of Lotus Green. She also held that DCC

was not a shadow director of Lotus Green. Lotus Green was held not to have infringed Section 108 because Mr. Flavin was not an officer of Lotus Green. There was nothing in the evidence that I heard which cast any doubt on the soundness of these findings by the learned High Court Judge.

11.3.3 The Director expressed concern that others may have facilitated the dealing by Mr. Flavin. The clear inference from the application was that a thorough investigation of the affairs of the companies, including interviews with the persons who had not given evidence in the High Court, might show that certain of the findings of fact of the learned High Court Judge were wrong or that other individuals would be shown to have been implicated in the 'insider dealing'.

11.3.4 It is hard to address these concerns or to report on the 2000 transactions without first referring to the findings of the High and Supreme Court in the **Fyffes -v- DCC and Others** proceedings. As referred to in several earlier Chapters of this report, the outcome of the High Court litigation between Fyffes and DCC turned on Ms. Justice Laffoy's conclusion that Mr. Flavin was not in possession of price sensitive information at the dates of the share sales. She determined that the dealing was not unlawful under Section 108 and no civil liability to account arose.

11.3.5 Against this single finding Fyffes appealed to the Supreme Court, and was successful in persuading all five members of the Supreme Court that the "*reasonable investor*" test was inappropriate and, in the words of Mr. Justice Fennelly, "*She should have adopted a straightforward test of market effect.*" All five members of the Supreme Court concluded that the information in the possession of Mr. Flavin in the form of the November and December management accounts was 'price sensitive' within the meaning of Section 108 and, accordingly, as Ms. Justice Laffoy held that if the dealing was unlawful, so as to give rise to a liability to account under Section 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 Section 109. Thus, all three companies were required to account for the profit.

11.3.6 There are a number of important facts relating to the share sales in 2000 and, in particular, in relation to the findings of Ms. Justice Laffoy, which appear to have become lost in the general reaction to the Supreme Court decision, but which provide an important context against which my inspection proceeded.

11.3.7 The first is that the non-statutory claim in the **Fyffes –v- DCC and Others** proceedings was unsuccessful. Ms. Justice Laffoy found that the Plaintiff had failed to establish a breach of fiduciary duty on the part of Mr. Flavin. She held that the Plaintiff was neither entitled to an account in equity nor damages or compensation in common law. The dismissal of the non-statutory claim was not appealed.

11.3.8 It was common case that the prohibition contained in Part V of the Companies Act, 1990, rendered unlawful any dealing by a person who, by reason of his connection with the company, was in possession of price sensitive information. Whilst the term 'price sensitive information' is not used or defined in the statute it is, and was, generally used as shorthand for *"information that is not generally available but if it were would be likely materially to affect the price of those securities."* The directive to which Part V was enacted to give effect was **Council Directive 89/592/EEC**, whose stated objective was to protect the market against *"improper use"* of inside information. It was clear, therefore, that the legislature, as it was entitled to do, enacted a regime which went significantly further than the Directive, since it was not confined to the 'use' of inside information. Mere possession of same rendered dealing unlawful.

11.3.9 It is also the case, as indicated earlier in this Report, that the statutory regime which was put in place from 2004 onwards to give effect to the Market Abuse Directive requires use of the inside information. Critically therefore, having found that Mr. Flavin was in possession of price sensitive information, he was prohibited from dealing merely because he had in his possession that price sensitive information. Furthermore, there was no requirement that the insider knew or ought to have known that the information was price sensitive.

11.3.10 A second overlooked fact is that Ms. Justice Laffoy, in considering the non-statutory aspect of the Fyffes' claim, which she rejected, held that, on any view of the evidence, the information which Mr. Flavin had *"simply had no bearing on the Share Sales."* (See page 247 of her judgment).

11.3.11 In a lengthy passage on pages 246 and 247 she stated as follows:-

> *"In my view, in this case, the evidence is not open to the interpretation that Mr. Flavin used the information contained in the November and December trading reports which is alleged to have been confidential and price sensitive, the negative information in relation to Fyffes' trading and earnings performance in the first quarter of financial year 2000 so as to enable the DCC group to exit from Fyffes in a manner which would avoid any share price impact which would ensue from the disclosure of that information. In my view, on the evidence, it is clear that what motivated Mr. Flavin in his involvement in the shares sales and what motivated the almost total exit of the DCC group from Fyffes in February 2000 was the opportunity to make a substantial profit because of the increase of the share price on the back of World of Fruit.Com. The Plaintiff has not established any evidential nexus between the profit which the share sales generated for the DCC group and the use by Mr. Flavin or the use by any of the boards of the corporate Defendants, of the confidential information contained in the November and December trading reports."*

11.3.12 She then stated, in relation the information in the possession of Mr. Flavin, as follows:-

> *"On any view of the evidence, that information simply had no bearing on the Share Sales. When dealing with the price sensitivity issue in the context of the statutory claim the Plaintiff, in its submissions, comprehensively analysed the evidence which it was contended supported their case that Mr. Flavin knew or ought to have known that the information contained in the November and*

December trading reports was price sensitive. The analysis covered Mr. Flavin's professional qualifications and his vast experience in business, his intimate knowledge of Fyffes and its business as a director and as a member of the Audit Committee and as Chairman of the Compensation Committee, the obvious significance of the information itself, the views of the expert witnesses called on behalf of the plaintiff as to its obvious price sensitivity, some of which I have recorded, and Mr. Flavin's engagement with Mr. Price on 31st January 2000 and with Mr. Scholefield on the 1st February 2000. Of course, when dealing with the statutory claim, it was unnecessary to express any view on whether, as urged by the plaintiff, that evidence disclosed knowledge on the part of Mr. Flavin, because I determined that knowledge is not a necessary ingredient of civil liability under Part V of the Act of 1990, so that question did not arise. Similarly, the question of knowledge does not arise in the context of the non-statutory claim for an account in equity, there being no evidence that the profit resulted from the wrongful use by Mr. Flavin of confidential information. I have already commented, in the context of the price sensitive issue, that the transactions which Mr. Flavin was embarking on warranted a more rigorous compliance process than he went through with Mr. Price and Mr. Scholefield. However, taking on board the allusion by counsel for the defendants to Occam's razor, I believe it would not be prudent to attempt, and, in any event, I believe it is not possible on the back of a hypothesis which has not been proved, to express any meaningful view on whether the failure to engage in a more rigorous compliance process would support a case of constructive knowledge.*

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."

* **Occam's razor** is a principle commonly stated as "Entities must not be multiplied beyond necessity". When several theories are able to explain the same observations, Occam's razor suggests the simpler one is preferable.

11.3.13 The findings of Ms. Justice Laffoy, that Mr. Flavin did not use the information in his possession in dealing and, further, that the information did not in any way motivate the share sales, were borne out by my investigation. I am satisfied, as appears below, that Mr. Flavin did not communicate the confidential information contained in the Fyffes trading reports to any person other than to the Compliance Officer and the company Solicitor. I also agree with the finding of Ms. Justice Laffoy (below) that there was no evidence of dishonesty on the part of Mr. Flavin or the companies:-

> *"I did not understand the Plaintiff to assert dishonesty on the part of any of the Defendants. In any event, I find that dishonesty was not established on the evidence"*

The Involvement of the Stockbrokers

11.3.14 As was made clear by the evidence of Mr. Barrett and Mr. McLaughlin, it was they, the stockbrokers, who approached Mr. Flavin in relation to the shares. Their interest in the shares, on behalf of institutional investors, arose because of the unprecedented rise in the Fyffes share price, driven by the huge popularity of dotcom stocks. That interest, as explained by both men, was predicated on the hope and assumption that the Fyffes share price was likely to rise further on the strength of the worldoffruit.com venture.

11.3.15 It was clear from the documentary evidence that Fyffes had announced its planned internet trading venture, worldoffruit.com on the 1st November, 1999, and there had been further public announcements with regard to the venture on the 14th December, 1999, as part of the Preliminary Announcement and on the 13th January, 2000, and also in the Fyffes' Chairman's Statement dated the 31st January, 2000, included in the Fyffes Annual Report for 1999 which was circulated to shareholders in mid-February 2000. Furthermore, in late January and early February 2000, Fyffes executives had been conducting extensive investor presentations on worldoffruit.com, in Ireland, the UK and the USA.

11.3.16 I accept (as was recognised in the High Court judgment) the evidence that the worldoffruit.com venture was driving the Fyffes share price upwards. It is against this backdrop that Goodbody's and Davy's made what I am satisfied were unsolicited approaches to Mr. Flavin in late January and early February 2000.

11.3.17 There was, according to the two stockbrokers, considerable demand for Fyffes shares and a belief and perception that, given the anomaly of the DCC stake, it was probably for sale. There is no evidence of any attempt made by the DCC Group to market or sell the shares. The impetus for Mr. O'Dwyer to travel to Holland was a response to these stock broker expressions of interest.

11.3.18 It was natural that the brokers (who knew nothing of Lotus Green) would make contact with Mr. Flavin, as Chief Executive of DCC. It is also of relevance to observe, as submitted by the companies, that the directors of DCC could not have anticipated the dotcom boom which arose in 1999 and 2000 when they decided to transfer the beneficial interest in the Fyffes shares in 1995.

Price Sensitivity of Trading Information a Matter of Judgment

11.3.19 I also accept the evidence of Mr. Flavin and the two stockbrokers that the 'price sensitivity' of trading information unlike, for example, a major transaction such as a big acquisition or a takeover bid, is a matter upon which judgment has to be exercised.

11.3.20 As was accepted by both the High and Supreme Courts, the statutory test requires that the likely price effect of the information be assessed in the light of the other relevant information and market conditions existing at the relevant time. That assessment

became more difficult where the company in question (Fyffes) had an uneven spread of profits throughout its financial year. Ordinarily, and as a matter of practicality and common sense, the company which has issued the shares (Fyffes) is best placed to determine whether it has price sensitive information in its possession.

11.3.21 This is reflected in the Stock Exchange Listing Rules, which places an obligation upon the company as follows:-

> "*A company must notify the Company Announcements Office without delay of any new major developments in its sphere of activity which are not public knowledge concerning a change:*
>
> (a) *in the company's financial position;*
>
> (b) *in the performance of its business;*
>
> (c) *In the company's expectation as to its performance;*
>
> *which if made public would be likely to lead to substantial movement in the price of listed securities."*

11.3.22 Having questioned him at great length, I have concluded that Mr Flavin genuinely believed that he was not in possession of price sensitive information. He was wrong in this belief, as the Supreme Court has held, but it is certainly relevant to point out that he genuinely believed that he did not have price sensitive information and that he did not deliberately go out to take advantage of information which he knew to be price sensitive.

11.3.23 I have set out below some of the matters which weighed on Mr. Flavin's mind when he made the judgment that he did not have price sensitive information, not only because they are relevant to the issue of the share sales themselves, but because they are relevant to my concern about the adequacy of the compliance process engaged in with Mr. Scholefield on the 1st February, 2000, and the telephone conversation with Mr. Price on the 31st January, 2000. They are as follows:-

- *The Fyffes November 'Trading Report' was circulated to directors of Fyffes on 6 January 2000 and the December Report on 25 January 2000. These did not cause Mr Flavin any concern because of the discussion which had taken place at the Fyffes board meeting on 9 December 1999 (the last prior to the share sales). In particular, at that meeting, the board was informed that Fyffes and its competitors (other publicly listed companies: Chiquita, Fresh Del Monte and Dole) were taking the unprecedented step of scaling back European banana volumes which, it was confidently expected, would result in prices and thus profits improving in the second half of Fyffes' financial year. These cut backs were announced to the market on 14 December 1999 when Fyffes made its preliminary announcement.*

- *During the discussions at that meeting Mr Neil McCann, the Chairman of Fyffes, in assuring Mr Flavin that there was no cause for concern on the trading front reminded Mr Flavin about 1997, a year in which Fyffes had made, at Mr Flavin's instigation, what proved to have been an unnecessary cautionary statement about trading. 1997 turned out to be a record year for Fyffes.*

- *Mr Flavin had in any event been a director of Fyffes since 1981 and was aware that the banana business (which accounted for somewhere in the region of 75% of Fyffes profits) was by its nature volatile. Furthermore, as far as the November and December figures were concerned it was very early in the financial year and typically the early months were the least important in Fyffes' financial year. As had occurred in 1997, Fyffes had had, in a number of years, profit growth following a poor start to the year. Significantly, the outlook for the current year was informed by the decision (announced to the market) that banana volumes were to be cut back by Fyffes and other key players in the banana business.*

- *On 14 December 1999 Fyffes announced their preliminary results to the market. Significantly, the chairman's statement forecast that the coming year was to be "a year of further growth". The statement itself announced the volume cutbacks and informed the market that the benefits would be second half weighted. The view of Mr Flavin was that the preliminary announcement brought the market up to date, and while indicating, as was already well known, that banana trading and prices were poor, there was an expectation that there would be a significant improvement as had occurred in previous years.*

- *The second half of the financial year in 1999 had not been a good one for banana companies, including Fyffes. But the problems which had beset the banana business had been the subject not only of analysts' comments but also announcements by the publicly-quoted banana companies. Furthermore, Fyffes own second half figures also reflected the problems. Accordingly, the difficulties were known to the market, and were reflected in broker commentary. The combination therefore of these well publicised difficulties and the preliminary announcement led inescapably to the view that the market was not expecting profit growth in the first half of Fyffes' financial year. That was certainly the view of Mr Flavin and there was no evidence that Fyffes thought any differently. There was certainly no evidence that the analysts expected profit growth in the first half of Fyffes' financial year.*

- *Accordingly, the trading reports contained nothing different from what the board had been told on 9 December 1999. In fact, estimated figures given by Fyffes financial director, Mr Frank Gernon, at that board meeting (referred to in the High Court judgement) showed a slightly worse picture than that now revealed in the two documents. In addition, the documents gave no hint that the executive directors of Fyffes had changed their expectations from those announced on 14 December 1999, and no concerns were expressed in these as to the outlook.*

- *In short, had Fyffes considered the information to be price sensitive then, under the Listing Rules, they would have been obliged to announce without delay their changed expectations to the market. Their silence spoke volumes because it was clear to Mr Flavin that notwithstanding the information contained in the documents, the persons best placed to assess the materiality of that information, the executive directors of Fyffes, who were known as careful and cautious, did not consider that it changed their expectations. It did not cause them to inform the market or their non-executive directors that the forecast of a year of further growth was not now accurate.*

- *Furthermore, Mr Flavin had contact with several members of Fyffes senior management in January 2000 including Mr Neil McCann, Mr Carl McCann, Mr David McCann and Mr Frank Gernon in relation to numerous matters, including executive remuneration and corporate governance, and no mention was made to him of trading or of any change in the company's expectations.*

11.3.24 While the absence of any announcement was significant as far as Mr. Flavin was concerned, the submissions also referenced the following positive actions of Fyffes which, they contended, confirmed the reasonableness of Mr. Flavin's belief that the information was not price sensitive:-

- *On 25 January 2000 Fyffes requested the remuneration committee (Mr Flavin and Mr Scanlan) to approve the grant of new share options, including to the company secretary, which grant had to be and was announced to the Stock Exchange. As Mr Flavin knew, such a request would not have and could not have been made had Fyffes considered themselves to be in possession of price sensitive information. Nor for that matter would Mr Scanlan or Mr Flavin have approved such a grant if they had believed themselves to be in possession of price sensitive information.*

- *Mr Neil McCann as Chairman and Mr Carl McCann as deputy Chairman gave permission (required under the Model Code) toMr John Ellis, an executive director of Fyffes, to sell shares.The sale was announced to the Stock Exchange on 28 January 2000.*

- *In accordance with the undertakings given to Mr Neil and Mr CarlMcCann in writing in 1998, Mr Flavin contacted Mr Neil McCann at 11 am on 3 February 2000, five to six hours before the first sale. He sent draft stock exchange announcements to Mr McCann of the kind that would be announced in the event of the sale. It is inconceivable that if Mr McCann had believed that it was a price sensitive time for Fyffes he would not have made Mr Flavin aware of his belief. Indeed, as is set out in the judgment, Fyffes contacted their solicitors with regard to the sale but the discussion related to other matters and did not focus at all on the question of price sensitive information.*

- *Furthermore, these actions (and the lack of an announcement under the Listing Rules) indicated to Mr Flavin, and indeed to the stock market, that Fyffes did not consider its expectations had changed or that it was in possession of price sensitive information.*

11.3.25 Mr. Flavin maintained that he would have given consideration to whether he did or did not have 'price sensitive' information as part of the 'normal compliance procedure'. The factors listed above, he said, did not give rise to a concern which either caused Mr. Flavin to telephone Mr. Price, or prompted the compliance process. In considering the issue, however, Mr. Flavin said he did place reliance on the fact that he knew that Fyffes did not believe themselves to be in possession of price sensitive information. Furthermore, the events subsequent to the first share sale, but prior to the second and third share sales, he said, served to confirm that view.

The Reaction of Fyffes

11.3.26 On the evening of the 3rd February, 2000, after the first share sale, at the meeting in the Dublin Airport Hotel, Messrs. Neil and David McCann bought a celebratory bottle of champagne to share with Mr. Flavin.

11.3.27 The following day, Mr. Neil McCann, in a letter to Mr. Flavin, encouraged further share sales. His letter stated:-

> "*…I think, in all of our interests, it would be helpful if the remainder of the shares are disposed of so that they will not be overhanging the market.*"

11.3.28 The second and third share sales took place on the 8th and 14th February, 2000, respectively. Mr. Flavin drew my attention to the fact that, after the first sale on the 3rd February, 2000, no action was taken by Fyffes executive directors which changed the perception of Mr. Flavin that Fyffes believed that he was not in possession of price sensitive information. In fact, as explained by Roy Barrettm to me, the Fyffes executives were, in the aftermath of the first share sale, very happy that DCC had sold.

11.3.29 The evidence which I heard, particularly that of Mr. Kyran McLaughlin, supports the view that Mr. Flavin was an experienced, careful and highly competent director and had specific experience of Fyffes as a business. The factors which influenced his judgment have been set out above. The belief that he maintained was not, in my view reached improperly, or without due consideration of several relevant factors. As it transpired, based on the Supreme Court's application of the facts to the law, he was wrong in his view and in placing too much reliance on the action, or inaction, of the Fyffes Executives.

11.3.30 Furthermore, the evidence of the two senior stockbrokers, who came bidding for the shares in 2000, in relation to the issue of price sensitivity was significant in my opinion. This evidence was not heard by the High Court or reviewed by the

Supreme Court and was, consequently, new evidence heard by me. Their evidence on the issue of price sensitivity completely corroborates the judgment made by Mr. Flavin.

Involvement of the Non-Executive Directors of DCC

11.3.31 I interviewed the non-executive directors of DCC, Mr. Spain, Mr. Gallagher and Mr. Barry, as to their involvement (or lack thereof) in the share sales in February 2000. I am satisfied that, apart from a brief telephone call to Mr. Spain a day or so before the first share sale informing him of broker interest in the Fyffes' shares, there was no contact between Mr. Flavin and the non-executive directors of the board prior to the sale of the first tranche of Fyffes' shares on the 3rd February, 2000.

11.3.32 Mr. Spain, Mr. Gallagher and Mr. Barry each gave clear and convincing evidence to me of their lack of involvement in, or prior knowledge of, the share dealings. They readily conceded that, had the beneficial interest in the shares not been transferred to Lotus Green in 1995, the sale of the shares would have been decided by the board of DCC plc. They accepted that a consequence of the structure which was set up in 1995 was that they had transferred the ultimate decision making power over the disposal of the shares to the board of Lotus Green. There was, they further conceded, some risk attaching to this but the risk was extremely low given:-

a) That the Chief Financial Officer of DCC, Fergal O'Dwyer, was on the board of Lotus Green;
b) That Mr. O'Dwyer had a veto over any decision that the three Dutch directors may decide to take; and,
c) Their confidence in the probity and commerciality of the Dutch non-executive directors and the extreme unlikelihood that they would take any decision contrary to, what they understood to be, the strategic objective of the ultimate parent.

11.3.33 Each of the three non-executive directors, in turn, was closely questioned by me as to the wisdom of this decision and the consequences for them and for DCC of the absence of formal oversight in relation to the disposal of a substantial part of DCC's net worth. Each of the three men in turn robustly defended the decision taken in 1995. They rejected any suggestion that this exposed DCC to considerable risk or any suggestion that the absence of formal DCC board oversight of the share sales in 2000 amounted to any breach of duty on their part.

11.3.34 Each of the three non-executive directors, when pressed as to whether a different outcome might have occurred had the formal decision to sell been taken by DCC (as opposed to Lotus Green), asserted that the outcome would have been no different. Each of them in turn, and in their own words, relied upon the judgment of Mr. Flavin. They stressed that they all, individually, thought that he had multiple reasons for concluding that he was not in possession of price sensitive information about Fyffes in early February 2000. In all the circumstances I am satisfied that no criticism can attach to the non-executive directors.

Dutch Directors of Lotus Green

11.3.35 The Dutch directors of Lotus Green readily conceded that they took their lead from Mr. O'Dwyer in the matter of the proposed sale of the Fyffes shares in February 2000. They agreed that no meetings would have taken place in Holland on either the 2nd or the 3rd February had Mr. O'Dwyer not suggested same.

11.3.36 They further accepted (as was accepted in the High Court) that the letter purporting to come from Mr. Roskam dated the 1st February, 2000, was, in fact, drafted by Mr. O'Dwyer.

11.3.37 They were adamant that they had no contact at any time with Mr. Flavin. They also gave sworn testimony that they had no information in relation to Fyffes, other than that which Mr. O'Dwyer had furnished to them. They both convinced me that they

gave due and proper consideration to the papers tabled at the meetings on the 2nd and 3rd February. Whilst Lotus Green was never going to act in a manner that DCC did not approve of, I am satisfied, on the basis of the evidence of the two Dutch directors heard by me, that the Dutch directors properly discharged their duties as directors of Lotus Green on the 2nd and 3rd February, 2000. I am equally satisfied that the board of Lotus Green did not have access to any information on Fyffes which was not in the public domain.

11.3.38 It is clear to me that each of the directors of DCC and Lotus Green Limited were aware of their respective roles and responsibilities within the structure that was established in 1995. The DCC board of Directors, for example, knew that to formally consider and decide to sell the Fyffes' shares would undermine the tax structure which they had so carefully put in place and would have run directly counter to the advice of their tax advisers (see the evidence of Terry O'Driscoll in relation to the 2000 transactions in this regard).

11.3.39 For their part, the Dutch directors knew, since 1995, that Lotus Green was set up to avail of the "participation exemption" afforded under Dutch law and that the day would come when the Fyffes shares would be sold. Through their contact with Mr. O'Dwyer they knew, and would have known at all times, the strategic view of DCC and, based upon the additional evidence heard by me, I am in complete agreement with Ms. Justice Laffoy's conclusion that it was inconceivable that Lotus Green would decide to sell the Fyffes shares without knowing that it was the wish of their parent company.

Mr. Fergal O'Dwyer and Mr. Mairead O'Malley

11.3.40 There were a relatively small number of people directly involved in the mechanics of effecting the share transactions. Ms. Justice Laffoy in the High Court found conclusively that both DCC and S & L dealt as principals, as did Lotus Green. The other persons involved on behalf of DCC were Mr. O'Dwyer and Ms. O'Malley. Mr. O'Dwyer had a dual role as Chief Financial Officer of DCC and Executive Director of

Lotus Green. Both Mr. O'Dwyer and Ms. O' Malley swore to me under oath that Mr. Flavin had not disclosed any information to them about Fyffes other that which was in the public domain. I accept their evidence and I find that they, in carrying through the mechanics of the decision formally taken by the board of Lotus Green, did so without any knowledge or information that was 'price sensitive' vis-a-vis Fyffes.

11.3.41 As referred to by me earlier, it is important to reiterate that Ms. Justice Laffoy made no finding of dealing contrary to Section 108 in respect of Lotus Green. This must not have been clear to Mr. Justice Kelly as the following found its way into his judgment, at page 14, where he recited that the Director's application was predicated on:-

> *"The finding of the Supreme Court that the three companies and Mr. Flavin acted contrary to s. 108 (1) of the Act in disposing of the Company's legal and beneficial interest in the ordinary shares of Fyffes in 2000."*

11.3.42 No such finding was made against Lotus Green and I found no evidence in the course of my investigation that would tend to cast doubt on the High Court's finding.

The 'Single Entity' Issue

11.3.43 At page 137 of her judgment, when dealing with whether Lotus Green, DCC and S & L should be considered as a single entity for the purpose of accounting under Section 109, Ms. Justice Laffoy stated the following:-

> *"… it is pertinent to restate the following findings and propositions:-*
>
> - *In the light of the determinations I have made in relation to the proper construction of Part V the only basis on which Lotus Green*

could have been liable to account under s. 109 was that it dealt in a manner which was unlawful by virtue of s. 108(6).

- *To make a finding that Lotus Green was so liable it would have been necessary to find that the Plaintiff had established that Mr. Flavin was a shadow director of Lotus Green. I have found at 'S' above that the Plaintiff has not established that Mr. Flavin was a shadow director of Lotus Green.*
- *Therefore it follows that even if the Plaintiff has established the issue which remains to be dealt with that, at the time of the share sales, Mr. Flavin was in receipt of price sensitive information by reason of his connection with Fyffes, the dealing by Lotus Green was not unlawful by virtue of s. 108(6) and Lotus Green is not liable to account under s.109.*
- *I have held at 'R' above that DCC and S &L cannot avail of the defence provided in s. 108(9) therefore if (and this issue remains to be dealt with) Mr. Flavin had price sensitive information by reason of his connection with Fyffes at the date of the share sales DCC and S&L dealt unlawfully under s. 108(6) and are liable to account under s. 109. But the Defendants' case is that no profit accrued to DCC and S&L from the share sales, so that there is nothing to account for.*

If DCC and S&L are liable to account, and if the Defendants are correct in their contention that the profit accrued to Lotus Green solely because it was the sole beneficial owner of the shares, not to treat Lotus Green, DCC and S&L as a single entity for the purpose of affording the Plaintiff and effective remedy under s. 109 would allow the DCC group to evade its obligations under Part V. I think that, as 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. To revert to the start of the analysis of the legal principles at (k) above, that determination falls within the fourth proposition in the passage quoted from Keane. Any other determination would have unjust consequences for the Plaintiff as an outsider, if it has a statutory remedy under s. 109."

11.3.44 I find myself in complete agreement with all of these conclusions.

11.3.45 Ms. Justice Laffoy went on to say that whether Fyffes had a statutory remedy under Section 109 turned on the outcome of the price sensitivity issue, which she ultimately resolved in DCC's favour, with the result that the dealing was not unlawful under Section 108 and no liability to account arose under Section 109. She concluded, however, that if she was wrong in relation to the price sensitivity issue and the dealing was unlawful, so as to give rise to a liability to account under Section 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 Section 109.

11.3.46 These findings with which, based on the evidence heard by me, I am in complete agreement, have important implications particularly for Lotus Green. The High Court has found that there was nothing unlawful about the dealing by Lotus Green in February 2000. I am bound by that legal determination. The Supreme Court did not interfere with this or any of the other findings of Ms. Justice Laffoy, apart from her conclusion that the information was not 'price sensitive'. The finding that DCC and S&L dealt unlawfully by virtue of Section 108(6) was due to the fact that Mr. Flavin was an officer of each corporate Defendant (being a director of each) within the meaning of Part V.

Approval of the Share Sales

11.3.47 I am also satisfied on the evidence before me that neither the board of DCC nor S & L met to discuss or take any formal decision on the sale of the Fyffes'

shares. The contrary was not asserted in the High Court or by the Director. Indeed, in accordance with the advice from their tax advisers, to do so would have been most unwise and could have jeopardised the efficacy of the tax scheme.

11.3.48 This is the view taken by Ms. Justice Laffoy, at page 127 of her decision, where she said that *"there is no evidence that the board of DCC as an organ in a formalised manner expressly approved of the share sales or the manner in which they were effected in February 2000."* She went on to state, however, as she had stated in the context of the issue of whether Mr.Flavin dealt, as follows:-

> *"I infer that the board tacitly approved of Mr.Flavin acting as agent of the DCC group in the sale of the shares. I also consider that it is probable that he did so with the informal express approval of the members of the board. I do not think it reasonable to infer that the board of a public company would countenance the disposal of an asset worth over €100m in the manner suggested by the defendants in these proceedings."*

11.3.49 I must confess to not knowing precisely what "informal express approval" means. On the basis of the evidence of the non-executive directors and of Mr. Flavin, which I accept, Mr. Flavin did not speak with any of the non-executive directors prior to the share sales with the exception of Mr. Spain. To the extent that he spoke with Mr. Spain, I am satisfied that he did not discuss the information he had about the Fyffes trading results in November and December or seek his view on whether the shares should be sold.

11.3.50 Mr. Barry, Mr. Gallagher and Mr. Spain took issue with the learned High Court Judge's finding of fact in this regard, although all three readily admitted that they were very pleased when they learned that the first tranche of Fyffes shares had been sold. Ms. Justice Laffoy did not have the benefit of the evidence of Mr. Spain and Mr. Gallagher. I have reached the conclusion that, contrary to the finding of fact of the learned High Court Judge, no express approval, informal or formal, was given by the

board of DCC to the share sales. The fact that they were happy with it after the event or would have given their assent to it, had they been asked, is a different matter.

11.3.51 They undoubtedly gave their implicit approval, in 1995, to Lotus Green taking the decision to sell the shares at the 'right time'. There is no evidence that the board of S & L met or were consulted about the share sales in 2000. The only 'involvement' of S & L was in ensuring that the share certificates in its name were furnished, at the direction of Lotus Green, to the institutional purchasers of the shares.

11.3.52 I was mindful throughout my investigation of the Director's concern that certain witnesses had not given evidence in the High Court. Not only did I request assistance and interview all of the relevant persons but I also sought an explanation as to why Mr. Spain and Mr. Gallagher did not give evidence in the High Court. I was informed by Mr. Flavin that at a certain point towards the end of the proceedings Ms. Justice Laffoy indicated that she did not need to hear the evidence of each of the non-executive directors of tDCC of heir lack of involvement in the share sales in February 2000 and a decision was taken to call Mr. Barry in a representative capacity for all three to explain this lack of involvement in the 2000 transactions. This explanation was confirmed to me by the legal advisers who acted in the High Court proceedings. I accept this explanation. It is worth adding that I did not detect any unwillingness or discomfort on the part of any of the any officers, directors (executive or non-executive) in coming to give evidence to me.

The Conduct of Mr. Flavin

11.3.53 The other executive director of DCC at the time of the share sales was Mr. Morgan Crowe. Mr. Morgan Crowe gave evidence that he had been travelling in the week leading up to the 3rd February, 2000. He informed me that, whilst he was made aware by Mr. Flavin that interest was being expressed in the Fyffes' shares by brokers on behalf of institutional investors, he knew nothing of the detail of same and certainly was not aware of any information that Mr. Flavin may have had in relation to the Fyffes'

trading position. For completeness, Mr. Murray and Mr. Breen, who did not become directors until the meeting of the 7th February (and did not attend that meeting as directors), said that they did not speak with Mr. Flavin prior to the sales and did not know about the interest that was being expressed in same until after the first tranche of shares was sold.

11.3.54 All of the directors of DCC expressed the view that Mr. Flavin was extremely "tight lipped" about anything to do with Fyffes and, in their view, was scrupulous in preserving the confidentiality of any information obtained by him in his capacity as a director of Fyffes. From all of the documentation furnished to me and from all of the interviews conducted with all of the companies' officers, directors and employees, I am satisfied that Mr. Flavin did not disclose any information about Fyffes trading to anyone in DCC apart from the discussion he had with Mr. Price on the 31st January, 2000, and with the Compliance Officer of DCC, Mr. Scholefield, on the 1st February, 2000.

11.3.55 Mr. Flavin impressed me as somebody who was not only fully conscious and aware of his obligations and responsibilities as a director of Fyffes, but also very well informed and knowledgeable of his obligations both under the Company's Code and under the Stock Exchange Listing Rules.

11.3.56 Indeed, it was telling, in the High Court proceedings, that notwithstanding all the serious allegations that were made against Mr. Flavin and the Defendants, there was no assertion of dishonesty on his part or on the part of any of the Defendants. At page 243 of her judgment, Ms. Justice Laffoy states the following:-

> *"I did not understand the plaintiff to assert dishonesty on the part of any of the defendants. In any event, I find that dishonesty was not established on the evidence."*

11.3.57 The evidence which I heard from the "non-DCC witnesses", Mr. McLaughlin and Mr. Barrett, although both were on the "other side" of the share sale transactions, gave strongly supportive evidence of Mr.Flavin's conduct and also of his general honesty and integrity.

11.3.58 Apart, therefore, from Mr. Flavin himself, against whom there is a finding of insider dealing in breach of Section 108(1), the only other persons with whom Mr. Flavin discussed the interest in the Fyffes shares before the dealing were Mr. Price and Mr. Scholefield.

Mr. Flavin's discussion with Mr. Price

11.3.59 Turning firstly to the conversation which Mr. Flavin had with Mr. Price, it is clear that the context of this call, from Mr. Flavin's point of view, was not out of any concern that he might have price sensitive information. The evidence of both Mr. Flavin and Mr. Price, and indeed Mr. Price's contemporaneous memorandum, makes it clear that Mr. Flavin called Mr. Price to discuss what was, in the context of (deteriorating) DCC/Fyffes' relations, the then perennial question of the application of the Model Code and Mr. Flavin's obligation to seek the permission of the Fyffes' Chairman before DCC could deal in the Fyffes' shares. The first paragraph of Mr. Price's contemporaneous file note reads:-

> *"Jim Flavin telephoned me today, 31st January to discuss the possible sale by DCC Plc of a shareholding in another public company. Mr. Flavin was on the board of that other company and he was concerned to be advised in relation to DCC's freedom to sell shares at this time. It was not a dealing by a director that was involved but rather a dealing by the company itself and DCC was not a connected person of him."*

11.3.60 The debate between DCC and Fyffes over the need to seek the permission of the Chairman of Fyffes in respect of any dealing on the part of DCC had been pursued

in correspondence in 1995 and again in 1998. Mr. Price gave evidence to me that, to the best of his recollection, it was he who raised the question as to whether Mr. Flavin was in possession of any price sensitive information. Whilst the memorandum does not record Mr. Price as having asked that question, it seems clear that the issue which motivated Mr. Flavin to call Mr. Price was a Model Code, and not a Companies Act, consideration.

11.3.61 In the course of my interview with Mr. Price I suggested to him that, once the question of price sensitivity was raised, it was necessary for him to go further to enable him to advise Mr. Flavin on his legal obligations. I suggested that the expression "*The first two months trading had not been all that wonderful*" was not very informative and further questioning of Mr. Flavin might have elucidated the extent to which the actual trading in the two months was below target.

11.3.62 Mr. Price insisted that he did not advise Mr. Flavin that there was no impediment to a sale for insider dealing reasons. Mr. Flavin, for his part, said that he did not consider that Mr. Price could or did give clearance for any sale.

11.3.63 In my view, if this was the case, one would have expected this to be reflected in the memorandum. The final sentence of the penultimate paragraph reads:-

> *"Having discussed the matter with him we confirmed that we shared his view that there did not appear to be any legal obstacle to their proceedings with the full disposal of the shareholding."*

11.3.64 The "*we*" in the memorandum can only be William Fry and the reference to there not appearing to be any legal obstacle to their proceeding with the full disposal of the shareholding can only have meant, in my opinion, that based upon the information furnished by Mr. Flavin to Mr. Price, he was of the legal opinion that DCC were free to sell. This may not have amounted to giving Mr. Flavin 'clearance' but, at the very least, it was expressing a legal view that, based on the information provided, DCC was free to deal.

11.3.65 Even though the purpose of the call, from Mr. Flavin's perspective, was to seek specific advice with regard to the Model Code, it is clear that the issue of whether Mr. Flavin had any price sensitive information was discussed in some detail on the call. The reference to Mr. Flavin having "*examined his conscience*" can only have been in the context of the discussion about the Companies Act obligations and not the Model Code.

11.3.66 Whilst I accept that it was not for Mr. Price to make a judgment call in relation to whether the information was price sensitive, I am of the opinion that the level of questioning indicated by the memorandum and, indeed, borne out by the oral testimony of both men before me, could have been more extensive and searching. Whilst I was initially minded to refer to this as a "failure" on the part of Mr. Price, I think it would be unfair to describe it as a 'failure' in circumstances where there are (a) no guidelines for a Solicitor in conducting such an interview and (b) ultimately, it is for the person with the information to decide and make a judgment call as to whether it is or is not price sensitive.

11.3.67 One could speculate as to what might have happened had Mr. Price pressed Mr. Flavin further or harder. But I think, on the balance of probability, it is unlikely that he would have advised Mr. Flavin not to proceed and the most that a Solicitor in such circumstances could have been expected to advise was that, if Mr. Flavin considered that the information was price sensitive, no dealing should take place.

11.3.68 It is also unfortunate for the companies that neither Mr. Flavin nor Mr. Price adverted to the suggestion that had been mooted by Mr. Scholefield as far back as June 1995, when he suggested that Mr. Flavin and DCC might avail of the "written arrangements procedure" envisaged by Section 108(7). Section 108(7) of the companies Act, 1990, provides as follows:-

"Subsection *(6) Does not preclude a company from entering into a transaction at any time by reason only of information in the possession of an officer of that company if –*

(a) The decision to enter into the transaction was taken on its behalf by a person other than the officer;

(b) It had in operation at that time written arrangements to ensure that the information was not communicated to that person and that no advice relating to the transaction was given to him by a person in possession of the information and

(c) The information was not so communicated and such advice was not so given.

11.3.69 The legal advisers for the companies and the officers, directors and advisers submitted that Mr. Price did not, as a matter of fact, advise Mr. Flavin that there was no impediment to a sale for "*insider dealing*" reasons. They submitted that the advice given, or indeed volunteered, was the much more general advice that, if Mr. Flavin had price sensitive information in relation to Fyffes, the sale would be unlawful and thus Mr. Flavin should consider whether he had any such information. Mr. Flavin said he believed he did not have such information for the reasons he gave and which are summarised in the memorandum.

11.3.70 I do not agree that this is borne out by the memorandum. Any fair reading of the third paragraph of the memorandum, written contemporaneously on the 31st January, 2000, and typed on the 1st February, 2000, would lead to the conclusion that, after Mr. Flavin had outlined to Mr. Price the information in his possession in respect of Fyffes, there was a confirmation from Mr. Price that he (Mr. Price) shared Mr. Flavin's view that there was not price sensitive information and therefore there did not appear to be any legal obstacle to DCC proceeding with a full disposal of the shareholding.

11.3.70 Mr. Flavin, for his part, said he didn't consider that Mr. Price could or did give clearance for any sale. He knew that Mr. Price would have very little knowledge or understanding of Fyffes' affairs or historic trading patterns, or how any particular monthly results for Fyffes would impact on the share price. Mr. Flavin knew that the issue of price sensitivity was one on which he personally had to form a view. He understood, correctly, from his call with Mr. Price that Mr. Price believed that the considerations Mr. Flavin had mentioned in relation to recent trading (which were reflected in Mr. Price's memorandum) were valid considerations.

11.3.71 I think it is undoubtedly the case that Mr. Flavin must have obtained some comfort from his discussion with Mr. Price and, insofar as it is relevant, I am of the view that Mr. Price advised him that, based upon the information which Mr. Flavin had relayed to him, it was Mr. Price's view that there was no legal impediment to a sale. The only impediment that could have been considered (apart from the Model Code matter) was the question of whether Mr. Flavin did or did not have price sensitive information. It is my view that this is what was under consideration in the third paragraph of the memorandum. However, I do not think very much turns on it as, even if Mr. Price had asked more searching questions and even if Mr. Flavin had provided him with more detailed information (which I do not believe he was precluded from doing by virtue of any duty of confidentiality), I do not think that the outcome would have been any different.

11.3.72 It is also significant that, although the purpose of Mr. Flavin's call was related to a "Model Code" concern, it did not mean that other issues could not, and did not, arise and, clearly, they did, in that Mr. Price, rightly, alerted Mr. Flavin to his own position vis-à-vis Section 108 of the Companies Act, 1990.

Mr. Flavin's conversation with Mr. Scholefield

11.3.73 Turning to consider the conversation between Mr. Flavin and Mr. Scholefield on the 1st February, 2000, the following is of note. This conversation post-

dated Mr. Flavin's conversation with Mr. Price. Prior to the conversation with Mr. Price, it would not appear that Mr. Flavin had any concern or had given any consideration to the issue of whether information which he was in possession of might be price sensitive. Mr. Scholefield and Mr. Flavin both asserted that the conversation which took place between them was part of DCC's normal compliance process and was consistent with previous practice. Based on the evidence of the additional documents, I am prepared to accept that Mr. Flavin and Mr. Scholefield were likely to have had a 'compliance conversation' at some time prior to the sale of the Fyffes shares. It is certainly true that it was consistent with previous practice but, if anything turned on the issue, I would be inclined to the view that the conversation which took place on this particular day was prompted by the conversation which Mr. Flavin had with Mr. Price the previous day.

11.3.74 There is nothing in the note to indicate that there was any searching enquiry made by Mr. Scholefield of Mr. Flavin. Nor did it occur to Mr. Scholefield, as it had occurred to him in 1995, that it might be necessary or advisable to seek to avail of the Section 108(7) procedure.

11.3.75 What emerges from Mr. Scholefield's compliance note is that Mr. Flavin discussed with him the key matters which led Mr. Flavin to the view that he did not have price sensitive information. All of the factors listed by him are undoubtedly important and although one can be critical (as Ms. Justice Laffoy was and as I am) of the absence of a more searching enquiry on the part of Mr. Scholefield as Compliance Officer, it would be wrong to conclude that the exercise entered into by Mr. Flavin and Mr. Scholefield was not important, or that time, it constituted a "failure" on the part of Mr. Scholefield.

11.3.76 It was certainly preferable, from a compliance perspective, that both Mr. Flavin and Mr. Scholefield gave consideration as to whether the share sales could take place, having regard to Mr. Flavin's connection to both DCC and Fyffes. Had no consideration been given, one would be driven to the conclusion that neither DCC nor any of its officers were sufficently mindful of their Companies Acts obligations.

11.3.77 I think in this context it is important to stress that no compliance process can guarantee that an individual or a company will avoid the consequences of getting matters wrong through errors of appreciation or judgment. But it is certainly to the credit of DCC, Mr. Scholefield and Mr. Flavin that consideration was given to the facts and factors which were central to the exercise by Mr. Flavin of his judgment as to whether DCC were or were not free to deal.

11.3.78 Mr. Scholefield made the point that it would have been impossible for him to be informed of everything Mr. Flavin knew and for him then simply to substitute his own judgment for that of Mr. Flavin. Whilst I agree that this is true, there is nothing in his note or, indeed, in his evidence to demonstrate that the enquiry he pursued was a particularly searching one. I doubt very much however that in this case even a more searching enquiry would have prevented the share sales from taking place.

DCC Strategy and Lotus Green

11.3.79 As already concluded by me, there was nothing unlawful about the attempt by the DCC group to avoid its Capital Gains Tax liabilities when, and if, it eventually disposed of its stake in Fyffes. The consequence of same, however, was that the DCC board was never going to be in a position to closely scrutinise the eventual sale when it occurred. The directors and officers of both DCC and Lotus Green were aware of the tax advice that everything had to be done to ensure that, insofar as it were possible, the appearance and the reality was that the power of disposal rested with Lotus Green and the actual decision to dispose of the shares which were beneficially owned by it was taken by Lotus Green.

11.3.80 As a matter of law, of course, the decision to sell the beneficial interest was one that could only have been taken by Lotus Green. To this extent, Lotus Green is correct in arguing that there was no scope for DCC to make a decision to sell. The effect of the transfer was, as admitted by the companies and the individuals involved, to remove any direct control of the eventual sale from the board of DCC.

11.3.81 The directors of DCC rejected my characterisation of the transfer as removing the ability to oversee from the board of DCC or stated that, at the least, I mischaracterised the nature of the transaction. They submitted that the real issue as far as compliance was concerned was whether, in effecting the transactions in 1995, the board of DCC acted properly. They further submitted that the transfer was carefully effected and had, built-in within it, certain safeguards from the perspective of DCC plc:-

(a) It was made for bona fide commercial reasons.
(b) DCC had ultimate shareholder control.
(c) The core strategy was reviewed annually by the DCC board.
(d) The strategy was known to the board of Lotus Green.
(e) Mr. Flavin, the only DCC person with access to unpublished information on Fyffes, was not a member of the Lotus Green board. Absent direct communication of inside information (made in breach of his fiduciary duty to Fyffes) to the board members of Lotus Green, that company would never be in possession of any information which might potentially be price sensitive.
(f) At the time Lotus Green became tax resident in Holland a senior executive, Mr. Fergal of O'Dwyer, the Chief Financial Officer of DCC, was a director of Lotus Green.
(g) The Dutch directors were experienced and respected businessmen.
(h) Following the transfer in 1995, Lotus Green held an average of 6 board meetings a year in Holland.

11.3.82 All of these are relevant factors. I have already concluded that the board of DCC (as a body) did not know of the share sales in advance of their occurrence and accordingly did not consider them. I do think, however, that, even allowing for the fact that the ultimate decision had to be taken for legal and taxation reasons by the board of Lotus Green, it would have been both prudent and desirable for the board of DCC to have

had some oversight in the process. As explained above, Ms. Justice Laffoy had held that Lotus Green did not breach Section 108.

11.3.83 I am mindful of the fact that, in respect of compliance by Lotus Green, the High Court, despite being asked to do so, did not find that Lotus Green dealt contrary to Section 108 of the Act (by virtue of DCC or Mr. Flavin being shadow directors of Lotus Green). That finding of the High Court was unaffected by the fact that the Supreme Court subsequently found that the information in the possession of Mr. Flavin was price sensitive. As previously explained, Lotus Green's liability to account arose so as to give an effective remedy under Section 109 of the Act.

11.3.84 The structure that was put in place in 1995 had no causal connection with the finding of insider dealing in 2000. The companies and their Irish directors could not have anticipated what happened in the early part of 2000. Moreover, I am satisfied, on the basis of the evidence heard by me, that the fact that the formal decision to sell the Fyffes shares was taken by Lotus Green and not by DCC did not materially affect the outcome.

Fergal O' Dwyer and the Decision of the Board of Lotus Green to Sell

11.3.85 I am satisfied that Lotus Green was in receipt only of published information with regard to Fyffes. Although Mr. Flavin was not a director of Lotus Green and did not have direct contact with the Dutch directors, it is inconceivable to me, despite Mr. O'Dwyer and Mr. Flavin's urgings, that Mr. O' Dwyer would have gone to Holland on the 2nd February to meet with his fellow Dutch directors of Lotus Green without being clearly of the view that this is what Mr. Flavin wished him to do. The legal advisers for the companies and the directors asserted that the decision by Lotus Green to sell was the decision of the board of Lotus Green and not the decision of Mr. O'Dwyer alone. I accept that that was the case. I also accept that the board was an experienced board, but from a practical point of view it was, I think, inconceivable that it would have acted contrary to what it understood to be the perceived preference of its ultimate parent,

DCC plc, as communicated to it by Mr. O' Dwyer. In fact, nothing turns on this and I am satisfied that the Dutch directors of Lotus Green acted properly as directors of that company in the circumstances. I am equally satisfied that, although Mr. O' Dwyer must have known that Mr. Flavin was positively disposed towards the expressions of interest which he was receiving, the decision he took was not prompted on the basis of any knowledge or awareness of any insider information which Mr. Flavin had, and, in such circumstances, I am of the view that Mr. O' Dwyer acted properly at all times as a director of Lotus Green (and as Chief Financia Officer of DCC) in relation to the 2000 transactions.

Mr. Flavin - Deliberate Wrongdoing or Dishonesty?

11.3.86 I have concluded, on the basis of all the evidence which I have heard from all of the witnesses and from Mr. Flavin himself, that there was no deliberate wrongdoing or dishonesty on his part.

11.3.87 Although he was ultimately held by the Supreme Court to have dealt (contrary to his assertion) and to have been in possession of price sensitive information when he dealt, his was an error of appreciation and judgment: judgment as to what the Supreme Court would find as a matter of law to constitute 'price sensitive' information within the meaning of Section 108 of the Companies Act, 1990.

11.3.88 His conclusion that he was not in possession of price sensitive information had a rational, if legally wrong, basis. There were a number of reasons which, objectively speaking, were relevant to any consideration as to whether he was or was not in possession of price sensitive information.

11.3.89 Mr. Flavin, DCC and all of the individual directors and officers accept, as they must, that the Supreme Court found as it did. Nonetheless, it is relevant to report that none of the directors or advisers or the stockbrokers for the institutional investors who purchased the sales were of the view that the information was price sensitive. I

think this belief was, and continues to be, genuine, and not merely because it suited them. As Mr. Kyran McLaughlin remarked in his evidence "*This was an unfortunate set of circumstances.*"

11.3.90 The findings of Ms. Justice Laffoy (cited above) that Mr Flavin did not use the information in dealing and, further, that the information did not in any way motivate the share sales are findings which I believe have been surprisingly overlooked. They, together with the finding that Mr Flavin did not communicate the confidential information contained in the trading reports to any person, are important findings both generally with regard to the reputation of Mr Flavin and DCC, but also in the context of my investigation into the 2000 share sales. My findings reflect the honesty and integrity of Mr Flavin and, indeed, all of the officers and directors interviewed by me and highlight the fact that, while what might be described as a "perfect storm" in February 2000 which ultimately led to a finding that Section 108 had been breached by Mr Flavin, DCC and S & L (but not Lotus Green), the transactions were not tainted by dishonesty or deliberate wrongdoing.

11.3.91 The evidence of the independent witnesses, Mr. Barrett and Mr. McLaughlin, both of whom acted for the purchasers of the shares, is compelling and striking in confirming that as far as they were concerned Mr. Flavin and the DCC Group conducted its business with honesty and integrity.

Compliance

11.3.92 Finally, at the root of the application to appoint Inspectors lay a suggestion that DCC and its officers and directors did not take their compliance obligations seriously. Although a very considerable amount was known about the transactions in 1995 and 2000, the Director, with some expectation on his part, believed that further information might come to light to support this, whether through the witnesses who had not been called to give evidence in the High Court proceedings, or otherwise, and that the public interest required not simply to know what had happened but also how and why the events happened. It is not, I think, unfair to the Director to suggest that the implication

throughout the application was that DCC, S & L and Lotus Green, their directors, officers and advisers were either wilful law breakers at worst or indifferent to their Companies Acts obligations at best, that Part V of the Companies Act 1990 may have been breached in 1995 and that the breach of Part V of the Act, as found by the Supreme Court, may have been deliberate. It was also implicit that, although the only finding against an individual in the High Court litigation was against Mr. Flavin, he may not have been the only person involved, and that the share sales in February 2000 may have been as a result of what amounted to a culture of law breaking within DCC. These concerns of the Director were not borne out in the evidence adduced before me or in the course of my investigations.

11.3.93 Based upon my investigations, the companies were ahead of most Irish companies in having appointed a dedicated Group Compliance Officer in January 1995, within seven months of going public in May 1994. In many respects this was not a surprise, in view of DCC's background in venture capital and corporate finance. During the course of the investigation I was furnished with an extensive and comprehensive Compliance File which detailed continuing attention to compliance with Parts IV and V of the 1990 Act, in respect of the acquisition or disposal of shares in at least six public companies, including Fyffes. The three notifications by DCC of its Fyffes' shares in August 1991 and December 1992 are to be found in Appendix F.

11.3.94 Overall the evidence disclosed, and I am satisfied that there existed, a very good culture of compliance within the companies in the two periods under investigation. All senior executives had direct access to the company's Solicitors and regularly availed of that facility. The Group Compliance Officer, Michael Scholefield, impressed me as somebody who was knowledgeable, meticulous and persistent. From the Chief Executive down the officers and employees involved in the transactions in 1995 and 2000, each attempted to do what they understood to be right in all circumstances. The awareness of compliance obligations, evident from the actions of the officers, was monitored appropriately by the directors and DCC was recognised externally as a company of integrity which took compliance matters seriously.

11.3.95 Mr. Lawrence Crowley stated that *"At a general level first of all, they would have been regarded as a fine company with a good reputation, a company with integrity."* Mr. Roy Barrett stated that *"DCC was a company which was always pretty straight down the line, always out front with their obligations*", and Mr. Kyran McLaughlin said that *"They would have been viewed as a very compliant company. They would definitely, with a lot of governance, a cautious and careful company."*