CHAPTER 9. THE INTERVIEWS:

With the exception of Mr. Desmond McGuane (deceased), Ms. Carmel Molloy and Ms. Susan Murray (company formation directors and secretary), and Mr. Henry Roskam, whose health did not allow him to attend for interview, I conducted detailed interviews with all of the directors and officers of the companies and in respect of most of them separate interviews in relation to the 1995 and 2000 transactions. The only non-director, non-officer of the companies interviewed was Ms. Mairead O'Malley.

I also conducted detailed interviews with each of the advisers with the exception of Mr. John Kelly, Mr. Andrew Casley and Mr. Friedrich Esterhuyse. I was satisfied that Mr. Kelly was operating in a purely support role to Mr. Wall and Mr. O'Driscoll. Mr. Casley and Mr. Esterhuyse were junior assistants to Mr. van der Hoeven. Neither Mr. Casley nor Mr. Esterhuyse were in the employment of Coopers and Lybrand/Price Waterhouse Coopers at the time of my appointment. It was obviously not possible to interview the late Mr Thomas McCann S.C., and I did not require the attendance for interview of Mr Brendan Heneghan, Solicitor, since he was not involved in providing advice in relation to Parts IV and V of the Companies Act, 1990 in 1995 or 2000. I conducted two detailed and comprehensive interviews with Mr. Alvin Price, William Fry, Solicitors.

In addition to the above, I conducted detailed interviews with Mr. Kyran McLaughlin of Davy's Stockbrokers and Mr. Roy Barrett of Goodbody's Stockbrokers, both of whom had acted for the institutional investors who purchased the Fyffes' shares from DCC in February 2000. Finally, I interviewed Mr. Laurence Crowley. Mr. Crowley had no involvement with any of the companies, but is a person with very considerable experience of Irish business in general and corporate responsibility and compliance in particular.

Each of the interviews that follow were conducted on Oath. Each of the individuals came voluntarily but provided assistance to me pursuant to the obligation that arose under Section 10 of the Companies Act, 1990. The summary of the evidence that follows is

based on the full transcript that was taken and subsequently signed by each of the individuals who attended for interview.

9.1 1995

9.1.1 The Officers

(a) Michael Scholefield

Mr. Scholefield was the Group Secretary and Compliance Officer for the DCC Group between January 1995 and August 2000. He explained that he was presently Managing Director of DCC Corporate Finance Limtied. Mr. Scholefield graduated from UCD with a B Comm. Degree in 1981. He completed a Diploma in Professional Accounting in UCD in 1982. He joined SKC (now KPMG) as an Articled Clerk to pursue qualification as a Chartered Accountant. He qualified as a Chartered Accountant and in May 1985 he joined the Corporate Finance Department of SKC. In August/September 1986 he left SKC to join DCC and has remained with DCC since that time. He explained that he was approached to join DCC. He also explained that he had no formal legal training prior to becoming Company Secretary and Compliance Officer in 1995.

When he joined DCC in 1986 it was a venture capital business with a strong corporate finance arm. He explained that DCC was structured as a company rather than as a fund which made it quite different from other venture capital and private equity organisations. (**Answer 15:** Page 19).

He explained that private equity today would be largely funds. They might be independent funds but they would be independent fund management companies that would raise 'time limited funds'. One of the things about DCC is that it raised share capital and invested its own balance sheet as opposed to taking funds from people for a limited period of time. (**Answer 16:** Page 19).

Once DCC took an interest in a company it sought to add value in the area of acquisitions and corporate development.

"We did not see it as our role at the time to run businesses, but we did see it as our role to add value to a focus on strategy, particularly things like management development, ensuring that there were good managers in the business and acquisitions where DCC had particular expertise. And at that stage a number of our businesses we actually went on to float, mainly on the unlisted securities market as it was at that time." (**Answer 17:** Page 20).

He explained that there was a separate corporate finance company called DCC Corporate Finance which carried out the corporate finance advice activities. At one stage they had two corporate finance companies one in Ireland and one in the UK. Apart from the corporate finance side the venture capital business was carried out mostly under the umbrella of Development Capital Corporation Limited and also some investment holding companies including S&L Investments Limited.

He also explained the background to S&L Investments. It used to be part of Bank of Ireland and it actually stood for 'Share & Loan Investments'. DCC bought out Bank of Ireland's venture capital business at one point and some of these investments would have been held in S&L Investments Limited. At various stages in the period from 1980 to 1990 DCC helped to float seven companies, Fyffes, Flogas, Reflex Investments, Wardell Roberts, Printec, Capital Leasing and Xtra Vision. "It was usually a condition of their investment in companies that they obtain board representation." (**Answer 44:** Page 25)

DCC didn't have board representation in Heatons but for all the other companies they did. Mr. Scholefield worked in DCC Corporate Finance in Dublin from 1986 to 1988 and in 1988 he moved to the London office where he worked between 1989 and 1993. He worked on acquisitions and advisory work for their portfolio companies and he did a lot of work for Fyffes at that time. "For Fyffes corporately, in terms of acquisitions that they

might have been interested in doing, principally in the UK, I also did one for them in Holland." (**Answer 47:** Page 27).

In that period from 1986 to 1992 he was retained by an English company called DCC Corporate Finance. When asked if he had further training in either corporate finance or law when he was in London he answered "DCC subscribes to a philosophy pretty much of on the job training. That is the philosophy of the organisation. That said I am sure I went to a relevant conference or something. I certainly remember going to conferences on the Yellow Book which would be in relation to Stock Exchange listing obligations…there was no formal course that I did that resulted in qualifications or that were over an extended period of time." (**Answer 53:** Page 28 and 29).

Even when in London Mr. Scholefield had cause to be concerned about corporate regulation under the Irish Companies Act. When asked what awareness or familiarity he had with Irish Companies Regulations in the period after the enactment of the Companies Act 1990 he said, "… If we were undertaking some transaction we would have considered all the implications or tried to consider the relevant regulations and that would, of course, include the Irish Companies Act… We would have gone back and talked to our colleagues in Dublin. We had a very good Company Secretary at the time a guy called Ken Rue who was certainly very well versed in and again I think Ken was a Chartered Accountant as well. But Ken was, if you like, a bit of a technical guru and so we would certainly go back and consult. And then the second thing I would obviously do was talk to our Irish Lawyers." (**Answer 63:** Page 31).

Question 64: And who were your Irish Lawyers?
Answer: "William Fry."

Question 65: At all times that you were there Fry's were the Lawyers?
Answer: "Yes."

Question 66: Was there anybody in particular that you had dealings with?
Answer: "Alvin Price."

Question 67: It was always Alvin?
Answer 69: "Always Alvin Price, well sorry there were some others as well but Alvin would always have been the principal legal adviser to DCC. The London office of DCC was closed down towards the end of 1992. Business was difficult in Britain at the time and we would not have had a great record of some of our British investments. We had also decided to change our strategy in DCC around 1990/1991 and very much move towards this model of being an investment holding company So we were concentrating on a smaller number of larger investments."

"Larger in the sense that (1) hopefully we were taking larger stakes and 2) hopefully those companies were growing faster so that they would have been more valuable." (**Answer 71:** Page 33). "They were also moving to taking majority stakes and ultimately 100% ownership of companies. That was a gradual process that started around 1990/1991 as a result of the pretty formal and fundamental change in strategy for DCC." (**Answer 72:** Page 33).

Question 73: Were you involved in that discussion leading to the change in strategy?
Answer: "Well there was a strategy conference which took place in Dromoland Castle around 1990 which would have been led very much by Jim Flavin. But I would have attended that conference along with other senior executives in DCC and a number of my colleagues who had responsibilities for particular sectors would have made presentations at that conference. It was as a result of that conference and Jim Flavin's views - because ultimately as Chief Executive he was charged with strategy - that he would have made a recommendation to the board and that that strategy would have evolved." When asked about Mr. Flavin's power within DCC Mr. Scholefield answered "Mr. Flavin was at the top of the organisation. He was the Chief Executive, so no significant decisions would be made in DCC without Jim being aware of them and approving of those decisions." (**Answer 74:** Page 34).

Question 75: And was a very hands-on Chief Executive?
Answer: "Oh absolutely a very hands-on Chief Executive, very hands-on."

"Between 1990 and 1994 DCC would have been trying to sell off those investments which they were not interested in continuing. In 1990 they had a portfolio of about 50 venture capital investments. And they were trying to increase their holdings in those that they would have hoped would be part of the DCC investment holding company going forward. Two of the companies which they acquired during that time were Wardell Roberts and Printech and similarly in relation to Flogas in 1993 where they took their holding from 30% to 60%." (**Part of Answer 77:** Page 35). "So the idea was to shape the group to a level at which it would be floated as an investment holding company. And that took place in 1994." (**Part of Answer 77:** Page 35). The floatation of DCC took place in 1994 and Mr. Scholefield was, "basically the person who was responsible for the day to day preparation for the floatation". (**Answer 78:** Page 36).

Question 79: What did that mean?
Answer: "Well, it meant liaising, sorry; there were two of us that were responsible. My responsibilities were liaising with the lawyers. Fergal was the other guy, I suppose, because Fergal was responsible for the numbers and I was responsible for liaising with the lawyers and corporate financing buyers …"

Question 80: And who were your corporate finance advisers?
Answer: "They were AIB Corporate Finance and J.O. Hambro Magan, AIB in Ireland and J.O. Hambro Magan in England and as a preparatory to this, in preparation for this, we had sold about 20% of DCC shares to a range of London institutions around December 1993." When asked if the move from venture capital company to an industrial group was public knowledge Mr. Scholefield said "it certainly was at the time of floatation when they published a prospectus which actually said all this". To emphasise the public nature of DCC Mr. Scholefield said that there were, "a couple of things of importance to understand about DCC: (1) We are an institutionally owned company right from the start…Jim Flavin in 1976…went out and raised £1 million as it was at the time from a range of institutions

to back him to start an Irish based venture capital company. He raised money from…the likes of Standard Life and Scottish Provident and some major institutions. DCC raised capital by going back through subsequent rights issues from those institutions and brought in new institutions. So at all stages 95% of DCC's share capital was owned by these institutional investors. So even prior to floatation DCC or Development Capital Corporation Limited would have published an annual report in every year which would have been publicly available." (**Answer 86:** Page 37). "We would have acted very like a public company because we were so institutionally owned." (**Answer 87:** Page 38). Mr. Scholefield agreed with Ms. Justice Laffoy's characterisation of the Fyffes' stake having become "anomalous" from the mid 1990s onwards. He explained that after DCC went public Jim Flavin was constantly asked when DCC were going to sell their stake in Fyffes and the answer that was given was typically, "I wouldn't be surprised in 10 years if we did not form part of the group." (**Answer 105:** page 41). He said he would have been surprised if the Fyffes' stake had been put up for sale but not if it had been sold, the distinction being, that if you said you were putting a company stake on the market you instantly devalue it by a proportion. (**Answer 110:** Page 42).

Question 111: But if somebody had come along and made an offer you might have sold it.
Answer: "Absolutely, yes." He explained that in relation to the floatation of DCC he would have worked with the corporate finance people to write the prospectus.

Question 114: and that is a document that great care has to be taken care over?
Answer: "Absolutely, yes."

Question 115: Because you were going out asking the public now to buy shares in your company and you were subject to greater scrutiny and you were subject to greater regulation.
Answer: "Yes."

Question 116: And around this time did you start to take a keener interest in the provisions of the 1990 companies Act or not?

Answer: "Well I'm not too sure how to take the term 'take a keener interest' because I think it was always relevant and always there in the background."

He agreed that of necessity he had to take a keener interest and spend more time in dealing with regulatory matters. He was already reasonably familiar with the Listing Rules. And of course he spent a lot of time throughout the flotation reading the relevant provisions of whatever regulations there were, particularly the listing rules, because that was particularly relevant. In relation to the Companies Acts he said they would have involved their lawyers very much on that side of things. When asked if he recalled ever getting a briefing either in general or specifically on the provisions of the Companies Act 1990 he said he could not recall. After the floatation in May 1994 and prior to January 1995 one of his principal roles was to set up an 'investor relations' function for DCC. He stressed that that would have been something fairly novel for Irish companies at that time – there weren't too may of them doing it 'we put a lot of time into that'. (**Answer 123:** Page 45.). He explained that although DCC was an institution owned company even prior to floatation it had to become ever more focused on investor relations after floatation "because you would be aware that there are transactions taking place all the time and taking place in the companies shares in the market, the market needs to be briefed. Actually, listed companies would tend to have very much a formal communications programme with investors which would involve half yearly results and you are putting together an investor presentation and tracking who the shareholders were and that." (**Answer 124:** Page 45). He then explained how he came to become Company Secretary. He was asked to become Company Secretary by Jim Flavin "but obviously that was something he had to recommend to the board and the board had to accept". (**Answer 139:** Page 47). When asked if he was familiar with Section 236 of the Companies Act 1990, when shown the section, he said he was sure he had read it before.

In relation to 'requisite knowledge and experience' as provided for in the Section he was asked if he was at any stage asked to provide that to the board, in other words did he have an interview for the position of Company Secretary of DCC plc., to which he answered, "no". He believes that he was appointed Company Secretary "because of the experience

that I had in terms of the number of roles that I had discharged in terms of advising public companies, being involved with public companies over quite a considerable period of time. And I think in DCC I would have been seen as somebody who was familiar with technical matters." (**Answer 154:** Page 50). "Where I thought there was a particular thing that was Companies Act related I would have inevitably gone and tried to seek legal advice on it." (**Answer 154:** Page 50). He made reference to a Compliance File which had been established by Ken Rue and which had been continued by Daphne Tease. The Minutes of DCC plc., from January 1995 record the appointment of Michael Scholefield as Company Secretary and as Compliance Officer. Michael Scholefield was also recorded as being in attendance at that meeting. Mr. Scholefield was asked about his minute keeping style and was asked whether it was normal for him to record just the bare details of what was done rather than any narrative of the discussion. He answered that the former was absolutely in accordance with his normal minute keeping style. Mr. Scholefield remembers Mr. Flavin making some positive comments about him at the meeting at which he was appointed Company Secretary and Compliance Officer. The Minutes record Mr. Flavin noting "that the position involved a wider role than heretofore including responsibilities in the area of investor relations and compliance". (**Question 164:** Page 54)

Question 167: Can I ask you just to explain to me what you're understanding of Compliance Officer was at the time you were appointed?
Answer: "...Well, again we need to go back into DCC history in relation to this." (Mr. Scholefield then explained his involvement with DCC Corporate Finance in the UK which was part of a 'self regulating organisation'.)

He explained that it was in the context of that that a Compliance Officer would have initially been appointed. It would have been required. Mr. Scholefield explained that he saw his role as a Compliance Officer as an extension of the role that the Company Secretary would normally have in those areas where DCC was subject to regulation. (**Answer 169:** Page 56). He did not have any terms of reference or a job description nor was there any explicit training for the position other than the fact that his experience in his

view trained him for the position. (**Answer 173:** Page 57). "I had extensive experience in terms of dealing with the Yellow Book and the Blue Book in my role in corporate finance and certainly I had supported the previous Compliance Officers in terms of the interpretation and compliance with the rules of the UK Regulatory Organisations that we were part of so I had very much plenty of experience in those areas." (**Answer 173:** Page 57).

Question 174: Yes when you say you had supported the other officers whom had you supported?
Answer: "Peter Fetherman in the UK and Hugh Keelan in Ireland were my predecessors as Compliance Officers."

Question 179: I take it that public companies in the UK and in Ireland, certainly in the UK would have had Compliance Officers?
Answer: "No, it would be quite unusual particularly at that time it would have been quite unusual to have a designated person. One of my functions is, as you can see there, as a designated role as a Compliance Officer. I suspect what people might have is they might have an internal function or they might have a risk management function or something like that but those kinds of things, this was early days, it was before those kind of things emerged. Normally I think those duties would have just been the duties of the Company Secretary."

Question 180: Yes but he or she would not have been called Compliance Officer?
Answer: "They wouldn't have been called Compliance Officers. I think in DCC's case it was a little bit more of a recognition that there were things that needed to be formally looked at and recorded…and monitored." (**Answer 181:** Page 58).

When asked if he ever felt he had a knowledge deficit or an information deficit he said that he had not. (**Answer 182:** Page 59). When pressed on this he said, "no I don't think so... to be honest here, if you just take the Yellow Book or something at the time, having been through it and dealt with it as often as I would and I don't wish to blow my own trumpet,

would have been far superior than anything you have learned in a day or two's course. At the time you could read those things, rules and regulations, but knowing how they were interpreted having liaised with the Stock Exchange on their interpretation of those was quite critical to the practical implementation of those kinds of things. I could have given those courses in relation to those matters and I'm not trying to say that in a big headed kind of way…I'm just trying to explain. At one stage when I was Company Secretary there would have been a company secretarial conference and you would go to that. I would have learned nothing from it because it is somebody sort of saying stuff that is either blindingly obvious or just giving you check lists of things that you would already know." (**Answer 183** and **184:** Page 59 and 60). Mr. Scholefield then explained how he became familiar with parts IV and V of the Companies Act 1990.

Question 231: …I am trying to get a sense from you is it something that you looked at as you needed to and if you are at all in any doubt in relation to it would you have sought advice elsewhere or is it something that you, as it were, lived and slept with?
Answer: "No. It is very much the former. It was an awareness of kind of knowing broadly hopefully where to go and particularly if something came up knowing where to go. I would tend in situations like this to have a look at it myself, trying to form my own judgments on it and then go and take legal advice and that would be pretty much standard practice in DCC and certainly my standard practice."

He explained that the tax scheme which was eventually put in place in respect of the Fyffes' shares came about after the floatation. "Tax planning would have been a very important part of that in terms of making sure the right things were in the right place." (**Part of Answer 236:** Page 68.) "As I understand it this whole thing came as a result of saying look, at some stage the shareholding in Fyffes is likely to be or may be sold, so if it is sold there will be Capital Gains Tax payable on the way it is structured at the moment, is there any way of legitimately setting up a structure to either minimise or avoid that tax being payable." (**End of Answer 236:** Page 69). When asked if there ever was a similar structure put in place prior to the 1995 Fyffes' transaction Mr. Scholefield said that DCC would have engaged with professional advisers in terms of proper tax planning as long as

it was in existence but they had never availed of a similar structure to avoid Capital Gains Tax before the Fyffes' scheme but they did so subsequent to this. He explained that as at 1995 the gain on the Fyffes' shares was of the order of IR£20 million which gave rise to an estimate of a tax liability of somewhere in excess of IR£7 million. Mr. Scholefield then explained that the Capital Gains Tax regime has changed since 1995 and "if we were where we are today you wouldn't have to do it at all because the law is different". (**Answer 263:** Page 72). He agreed that quite a considerable effort was put into the structure on the tax side, including Accountants and Senior Counsel. When asked if he himself as Company Secretary or Compliance Officer had ever suggested or requested that Counsel's Opinion would be obtained in relation to a particular compliance issue he answered, "no I didn't. I think one of the things that I would recall from the documentation Mr. Shipsey is that we were recommended by our tax adviser to seek Counsel's Opinion on that case. I don't ever recall being advised by our legal advisers that we would ever seek Counsel's Opinion until we got to the circumstances we are talking about now." (**Answer 275:** Page 74).

"So I would think that the way we would judge something like that is that we would first look to our Solicitors or to our tax advisers and if they said to us 'look you should get Counsel's Opinion', you would get Counsel's Opinion as a result of their recommendations. It had not struck me and it didn't strike me at that time or any other time." (**Answer 276:** Page 75).

Mr. Scholefield's understanding of the involvement was that it was at the behest of CooperS&Lybrand as opposed to Mr. O' Dwyer. It never crossed his mind to look for Counsel's Opinion on any of the obligations under the Companies Act. (**Answer 280:** Page 75).

When asked was there a concern or an apprehension or a desire that the Revenue Commissioners would not know about this transaction until it came to the point in time when the Fyffes' shares owned by whatever vehicle they were owned came to be sold. He answered, "I don't have any recollection of that at all. I mean I don't think that

featured at all, it didn't feature at all to my knowledge." (**Answer 295:** Page 77). Having expressed surprise in relation to the question Mr. Scholefield said "it is actually the first time I have heard that suggestion but I may be wrong." When pressed on this as to whether DCC cared whether the Revenue knew about this scheme Mr. Scholefield answered, "well I didn't have any knowledge of any concern within DCC." (**Answer 300:** Page 78). When asked what circumstances he could conceive that a company would not want the Revenue to know about it he suggested that the question should be addressed to Fergal O' Dwyer. When asked if he thought that this scheme could be challenged he said, "I think so". (**Answer 311:** Page 80). To the best of his recollection he did not have sight of the advices coming from CooperS&Lybrand or Tommy McCann or KPMG in 1995. He agreed that he understood that the advice from the professional advisers CooperS&Lybrand, KPMG and Tommy McCann was that it could resist any challenge from the Revenue Commissioners. As a director of Lotus Green he confirmed that he was happy that he was doing something that was legal and would inure to the benefit of the group of companies of which Lotus Green was a part. (**Answer 348:** Page 85). He could not remember whether he had any "hand, act or part" in seeking advice on the notification obligation from Mr. Price in April of 1985. Mr. Scholefield was pressed on the issue at

Question 362: If I have to form a view as to whether you did or you didn't (have an involvement in seeking advice from Mr. Price in April 1995) can you provide me with any assistance as to whether on the balance of probabilities it is more likely that you did or it is more likely that you didn't have an involvement with seeking this advice?

Answer: "Well, the only thing, it is very difficult going back 13 years, the only thing and I don't know whether it is relevant or it isn't relevant but there is a note on what was definitely one of my files, I think it is the prior year, there is a Flogas note which I think was the prior year where there was a similar question asked and the same answer was given so I think there was probably a general awareness in DCC and I am only saying this from the documents. I cannot say it from memory, there was probably a general awareness of this being the relevant advice, but I can only say it from documents that are there. That's all."

Question 364: Wouldn't that make it less likely that you were involved in asking the same question a year later?
Answer: "No, because I think we would have checked again. Look you just asked me something. You want me to be definitive on something and I find it very difficult to do that."

Mr. Scholefield does not recall whether he saw the letter from Alvin Price to Daphne Tease in April 1995 at the time it was sent. Insofar as compliance issues were concerned the first time he recalls it becoming an issue was when Jim Flavin asked him to look at certain aspects of it (in June 1995) (**Answer 392:** Page 94). It was suggested to him that it was only as a result of the fallout from Jim Flavin mentioning the proposed tax scheme for their Fyffes' shares at a Fyffes' meeting that it came back on the table for DCC and that Mr. Scholefield had to consider it again. Mr. Scholefield disagreed. When asked if the request from Mr. Flavin as to whether he was required to notify the details of the transactions to Fyffes in his capacity as a director of Fyffes not under the Companies Act but under the listing rules, Mr. Scholefield answered, "that is right, yes". (**Answer 394:** Page 95).

Question 395: And then (Jim Flavin) also had some concern about insider trading concerns allied to that obligation. But what you were asked in June of 1995 was not whether DCC or S&L or Lotus Green would have to notify but whether Mr. Flavin personally would have to notify?
Answer: "Yes."

Question 396: And the reference in it where you say "given that Fry's have confirmed that there are not requirements to notify" you aren't, as it were, revisiting that, you were just confirming that advice had already been given and giving some assurance to Mr. Flavin in relation to his personal notification requirements by reference back to that earlier advice, would that be right?

Answer: "Well you see I don't know whether that is right because I don't know whether there had been subsequent discussions between Alvin and anybody else after Daphne's note. I mean we are all going on the documentation here."

Question 399: So we are not talking about Part IV, we are not talking about a duty to disclose either to Fyffes by DCC or any DCC company, and we are not talking about an obligation to notify the Stock Exchange under Part IV, isn't that right?
Answer: "Well you see I don't know that that necessarily is right because it is talking about the point about 'notifying the details of the above transactions to Fyffes' that is what it says isn't it?"

Question 401: Well apart from the listing rules what obligation is there in the Companies Act for Mr. Flavin as a director of Fyffes to give notification to Fyffes about the share transaction?
Answer: "I am not aware there is any. But that might have been equally what I would have considered at the time – I was asked an open question there to notify the details. It doesn't say don't notify the details of the above transaction to Fyffes under the listings rules – it actually says to notify the details of the above transaction to Fyffes and I think I would have – I'm trying to put myself back at the time."

Question 404: …You weren't being asked to consider whether DCC or S&L or Lotus Green had to (notify).
Answer: "That is not specifically what I was being asked but I am not saying that I wouldn't have tried to think more widely at the time as to whether there were other issues."

When pressed and asked if I would be right in saying that the notification issue probably wouldn't have come and been considered at all again in June or July and into August of 1995 if Mr. Flavin had not raised it at a Fyffes' board meeting Mr. Scholefield answered, "I really don't know. I think from what I can tell from the files we had advice at the time from Fry's and Alvin was involved or Fry's were certainly involved in the documentation

here throughout so if there was an issue with it I would imagine that it would have come up, if there wasn't an issue it might not have come up." (**Answer 407:** Page 98 and 99). Mr. Scholefield confirmed that in the memorandum at Tab 18 (of the 1995 Core Booklet) he was sufficiently confident of his understanding of the chapter 9 and 10 provisions of the listing rules to be able to offer an opinion to Mr. Flavin as Compliance Officer, he confirmed that he was.

Turning to Mr. Flavin's concerns in relation to insider dealing it was suggested to Mr. Scholefield from the memorandum that Mr. Flavin had something in the back of his mind that was troubling him about his position vis-à-vis the transaction and insider dealing. Mr. Scholefield answered, "I wouldn't necessarily say that. Because I think you just have to understand Jim is a careful person and there would be times when he would ensure – something didn't need to necessarily trouble him, he would just want the question asked. I mean without necessarily saying there was something troubling him he would be saying I wonder is there anything that we should be aware of that we are not aware of and ask, if you like, an open question so I wouldn't have interpreted that as there was something that was troubling Jim. Jim would have just wanted to make sure that there was not anything that needed to be brought to his attention that he should know about." (**Answer 416:** Page 101 and 102). It was again suggested to him, that he was prepared to offer a view in relation to whether the insider trading provisions were applicable or weren't applicable. He said, "yes that is what I did". (**Answer 417:** Page 101).

Question 418: And that must have been based upon your having regard to the provisions of the Companies Act of 1990.
Answer: "Absolutely yes."

Question 419: And in order for you to do this you would have had to have some understanding beforehand or you would have to go to it?
Answer: "I went through it and read it. I read the relevant portion of the Companies Act."

Question 420: And is that something that you would have had regular cause to do?
Answer: "Absolutely."

Question 421: But in terms of these particular provisions under Part V.
Answer: "Under Part V well I would say yes. I have been through it so many times more recently, Mr. Shipsey, but yes as a public company and as corporate finance advisers having been through the Companies Act and in fact now that you are reminding me if you just go into insider dealing we did, or colleagues of mine would have prepared some advisory notes for directors of some of the public companies we were involved with and also in 1995 we would have sent a note and it would be focused a little more on the Model Code than perhaps on Part V but Part V would interact with the Model Code that I don't think you could have done any of that at the time without having some regard to Part V."

"…So it was an area of territory that I felt reasonably comfortable about, rightly or wrongly." (**Answer 422:** Page 102).

Referring to his manuscript memorandum at Tab 19 he agreed that he was referring to the proposed Fyffes' transaction when he stated that it might in his view constitute 'dealing'.

Question 425: And that was one of the technical components of the insider dealer provisions?
Answer: "Yes."

Question 426: As the definition does not on the face of it seem to exclude purchases and sales within the same group.
Answer: "Yes."

Question 427: And you were able to tell that it didn't exclude purchases and sales within the same group presumably by reading the provisions of the Companies Act.
Answer: "Yes."

Question 428: Then you go on to conclude that:

> "If you were not in possession of price sensitive information in relation to Fyffes plc., then there is no problem. If you are in possession of price sensitive information in relation to Fyffes plc. it is my belief that the insider dealing rules are not relevant because the decision to enter into the transaction having been made by persons other than yourself (the board) who would not be aware of any price sensitive information in relation to Fyffes. However, in those circumstances it might be appropriate if you did not participate in the board decision and that we review the written arrangements referred to above."

[Mr. Scholefield probably did not realise that the advice given at this time was very significant. Had it been used in 2000 arguably it would have avoided the finding of insider dealing in breach of Section 108 by Mr. Flavin, DCC plc., and S&L Investments Limited.]

Returning to **Question 428:** What you are saying there is because, as I understand it, technically the decision to sell the shares to Lotus Green could be a dealing?
Answer: "Yes."

Question 429: Because it was being taken by the board of DCC or the board of S&L and it wasn't being taken by Mr. Flavin even thought he was part of the board.
Answer: "Yes".

Question 430: But as a counsel of additional prudence if Mr. Flavin was in possession of any price sensitive information he ought to exclude himself from that decision as a way of taking the transaction out of any insider dealing concern. Is that correct?
Answer: "Yes, I think I was referring to that. I think there is a specific exemption within the Companies Act which kind of reversed some of those things and I think I was actually referring to that."

When asked when he was looking at Part V in such detail did he not at that time also look at Part IV Chapter 2 again or was it the case that he was happy to rely upon Mr. Price's confirmation from April 1995. "I have no recollection of looking at Part IV again and I certainly did rely on Mr. Price's advice." (**Answer 431:** Page 104). When asked if he was aware that there were no exemptions for intra group transfers in Part IV he answered, "I am aware of that yes". (**Answer 433:** Page 104). In the memorandum at Tab 18 he asked, "Would you like me to get Alvin Price to confirm any of the above." He explained that this would have been a preliminary memorandum to Jim Flavin. "I would have definitely expected that Alvin would sign off on anything like this – I mean it just would have been practice." (**Answer 436:** Page 104).

Question 437: But if Jim had said to you "no there is no need to contact Alvin?" Why would you go to him?
Answer: "Well I would be surprised if Jim would say that for a start – just in relation to anything that was important."

Question 438: Well did he say it?
Answer: "Yes he did."

Question 439: In response to this he told you to go and ask Alvin?
Answer: "Yes he told me to go and talk to Alvin."

Question 440: And is that minuted, or I have missed (something)?
Answer: "I think that is the next Tab 20. I spoke with Alvin Price as agreed on the insider dealing implications of the above so I can only assume that (he asked me)."

Mr. Scholefield was then asked about the handwritten memorandum in Tab 19. He confirmed that it was his writing but he was not able to put a date on it but sought to explain where those handwritten notes came from. "They came from just a jotter so they are not in any sense intended to be any kind of formal note. They are just a jotter that I retained. And I kept my jotters over the years. So I would have jotted down things. But

any kind of formal note or any kind of coherent thought that I had, I would obviously express in sort of a typewritten note. That is why you will see there are things crossed out and all kinds of things that don't have anything to do with the Fyffes thing. So I just want to put that in context for you." (**Answer 444:** Pages 105 and 106). He explained that this handwritten jotter entry had been discovered in the Fyffes' litigation. His best guess is that the jotter entry was written when he was having a conversation with Alvin Price between the two memoranda sent to Jim Flavin in June 1995. "That is my best guess, Mr. Shipsey." (**Answer 447:** Page 106). The first item on the manuscript jotter note is 'no exemption for inter group transaction'. Mr. Scholefield explained that he thought that was referring to the insider dealing issue.

Question 451: There is a dealing.
Answer: "Yes."

Question 452: Don't think we would be prosecuted?
Answer: "Yes."

Question 453: Technically unlawful, not too concerned. Then I think:

> "If there was nothing immediately contemplated no price sensitive info price sensitive info fairly robust view.
> 3. Our intentions – not participation on equal.
> 1. Sell and market – tell brokers. Brokers need to tell perspective purchaser if possible of market transaction – doesn't come within authorisation – locate specific buyer and advise them of conditions."

Now when you record there 'don't think we would be prosecuted' is that recording somebody telling you that or is it you putting down on paper what you are thinking? **Answer:** "I think it is probably me putting down on paper my interpretation of a result of a discussion."

Question 454: But who would the discussion have been with?
Answer: "I think it was with Alvin."

Question 455: And what you are talking about there is you 'don't think we will be prosecuted for insider trading even if technically there was a dealing'?
Answer: "If there was a dealing when there was price sensitive information."

Question 456: Why do you think you wouldn't be prosecuted or what was your understanding of why you wouldn't be prosecuted if there was a dealing at a time when you had price sensitive information?
Answer: "Because of the interpretation of the Act that was being put upon it I suppose."

Question 459: And that although it might be technically unlawful that either you or the person you had spoken to was not too concerned about it?
Answer: "Yes."

Question 460: …But was there ever a concern, however fanciful you or anyone thought it might have been, that the decision to sell the shares to Lotus Green was a dealing and that the price sensitive information was the knowledge that that is what DCC were intending to do?
Answer: "No."

Question 461: That never featured in anyone's thinking that you can recall?
Answer: "No not that I recall."

Question 462: Because there is just something in the documentation a little bit later that led me to believe that that might be the case and we will have a look at it but you don't recall that ever being contemplated or considered.
Answer: "No."

Question 463: Or even thought about and then saying "that is nonsense, that can't apply"?
Answer: "No."

He was then referred to the memorandum of the 14th of June where he said, "I spoke with Alvin as agreed on the insider dealing implications of the above". (**Question 464:** Page 109). "On reflection Alvin agreed with my original conclusion that the transaction might technically be construed as insider dealing but only if he was in possession of price sensitive information in his capacity as a director of Fyffes." (**Question 465:** Page 109).

When asked if the 'on reflection' suggested that he had had an earlier discussion with Alvin when a different conclusion came up he agreed that it did suggest that it had been discussed before. But Mr. Scholefield thought that the period of time for 'on reflection' could have been on the call itself and thought that this was more likely. (**Answer 478:** page 111).

Question 471: I think that seems to make sense, that you phoned him and had a discussion about this, he expresses a view, you say 'but couldn't it still be a dealing because we were actually transferring a beneficial interest in these shares, but only if Mr. Flavin has price sensitive information'?
Answer: "Yes this is possible."

Question 473: But again more likely than not that that is the position, would you say?
Answer: "Yes, it evolved out of a discussion, if you like – I mean Alvin probably got more information from me in relation to it or whatever."

Question 474: Then clearly both of you were of the view that if Mr. Flavin had price sensitive information in his capacity as a director of Fyffes about Fyffes, not about DCC.
Answer: "About Fyffes not about DCC."

Question 475: About DCC's intentions in relation to its shares Alvin's advice was "we need to review this very seriously."

Answer: "Yes. There might be an element of understatement about that."

Question 476: And whether the transaction should be undertaken at a time when that was the case. "At a minimum we would need to have a very careful look at the drafting of the documentation." What way would the drafting of the documentation have changed? **Answer:** "Oh we didn't get into that."

Mr. Scholefield was then questioned upon the tax advice which was being given in relation to the proposed scheme to which he stated, "It wouldn't have been anything that I would have had anything to do with at the time." (**Answer 496:** Page 115). He was however aware that there was going to be a time lag between the transfer of the shares, the liquidation of Marjove Limited and the residence move by Lotus Green to Holland. "I wasn't particularly fazed with the detail of it that you are asking me about at the time." (**Answer 502:** Page 116).

Question 503: Neither phased nor thinking about it?
Answer: "Neither phased, nor knowledgeable, nor thinking about it. This was Mr. O' Dwyer's 'baby'." (Inspector's word).

He was then referred to his memorandum to file dated 20th June where he agreed that it was a note of him wearing his Compliance Officer hat setting out what he had done in fulfilment of that role in relation to this proposed transaction. "Into the insider dealing leg of it." (**Answer 511:** Page 117).

Question 513: When you say there: "any potential for gain or loss falls entirely within the group and will not impact on any third party" that is any gain or loss in relation to any movement in the share price. But again intentionally and deliberately the Revenue Commissioners were going to be affected by this transaction actually and potentially. **Answer:** "Right."

Question 514: And therefore, when you say there: "any potential for gain or loss falls entirely within the group", you are correct insofar as the share value is concerned but it doesn't take account of the tax saving from your perspective or the tax loss as far as the Revenue Commissioners are concerned.
Answer: "Well I didn't think about that at the time."

Question 515: Then you say "I have discussed with Jim Flavin his current knowledge of corporate development and other relevant matters within Fyffes plc." When you say you discussed that, in what forum did that discussion take place, how formal was it, did you minute that discussion other than this?
Answer: "No."

Question 517: But what is involved in satisfying yourself that he wasn't aware of any matter which would cause material movement in the share price of Fyffes plc.
Answer: "Well I suppose asking him that and asking him what information he had and whether there were any corporate developments at that point in time in Fyffes that he was aware of. I suppose I would note particularly there is a point there that it wont take place within a close period. Fyffes' period end was 30th April, so Fyffes were about to report their results for the period of 30th April then, so we had obviously determined that the transaction was not going to take place until Fyffes had actually reported at that point in time so that would have meant that I wouldn't have a concern about trading matters because I would expect the market to be brought fully up to date in that."

"So I wouldn't have had a concern about there being trading matters that would be an issue. So then I would be mainly focusing on corporate development type matters and I mean, at the end of the day, ask Jim are there any matters of that nature and rely on what he would tell me. I mean what I was trying to do was get an understanding of Jim's state of mind and his state of knowledge in relation to matters in Fyffes. Jim has huge experience in public companies and in considering the issue of price sensitive information and would have been aware of that so what he had to say would have been very material to me." (**Answer 518:** page 119)

Question 519: …But in terms of your ability to carry out your role as a Compliance Officer when it is your Managing Director and your, would it be correct to say that, Mr. Flavin was your boss?
Answer: "Absolutely it would be correct."

Question 520: When your boss is the person that you are having to interrogate as to his knowledge does that impose challenges in carrying out your role, I mean it would be one thing if there was an employee of yours who was on the board of a company and you were trying to find out whether they had or didn't have price sensitive information but is that not something that is rather difficult for you to do. I mean for example, if you asked Mr. Flavin "are you in receipt of any price sensitive information?" And he says no to you, I would assume that in terms of the relationship between you as Compliance Officer towards your boss it would be rather difficult to go beyond that?
Answer: "Yes, well I would have had a high degree of regard for Jim's integrity and for his ability to assess that. I mean, at the end of the day to some extent Mr. Shipsey you have to have that view. Because there is an element where Jim might be aware of something that it would be very difficult to prove anywhere else, to access anywhere else other than asking him about it, you know."

Question 521: Yes, in terms of protecting, your duty as Compliance Officer is to DCC and DCC's shareholders and employees and creditors?
Answer: "Yes."

Question 522: And also to yourself as Compliance Officer. You are accountable to the shareholders, you are not a director of the company but in a sense the compliance buck stops with you.
Answer: "Yes."

Question 523: And I am just wondering what procedure was in place to ensure that at least the right questions were asked both from a protection of you in your role as Compliance Officer and in terms of you discharging your function towards the company

of which you are Compliance Officer and who are paying you your salary. I mean I can understand and sort of sympathise with the position you are in but there has got to be some procedure for determining whether an insider dealing situation has arisen, whether somebody is or is not in receipt of price sensitive information other than saying "do you have it" and them saying "no I don't?"

Answer: "Well it is a judgmental thing in any event whether somebody has price sensitive information or not. I mean you can't define price sensitive information necessarily and say objectively that something is or is not a piece of price sensitive information. So you have to make a judgment in terms of the information that somebody has and I suppose I would have been trying to discuss the issue and you kind of look and say "what circumstances could there be in terms of there being price sensitive information?" Now, there could be trading circumstances or typically there could be some sort of a takeover or major corporate development. And in a business like Fyffes those were the two main things I would have thought that would have been the case. As I say, on the trading side you had regard to the time of year that the transaction was taking place in and as I say, this was taking place shortly after Fyffes was announcing results for the half year when the market would be updated. And in terms of a development, I mean that is something that I had to rely on Mr. Flavin for."

Question 524: I suppose what I am getting at, I'm not saying that you don't – in fact I am saying you have got to bring your judgment to bear on it and you have got to bring your professional skill and expertise as Compliance Officer. But what I am trying to find out is what procedure was there within DCC for you to ensure that you complied with your responsibility? In other words if it was the case…that on 5th July Fyffes were about to take over Del Monte or something like that and you had asked Mr. Flavin on the 25th June "Jim is there anything that is going to happen in Fyffes?" and he had told you "no there is nothing in relation to that," then say for this hypothetical argument that the shares had been transferred some time on the 1st of July and I am very mindful of the fact that if that had happened and they had gone up it wasn't a transfer out of the DCC group … but if the rest of the board came to you afterwards and said "Michael, you are Compliance Officer, how did you not find this out?" What would you have been able to point to them to say

"Well, here is the procedure I followed. Here are the questions I asked. This is what Jim told me" and to be able to say "well, whoever else is at fault in relation to this, it is not Michael Scholefield, because I did my job." …And what I want to find out from you here is what procedure was in place, either what procedure did you inherit or what did you create in order to ascertain as best you can or as best you could whether somebody – and in this case Mr. Flavin your boss – was in receipt or was in possession of price sensitive information relevant to Fyffes?
Answer: "Well I would have considered the external circumstances and I would have spoken to Jim and that was it. I mean I didn't do any more than that."

Question 525: But when you say 'external circumstances' are they external circumstances known to you is it?
Answer: "Yes, well, as I say, on the trading side known to me yes, absolutely on the trading side where we were and the time of year so that would have been relevant so that is what I am saying."

Question 526: So external circumstances knowing the Fyffes reporting cycle?
Answer: "Knowing the Fyffes reporting cycle, yes."

Question 527: But in terms of anything that may have been going on within the board of Fyffes about major transactions sort of coming up is it the case, and are you saying that it was just entirely down to an honour system that you would be relying.
Answer: "Yes I had no link in to go and ask the question of Fyffes and I didn't."

Question 528: In terms of you asking the questions that would elicit the answers that you could point to afterwards was there any questionnaire or anything?
Answer: "No, so I would have been relying on my own professional experience as you put it, yes."

Question 529: And other than what is documented here "I have discussed with Jim Flavin his current knowledge of corporate development and other relevant matters in Fyffes plc.," we don't know what those other relevant matters are, no?
Answer: "I don't."

Question 530: I mean we are all wise with hindsight but can you see from the perspective of other board members, lets say I was a board member of DCC and something had been afoot within Fyffes and it had a real material bearing and we were selling outside the group, and they are all hypothetical do you not see or can you see that there would be or could be a problem for you as Compliance Officer in relation to the procedure that was adopted?
Answer: "I can."

Question 531: I am just wondering. I mean you are not Compliance Officer now, but was there any change over time in relation to how compliance obligations were being discharged.
Answer: "I don't think so. I think that would have been fairly consistent practice prior to my time and practice up until the Fyffes' shareholding was sold which would have been the last time that there would be any external shareholding that would have been sold by DCC. I mean pretty much the same thing would be adopted in relation to dealings in DCC as well. If somebody was seeking permission to deal its shares in DCC again there would be a discussion based on whatever knowledge the Compliance Officer had and whatever knowledge Jim as the responsible person as the CEO would have."

We then came to Tab 27 of the core booklet which is where issues arose in relation to compliance with Part IV of the Companies Act 1990. There is reference to a Fyffes' board meeting followed by lunch some time prior to the 21st June and Mr. Flavin informally says to Mr. Neil McCann or Mr Carl McCann or to the persons collected there "by the way we are doing this tax scheme where we are going to transfer the beneficial interest of our shares that we currently hold in Fyffes out of the company they are currently in to Lotus Green Limited and that company will be non-resident". It was suggested to Mr.

Scholefield that this was being done by Mr. Flavin as a matter of courtesy towards Fyffes and not in compliance with Part IV of the Companies Act. "Knowing the man I would say it was courtesy and the longstanding relationship between the parties were the reasons that that was done." (**Answer 535:** Page 126).

Mr. Scholefield agreed that he had advised Mr. Flavin that he didn't need to notify Fyffes under the Listing Rules as he didn't control DCC. Nothing is said following Mr. Flavin's statement at the Fyffes' board meeting but subsequently Mr. Carl McCann, Deputy Chairman of Fyffes makes contact with Michael Meghen, Solicitor of Arthur Cox, Solicitors. Mr. Meghen writes back to Mr. McCann who sends it on by fax to Mr. Flavin. In the letter Mr. Meghen asks Mr. McCann to let him know precisely the details of what is proposed whereby DCC would transfer its entire shareholding in Fyffes, in particular he wished to know if the legal and beneficial ownership of the shares in question would pass together with some particulars as to the nature of the new entity concerned and its relationship to DCC. There is a note on the fax of the letter which was sent to Mr. Flavin which just says "Jim, Regards Carl". When Mr. McCann forwarded it to Mr. Flavin at 2:20 p.m. on 21st June having received it at 11 a.m. that morning, Mr. McCann has clearly some understanding of what is proposed but is very hazy, presumably on the basis that Mr. Flavin was not forthcoming with the details? "Yes". (**Answer 544:** Page 128).

The next document in sequence referred to seeking a further Opinion from Tommy McCann. Mr. Scholefield was asked to confirm that there was no consideration given at any stage to asking Mr. McCann to opine on the company law aspects of the transaction or on the notification obligation. "No." (**Answer 547:** Page 129)

Question 548: Just wasn't considered?
Answer: "Wasn't considered, no."

Question 553: Again insofar as this is a tax scheme…no stone was being left unturned by the company to make sure it got it right.
Answer: "Yes."

The next document is a jotter note from Mr. Scholefield referring to a conversation which he had with Mr. Carl McCann.

Question 558: Carl is saying "if anyone wants to deal in the shares they are required to notify the Chairman."
Answer: "Yes."

Question 559: That would be referring to the listing obligations.
Answer: "The Model Code."

Question 560: That's the Model Code. If that director was dealing in the shares he had to tell the Chairman of the company?
Answer: "Yes. Mr. McCann seemed to be also concerned that DCC was transferring ownership to an entity that was not under DCC's control. That is the BV. Mr. Scholefield said that that was his interpretation but it was not in fact since DCC did control the BV. "I think Carl was at all times concerned about Fyffes' position here just that at some point in time the DCC's shareholding could be sold to some party who perhaps he didn't like, I think that was the ultimate concern and that some other third party could take control of the Fyffes' shareholding." (**Answer 564:** Page 131).

Question 565: Again insofar as DCC is concerned it owns shares in a public company?
Answer: "Yes."

Question 566: DCC were free to sell those shares to whomever they wished?
Answer: "Absolutely and that would have been quite an important principle we would wish to have and having reviewed the situation very closely and took legal advice on it."

To the best of Mr. Scholefield's recollection the telephone conversation with Mr. Carl McCann was between the 21st and 23rd June and his jotter notes were trying to get the essence of what he, Carl McCann was on about. Then on the 23rd of June another email is sent from Mike Meghen to Carl McCann which again is sent on to Mr. Flavin. The letter

from Michael Meghen referred to having received a phone call from Mr. Scholefield in the course of which he, Michael Scholefield, gave a brief outline of what is proposed. Mr. Scholefield did not have any memo of his conversation with Mr. Meghen nor would it have been his practice to keep one at the time. He didn't recall anything more of the conversation other than what is recorded in Mr. Meghen's note. "I understand that the beneficial ownership of the shares in Fyffes currently registered in the name of DCC will be transferred to a non-resident BV." When asked about the "not true" written in manuscript he said "it looks like Fergal's" (handwriting). Mr. Scholefield was asked if there had been a share transfer executed would that have shown up in the register of Fyffes? "It would, yes." (**Answer 585:** Page 134).

Question 586: If that had been done or contemplated there was no way that you couldn't notify the transfer of the interest under Section 67 or at least there would be no point in not notifying it if you were executing a share transfer and the title to the shares was going to be in the name of Lotus Green?
Answer: "I am not sure about that."

Question 587: Well let's just take it in stages. If what was done in relation to this transaction was that the shares were transferred legally and beneficially to Lotus Green and the share transfer form is executed?
Answer: "Yes."

Question 588: Maybe there would be a further step required to actually lodge that, but if that was lodged then the register of Fyffes would be required to register Lotus Green as a shareholder in Fyffes?
Answer: "Yes."

Question 589: In those circumstances it would not be, whether it was legally required or not, it would be pointless not to comply with the disclosure obligation under Section 67 in circumstances where Lotus Green was registered as a shareholder in Fyffes?

Answer: "Possibly. I am not sure it makes much, is it any different from what actually did happen."

Question 590: Well yes because there was no notification and there was no registration of Lotus Green as a shareholder in Fyffes so nobody ever knew that Lotus Green had a beneficial interest in 10% of Fyffes until it came to sell those shares in 2000.
Answer: "I mean save for Mr. Flavin's conversations with Mr. McCann, sorry that's the other point that was at the back of my mind."

Question 591: But the Stock Exchange didn't know.
Answer: "No, no."

Question 592: If the legal and beneficial interest had been transferred and the shares had been registered the Stock Exchange would have had to have known.
Answer: "Yes."

Question 593: I mean the Registrar of Fyffes would have had to have registered those shares and then it would be public knowledge that Lotus Green had 10%.
Answer: "I'm sorry, of course you're absolutely right. Yes I was forgetting the register is obviously a public document. Sure."

Question 594: Now the rationale for not effecting the transfer of the legal as opposed to the beneficial interest on the documentation appears to have been tax driven as well isn't that right?
Answer: "That's right."

Question 595: In that there was a saving or a potential saving of some IR£300,000 in stamp duty because you didn't pay was it a 1% stamp duty on the transfer of a share and by entering into an agreement to buy the shares but with no closing date that could be avoided.
Answer: "Yes."

(Mr. Scholefield went on to explain that if the transfer stayed within the group for those two years no stamp duty would have arisen. It would only be if it was transferred out of the group within those two years that stamp duty would have arisen). It was then suggested to Mr. Scholefield that the effect of not transferring the legal interest made it more difficult for persons outside of DCC to know that this had happened. "Yes that's a fact." (**Answer 600:** Page 137).

Returning to Mr. Meghen's letter it says "it appears on the face of it that the provisions of Chapter II of the Companies Act 1990 (the Act) may be applicable. The Sections of the Act which are particularly relevant to the proposed transactions are Sections 67, 77 and 91. Section 67 provides that where a person to his knowledge acquired an interest in voting shares in a public company or which ceases to be interested in such shares shall be under an obligation to make notification to the company of the interest which he has or had in its shares. "Section 77 (2) provides that a reference to an interest in shares is to be read as including an interest of any kind whatsoever in the shares. Section 91 (2) provides that where a person becomes aware that he has acquired or ceased to have an interest in shares to which the Section applies he shall in addition to the obligation of disclosure to the company under Section 67 be under an obligation to notify the exchange of his interest in the said shares. In view of the foregoing it would be interesting to know on what basis it has been determined that the proposed transaction does not fall within Chapter II of the Act."

On the same day Carl McCann writes to Jim Flavin:-

> *"Dear Jim,*
>
> *I have spoken to Michael, (Scholefield). We have faxed him a copy of a letter of today's date from Michael Meghen. There may be an obligation to notify the Chairman in advance in writing of the prospective transaction about which you recently informed us."*

Carl McCann is referring to the Listing Rule obligations on a Director to notify his Chairman whereas Mr. Meghen is pretty clear and specific when he is talking about Part IV of the Companies Act of 1990. "That's correct, yes." (**Question** and **Answer 613:** Page 139 and 140).

Mr. Scholefield said the reference to Sections 67, 77 and 91 caused him to dig out the Companies Act to see what was being referred to. When asked what view he took when he read the Sections he answered, "I didn't really know what to think because I didn't see an exemption there for inter group transactions so I would have gone back to talk to Alvin Price about it." (**Answer 616:** Page 140).

Question 619: Those provisions on their face require you to notify any interest that you dispose of or that you acquire above the 5% threshold.
Answer: "Yes."

Question 620: When you say you didn't know what to think, would I be correct in saying or think you didn't know what to think having regard to the advice that had earlier been given that you didn't need to notify?
Answer: "Correct."

Question 621: Because there was nothing, the Act hasn't changed, there is nothing in the Act or in any of the provisions in Part IV that you could see which exempted notification in an inter group situation.
Answer: "Yes having seen Mr. Meghen's note and in the absence of having got the advice from Fry's." Mr. Scholefield agrees that he would have said to Mr. Flavin "we probably have to notify but we better check the situation with Fry's." (**Answer 624:** Page 141).

Question 626: Can I ask you what was wrong with notifying? What was the problem with notifying?
Answer: "I think the only issue that there was with notifying, that I would be aware of, is that if you had made the notification Fyffes would have been required to publish that

notification and that would have gone out into the market and caused confusion if you like about the DCC group's shareholding in Fyffes and possibly about whether there was an imminent sale going to take place of the DCC Group shareholding in Fyffes and that might not have been helpful to DCC or to Fyffes."

Question 627: That doesn't seem to have been a factor from the DCC side. I mean there was certainly evidence recorded that Fyffes were not unduly upset that you didn't notify ultimately?
Answer: "Yes."

Question 628: But I don't see anything in the DCC documentation which features that as a concern?
Answer: "Right."

Question 629: And if it was the reason at the time and again we have all got to be careful in terms of I think what Ms. Justice Laffoy referred to as "ex post facto rationalisation" I am just wondering, with the benefit of mature reflection, is there an element in your mind that that is what is now happening within DCC and even for you to say 'oh we worried about the impact upon the share price'?
Answer: "That's my best recollection. I can't think of anything else Mr. Shipsey. I think it was there at the time. I know what Ms. Justice Laffoy said. I think it was there at the time. That's my best recollection and I can't think of anything else."

When asked why such a consideration would have been a concern when DCC had no intention of selling the shares immediately Mr. Scholefield answered, "arguably". (**Question 632:** page 143).

Question 633: You see that's what makes me wonder, and it may be the case that you don't know, whether or not there were other reasons or another reason for not wanting to notify because there was nothing onerous about the notification obligation, it wasn't expensive in the sense of what you had to go through, I mean presumably the tax scheme

was expensive in that you had lots of advisers and expensive times. The notification of this was something that was very simple, isn't that right.
Answer: "Yes."

Question 634: It was a form that you could have drafted and presumably did draft on other occasions.
Answer: "Yes. Sorry I think this one might have been slightly more complex given that DCC was disposing of an interest and reacquiring its interest through Lotus Green which is slightly more complex."

Mr. Scholefield couldn't recall whether a view was taken as to whether S&L Investments Limited was caught by Section 67 or not.

Question 639: There was never a time in which anybody said, well for this reason it is clear that DCC has an obligation to notify the disposal of its beneficial interest, in whatever it was, 7 or 8% of the stake. Lotus Green has an obligation to notify its acquisition of a beneficial interest and S&L has 3%, it doesn't meet the 5% threshold but if you look at another provision of Part IV, DCC controls S&L and therefore that shareholding has to be considered?
Answer: "I don't recall. It could have happened. I don't recall. If it happened at all it would have been during some conversation with Alvin Price. The only person who kind of said well it should be notified was Michael Meghen. I don't think anybody else said that it should be notified."

Question 640: Who else was asked?
Answer: "Nobody else was asked."

When pressed as to why DCC did not want to notify the company and notify the Stock Exchange Mr. Scholefield answered "I don't think I can help you any more than I have tried to and my answer is that I thought that there was. I don't know that it was a particular concern that I had necessarily but my understanding and I suppose it would be

largely from Jim I would say would be that perhaps there was an issue. It may have been a reflection of Fyffes concern, I really don't know, but there is nothing else that I am aware of." (**Answer 643:** Page 145).

Question 644: Yes. But Fyffes never said "don't notify".
Answer: "I don't think they did."

Question 645: In fact far from it. They were at pains to ensure that if any decision was taken about the notification it was a DCC matter.
Answer: "That's right."

When asked about the evidence which Mr. Price had given in the High Court to the effect that he had a sense in which DCC didn't want to notify, Mr. Scholefield answered that the only way he could have had that was from "Fergal, me, Daphne or Jim." (**Part of Answer 654:** Page 146).

I asked him if he recalled Mr. Price saying his sense was that you didn't want to notify and that the company was looking for a rationale not to notify? (**Part of Question 655:** Page 147)
Answer: "I'm not sure about that, but fine if that's what you say."

Question 656: You are not sure that he said it or you are not sure that he is right thinking that?
Answer: "I am not sure that he said it."

Question 658: Because if there wasn't a rational basis for a fear about any impact upon the share price and yet there was a desire not to notify, there are, I suppose endless possibilities but here are two: one, is that you were operating on an irrational fear basis or, secondly, that there was another reason motivating it perhaps and again you were not involved in this, perhaps related to the desire, perhaps an understandable desire for secrecy

in relation to the tax transaction or at least to the timing of when information would come out about the tax.
Answer: "I have no recollection of that – I don't recall anything of that nature."

Question 661: The Revenue Commissioners, you wouldn't be surprised to hear, they have a habit of closing off loopholes where they lose a case in court or where something is perceived to have cost them in circumstances?
Answer: "Sure I can think of a specific example."

Question 662: It's not unusual.
Answer: "Sure."

Question 663: Let us say I was to conclude that your reading of the provisions of Part IV was actually correct and that there was no exemption and that this ought to have been notified I conclude – well there are a number of things I conclude. I could say you got bad advice from your lawyers and you followed that advice and unfortunately the company is technically in breach of its obligations and there is an exposure for a technical breach.
Answer: "Yes."

Question 664: But in defence of which you might say, "well we took legal advice, we got legal advice in relation to it and we followed that advice." Or alternatively there are other possibilities. There is the possibility that the advice you got was equivocal, that it was clear to you and your fellow directors within the three companies that it was equivocal and you took a chance in not notifying because the advantage of not notifying outweighed the risks of being wrong in relation to the notification. They may be two sorts of extreme positions…what I need from you now is to try and find out, because you are the Compliance Officer, you are the one that would have had to take responsibility for the notice from DCC plc., S&L Investments, if you decided it had to notify and also Lotus Green Limited and you are the one that would have also had to notify the Stock Exchange. So I am just wondering whether there is any assistance or further assistance you can give me as to why, if there was a preference not to notify, that was.

Answer: "Beyond what I have already said I don't think there is. I will try and give it some more thought. As I said I struggled in the High Court so…"

Question 665: You will agree with me though, again just by comparison, insofar as the tax advice as opposed to the legal advice is concerned, there is huge emphasis on that even after the scheme is devised in terms of going back for detailed opinions and clarifications and second opinions.
Answer: "Yes. The only thing I can do is repeat what I have said before. That was a whole complex thing. There were a whole load of inter relationships. I think by comparison the other point was a net point."

The next memorandum was a memorandum from Mr. Scholefield to Mr. Flavin of the 7th July. The memorandum records that "Alvin Price finally managed to speak with Mike Meghen at the end of the week in relation to the above. According to Alvin he had a good telephone conversation with Michael whose attitude he felt was positive. While Michael pointed out that the legislation if applied to the letter could be interpreted to provide that any transfer of interest was notifable, it is my understanding that he accepted that the intent of the legislation was not such and that he did not disagree with Alvin's argument that the proposed transfer was not necessarily notifable. I endeavoured this week to contact Michael to confirm this interpretation and ensure he was entirely happy but I found he was on holidays and due back in the office on 10th July. Michael Meghen did not raise with Alvin any of the other arguments raised by Carl with me relating to any requirements on a director of Fyffes to notify dealings of a company of which he was a director. However, I took the opportunity to confirm clearly with Alvin that under company law and the Model Code there are no such requirements unless the director controls that company. I don't believe the code of dealing in practice extends to these principles." There is then recorded on the memorandum a manuscript note from Mr. Flavin "thank you, we have spoken. Keep on Compliance File."
Mr. Scholefield then explained the memorandum in some detail in answer to Question 672. "I think what happened here is that after I spoke with Michael (Meghen) and we were looking at a situation where I didn't receive Michael's letter, absent Michael's

advice, I would have said 'here is a technical legal matter' and I may well have done it in discussion with Jim – I can't absolutely recall, where we would have said we will put the two lawyers together to sort out the issue all right." (**Answer 672:** Page 153).

"So I mean it's in that sense that the transaction took place. I think they pretty much chose to agree to disagree." (**Answer 674:** page 153).

Mr. Scholefield was then referred to Michael Meghen's letter of the 19th July to Mr. Scholefield where he said in the third paragraph "in summary I explained to Neil that Alvin had no fundamental disagreement with the points made in my fax to Carl 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."

It was put to Mr. Scholefield that there was no sense in which Mr. Meghen was backing down from his position. Far from it he says that Mr. Price had no fundamental disagreement with the points made in his letter. Mr. Scholefield agreed that this was so.

Question 686: You see if Mr. Meghen had not raised any of Sections 67, 77 and 91 it never would have come up again, isn't that right?
Answer: "Probably yeah."

"Can I just say one other thing? One of the things that would have been very clear in my mind that I know was part of our discussions and I don't know at what stage was that as we have no example anywhere of a transaction of this nature having been notified and I can't remember when that actually came up in discussions with Alvin, but it was an issue that did come up so there was nothing to suggest, we found it difficult to believe that there hadn't been any other inter group transactions and there was no evidence that we could find that any of these had been notified." (**Answer 693:** Page 156).

Question 694: Did you have a view as to what the intention of Part IV, Chapter II was?
Answer: "So that the market would be aware of the holdings in companies by a third party, substantial holdings by third parties."

Question 697: You also had to notify the Stock Exchange so there was a dual protection that the public would find out about it.
Answer: "Yeah."

Question 698 - 700: And the intent of it was to ensure that where there was a disposal… was to ensure that there was a transfer of any interest or any acquisition of any interest that the Stock Exchange and the company would be notified.
Answer 700: "Yes."

Question 703: Therefore I am just wondering where in your discussions or whether in your mind you thought that there was an intention apart from that intention.
Answer: "Well I didn't know that that intent extended to transfers within a group. I think that's what the net point boils down to."

"If you are shuffling an interest from one part of a group to another part of a group that the intent was that it would apply to such transactions." (**Answer 704:** Page 158).

Question 705: So what you thought had to be implied into it that anything within a group was to be considered at a group level.
Answer: "Yes."

Question 706: That was somewhat at odds with the view you had to take in relation to the tax scheme, isn't that right, because for this tax scheme to work nobody could view it on an inter group basis, there had to be an actual transfer of the beneficial interest from DCC and S&L to Lotus Green Limited and that company had to be resident (in Holland).
Answer: "I don't think I was making distinctions between the tax scheme and Part IV."

Question 707: Why not?
Answer: "I don't know but I don't think I did."

Question 708: Could it have been because it didn't suit you to do it and it didn't suit DCC.
Answer: "Beyond what I have said I have a feeling that there was a view that we didn't want to have the thing notified because of the questions it might put out on the market that is the only reason I can think of why it wouldn't suit us."

He was then asked about the Minutes of DCC plc., which recorded the transaction as being for 'corporate restructuring reasons'.

Question 711: So even internally within the company there was unwillingness to acknowledge, for the purpose of the Minutes, that the reason for doing it was to gain a tax advantage.
Answer: "While I can think of lots of transactions that have been done where there could have been a tax planning objective and I can't ever think of anybody writing down that it's for tax planning reasons. Corporate restructuring certainly in my view was a euphemism for tax planning purposes and I just don't recall seeing any and it just wouldn't have been the style to write down we did this for tax planning purposes."

Question 712: In terms of what you were doing from a tax planning point of view it was entirely legal?
Answer: "Absolutely."

Question 713: You had been advised?
Answer: "Yes. It is just a nuance of wording then perhaps and just something that you would be more comfortable seeing written down 'corporate restructuring' rather than 'tax planning purposes'."

Returning to Tab 32, there is a draft letter from Michael Scholefield to Carl McCann. Mr. Scholefield is not too sure that the letter was actually sent. He agreed however that whether it was actually sent or not it gave an indication of what he was thinking, "absolutely, yes." (**Answer 717:** Page 161). Mr. Scholefield when pressed asked that I would take it that it wasn't sent. "It didn't turn up on Fyffes own discovery Mr. Shipsey and I would think that if it had been sent it would have turned up." (**Answer 720:** Page 161).

We then turned to the letter of advices from Alvin Price of the 21st July. When asked how he would characterise Alvin's letter he answered, "well it was a little more equivocal than we might have expected actually after the previous discussions with him." (**Answer 730:** Page 163).

"I suppose having read the Companies Act that didn't particularly surprise me but there was a question of what his bottom line advice was." (**Answer 730:** Page 164).

In relation to Daphne Tease's letter to Alvin looking for more detailed advices on the 14th July Mr. Scholefield said, "I have a feeling actually that Jim Flavin might have asked me to get Alvin to get it done in advance of the board meeting knowing that the board meeting was coming up." (**Answer 749:** Page 137). He was then referred to the memorandum at tab 39 to Jim Flavin, copied to Fergal O' Dwyer and Tommy Breen. It is from Daphne Tease dated 14th July and there is a reference to the anti-avoidance Section 86:-

> "If restructuring postponed until sale imminent because of the short time frame this increased the risk of…seen as a trading company and enables the Revenue to quantify tax sale for the purpose of Section 86. He also made the point that if we postponed the tax structuring we run a not insignificant risk of a change in the Irish legislation to close the loophole as in the UK."

Mr. Scholefield doesn't recall being aware of this at the time. When asked if notification had occurred it would have increased the risk or the likelihood that the Revenue would seek to have the Irish legislation changed to close the loophole, he answered "I frankly doubt that but it's a view. I mean to be honest as I sit here I don't see that notifying the transaction would have excited the Revenue's attention at all but I may be wrong, I don't see it." (**Answer 755:** Page 168, and 169). He agreed that had the transaction been notified to the company and to the Stock Exchange it would have been clear that the most likely reason that it was being done was for tax avoidance reasons. However Mr. Scholefield said, "I just didn't have a perception that the Revenue was following those kinds of issues and maybe I'm wrong – that's all I'm saying." (**Answer 760:** Page 169).

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When asked if he was unfamiliar with seeking Counsel's Opinion on a matter such as the notification issue he answered "on a matter such as this, it was something that was unfamiliar to me in practice yes". (**Answer 5:** Page 9).

Answer 7: "I think I said yesterday that one was a complicated tax scheme with lots of issues and nuances to it and this I thought was a net point and I think that is what I said yesterday."

Question 8: It being a net point on one view where it is sort of very complicated you can manage the details of the scheme but if it was a net view did that not make it all the more important and in a sense easier to get Counsel's Opinion on what was a matter of statutory interpretation?
Answer: "It may have, but the point didn't strike me, and I suppose I was conscious of the fact that you know Michael Meghen wasn't advising us, you know we had advice from our legal advisers and I thought I only had one piece of legal advice that was addressed to me as opposed to something else that I was aware of."

When pressed if he as Company Secretary and Compliance Officer needed to have a very clear view in relation to the point he answered, "any more than talking to our own Solicitors who, you know, Alvin Price in particular who I dealt with and who I had a lot of trust and respect for and I think I did say yesterday conscious of the fact that I had never seen anything like this notified in the past before so those were the things that were in my mind." (**Answer 9:** Page 10 and 11) When asked about his understanding of the consequence of failing to make the disclosure where you were required to make it he answered, "I think it is an offence under the Companies Act." (**Answer 22:** Page 13).

Question 23: An offence for whom?
Answer: "For the officers of the company." He couldn't remember the precise penalty prescribed for the offence.

Mr. Scholefield accepted that if the matter had 'gone wrong' and notification was required the board would have come to him to ask "how did this happen". He repeated that he had "had pretty strong advice from Alvin Price prior to the 21st July but when he received the letter it was 'slightly less strong than he would have recalled the advice being beforehand, the substance of the advice being beforehand'." (**Answer 33:** Page 15). Mr. Scholefield was asked if he remembered Mr. Price giving evidence in the High Court to the effect that the request for advice on 21st July was to try and get him 'off the fence'. Mr. Scholefield said he remembered that but he didn't recall it being that way. He explained that Mr. Flavin was keen to have a letter for the board meeting of 31st July and that was why a more detailed letter of advices was requested from Mr. Price. Mr. Scholefield said that he didn't ask Mr. Price what the consequences were for failing to notify where you were required to notify. "No I didn't. No I don't think we went down that road." (**Answer 45:** Page 17).

Question 46: But you say you knew it was illegal?
Answer: "Sorry I didn't say that I knew it was illegal. I said, I think I said if it was."

Question 47: …But if it was required it was a criminal offence.

Answer: "Yes."

Question 48: And a criminal offence that impacted upon the directors and officers, that was your understanding.
Answer: "Yes."

Question 49: In that context though would it not be surprising that you wouldn't have some view as to how serious that was…the…potential penalty?
Answer: "Well not if you didn't think that was the likely interpretation of it I think." [Mr. Scholefield was not very familiar with the Revenue Commissioners or with their practices.] When it was suggested to him that there was a likelihood of Revenue scrutiny on the basis that the greater the benefit for the company the greater the detriment there is for the Revenue Commissioners. (**Question 62:** Page 21). He answered "…If there is lawful tax planning, I am not too sure that there is a detriment to the Revenue." (**Answer 63:** Page 21).

Question 64: No but whether it is lawful or not the implementation of this scheme meant that IR£7 million that was going to the Revenue was going to the shareholders of DCC.
Answer: "Yes."

Question 65: Therefore the bigger the benefit to DCC the bigger the detriment to the Revenue in the sense that they are responsible for the collection of taxes under the tax code.
Answer: "Fine if you want to put in those terms."

Mr. Scholefield said he was not familiar with what the Revenue does but that it would be likely that the tax saving scheme would have a high profile with the Revenue. Although Mr. Scholefield was not very familiar with the filing of the accounts by Lotus Green he was certain (as turned out to be the case) that Lotus Green in its first filing with the Irish Tax Authorities disclosed that it had an investment in Fyffes. When pressed about whether his Compliance Officer function extended to reviewing tax advice he answered at

Answer 93: "Well the compliance function didn't work that way in terms of reviewing tax advice and I know I would be conscious of the fact that Fergal would be dealing with the matter. Fergal is a competent individual with experience in this area. He was taking external advice and to be honest I wouldn't get into the detail of it and I don't think anybody would have expected me in my role as Compliance Officer to get into the detail of it and that is not how I saw my function."

Question 94: Yes but I mean insofar as compliance issues were concerned are you saying your compliance role didn't extend to tax compliance.
Answer: "It didn't extend to tax compliance, no."

Mr. Scholefield was then referred to Tab 37 and his letter of the 11th July to Michael Meghen where he said, "further to our telephone conversation in relation to the letter agreed to be sent to Neil McCann perhaps you would consider whether it is appropriate to send something in the attached form". This was a follow on from his memorandum in Tab 34 where he says, "I will endeavour this week to contact Michael (Meghen) to confirm this interpretation to ensure he was entirely happy but found he was on holidays to be back in the office on the 10th July". When asked if when he spoke to Michael Meghen on or about 10th July he was "entirely happy" Mr. Scholefield answered, "I can't remember. I mean I would take it that this letter emerged as a result of my conversation with Michael so I would imagine, I think what Michael was saying and I am interpreting from this Mr. Shipsey that Michael was saying what he had been saying to Alvin and from my previous note Michael was saying "look Alvin and I have spoken about it. We take slightly different views but in any event it is your responsibility. I think." (**Answer 103:** Page 30)

When asked if it was somewhat unusual for him to be 'debating the toss' in relation to whether notification should or should not take place with the Solicitor for Fyffes he answered, "not entirely in the relationship between DCC and Fyffes, I would say, but I don't think I was debating. I think I had had the initial debate and then I put Alvin in touch with Michael." (**Answer 107:** Page 31). He confirmed that he had had prior dealings with Michael Meghen in the context of DCC providing financial advice to Fyffes.

When asked if he felt some discomfort in speaking with Michael Meghen about this issue he said he did feel discomfort about it and that is why he put Alvin Price in touch with him. He also said that he had had quite a lot of dealings with Carl McCann but less so with Mr. Neil McCann. When asked if it struck him that it was unusual that he was having the debate about whether notification was required with the company that they might have been required to notify. He answered, "yes". He also explained that "my perception at this time was that the company Fyffes was far more concerned about the listing rule, the Model Code kind of implications of this rather than the, and that is something that is referred to in my kind of draft letter to Carl McCann, and I think the company is far more concerned about that and that kind of got wrapped up in this notification issue". (**Answer 118:** Page 32) When pressed as to whether he thought there was something untoward about him having a discussion with the company that he might have been obliged to notify about whether he should notify or not he answered, "I don't think it struck me that it was untoward. I mean it certainly struck me that it was unusual but lots of unusual things happened between DCC and Fyffes." When asked what was his understanding of what Fyffes' view was in relation to notification he said, "I take it their view was that marginally they might have a preference if it wasn't notified, marginally". (**Answer 134:** Page 35 and 36).

Question 135: Why is that?
Answer: "Because they didn't think it would be helpful."

Question 136: In what sense?
Answer: "In the sense of possibly suggesting that the DCC shareholding might be about to change hands and might be about to be sold or something like that."

Question 137: And that might have an adverse bearing on the price?
Answer: "The marketability of shares."

When asked if this additional factor did not cause him to feel some discomfort he said, "I am not too sure that I remember that as being relevant, at the time, to our decision to notify or not to notify". (**Answer 139:** Page 36).

When asked if in his letter to Michael Meghen he was in effect saying "back off – this is our decision and you shouldn't be interfering with that?" He said that "you shouldn't read that into it now".

When asked how it arose that Daphne Tease was asking Alvin Price to get "a rather more specific letter setting out the situation with regard to Companies Acts, Yellow Book, Blue Book, he said that he thought that that was as a result of a conversation with Mr. Flavin". (**Answer 146:** Page 38). He said he didn't recall the discussion but that following the discussion he had asked Daphne Tease to get a detailed Opinion from Mr. Price. "A more specific letter." (**Answer 149:** Page 38).

Question 150: Yes more specific than the one that he had sent on the 7th April?
Answer: "Yes."

Mr. Scholefield was then referred to the letter from Michael Meghen to Mr. Scholefield dated 19th July in which he said "in summary I explained to Neil (McCann) 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 was 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 the matter unless there are new developments of which he should be made aware." It was put to Mr. Scholefield that there was no reference by Mr. Meghen there to any acceptance on his part of the view being expressed by Mr. Price with which Mr. Scholefield agreed. "No there isn't, no." (**Answer 167:** Page 41). "On the contrary there was a statement that 'Alvin' had no fundamental disagreement with the points made in my fax to Carl of June 23rd." He answered, "that is right." (**Answer 168:** Page 41).

It was also clear that Mr. Meghen was not asking Mr. Scholefield for the letter that had originally been discussed. Mr. Scholefield agreed.

Turning to the Minutes of the meetings of DCC plc., S&L Investments Limited and Lotus Green at the end of July and beginning of August 1995, Mr. Scholefield confirmed that he drafted the Minutes for the DCC plc., meeting but that the Minutes for S&L Investments Limited and Lotus Green were 'probably drafted by Daphne Tease in conjunction with advice from CooperS&Lybrand and William Fry'.

When asked about the 'more cautious approach' referred to in Mr. Price's letter and why the cautious approach in notifying was not taken Mr. Scholefield answered, "I think that the advice that we had all along was that we didn't need to notify. We were coming at it from that kind of perspective really." (**Answer 249:** Page 58).

"I don't know that we looked at it like that at the time. I think we felt we had the advice, it was not necessarily notifable and we went with that approach. That was the advice we had pretty consistently." (**Answer 251:** Page 58).

When asked whether the fact that they didn't take the cautious approach suggested that there was another reason or reasons for not wanting to notify (other than the possible impact upon the share price) Mr. Scholefield answered, "that is the only reason that I recall it being mentioned…" (**Answer 253:** Page 59). When it was suggested to him that the desire for secrecy in relation to this transaction may have arisen because of fear that the tax scheme could have been upset or jeopardised if it became publicly known that Lotus Green acquired a 10% stake in Fyffes and was then moved to Holland, Mr. Scholefield answered, "I don't know that that is the case." (**Answer 256:** Page 59).

Question 258: If one of the ways of ensuring that that is not jeopardised is that I don't publicise the fact that I have entered into the scheme that provides an incentive not to do what will or might cause the scheme to be jeopardised?
Answer: "I didn't look at it that way at the time."

When pressed as to whether this provided a rationale for what was done Mr. Scholefield answered, "I just need to think that through, and I haven't done so, the implications of why transferring the shares from DCC and S&L Limited to Lotus Green Limited, why that actually triggers a perception that there is a tax saving. I am not quite getting the next step as to how you get from Lotus Green owning the shares to a perception that there is a tax saving of IR£7 million, I am not quite sure how it gets there." (**Answer 259:** Page 60). He agreed that at the very minimum the notification might cause questions to be asked.

When asked what the commercial considerations were Mr. Scholefield answered, "I think that is probably a reference to Alvin acknowledging that there might have been some preference not to notify." (**Answer 276:** Page 64).

Question 277: An awareness on his part?
Answer: "An awareness on his part."

Question 280: Did he pick it up from you?
Answer: "I think he probably did yes."

Question 281: If he did pick it up from you what did he pick up from you?
Answer: "Just that there might have been preference not to notify."

Question 282: Yes, what was the basis for that preference?
Answer: "The only one that I am recalling now is just that there might have been an effect on the marketability of Fyffes' shares. To be honest I cannot go any further than that Mr. Shipsey. I know we have been over this ground a couple of times and I've tried, believe you me."
When asked if he agreed that this letter from Alvin Price was a less than fully unequivocal letter he answered, "yes." (**Answer 286:** Page 65)

Question 292: I am just wondering how that left you as the recipient of this in a position to decide not to notify based upon this letter of advice.
Answer: "I can only put it in the context of the discussions that we had in relation to this over a period of time starting obviously with that one in April when I say we, I mean DCC as a group. Alvin had maintained, I think, pretty consistently in that period of time that the transaction wasn't notifable and to be honest I think at no stage did Alvin turn around and say to us you have to notify this transaction. Alvin is a pretty prudent, conservative kind of guy and I would have expected if there was a real problem here, if he perceived a real problem for the DCC group we would have got a very different letter. This letter probably wasn't as strong as we were expecting given the previous discussions but he still came down we thought on the right side if you like. If we got different advice when it was put to our lawyers we might have taken different action…"

Following on from the letter of the 21st July Mr. Scholefield thinks he contacted Mr. Price to say "you didn't deal with insider dealing. Can we have another letter to deal with insider dealing issues." (**Answer 293:** Page 67). Mr. Scholefield agreed that the letter in relation to insider dealing was a lot less equivocal. "Absolutely yes." (**Answer 295:** Page 67). Mr. Scholefield agreed that he perceived the insider dealing matter as being more serious than a failure to submit a Section 67 Notice.

Mr. Scholefield agreed that CooperS&Lybrand had reviewed all of the Minutes of the meetings of the various companies involved in the transaction, DCC plc., S&L Investments, Lotus Green Limited, Marjove Limited and DCC Properties Limited.

Question 320: You were ensuring that everything was documented, I's dotted and T's crossed.
Answer: "Yes."

Question 321: You were letting the Accountants review all of this to ensure that from a tax perspective everything was going to stand up if scrutinised subsequently?
Answer: "Yes."

Question 322: It wasn't for the sake of involving CooperS&Lybrand but you wanted to ensure that the Revenue, if and when they came to scrutinise this transaction that they would not find anything that would make it easier for them to upset this transaction?
Answer: "Absolutely."

Mr. Scholefield was then asked whether he had ever come across a circumstance in which copies of letters of advices from Solicitors were being sent to the board for the purposes of securing an agreed board position to which he answered "it would not have been an unusual practice. I can't say that this wasn't the first time, I would be surprised if it was the first time, I think there would have been a letter around the floatation where we would have letters from Solicitors I am thinking about that." (**Answer 364:** Page 77). When pressed that I thought there was something unusual about asking board members to express a view as to whether they agree with legal advice or not Mr. Scholefield qualified his answer "right, right, okay, I'm not sure that there has been that wording before Mr. Shipsey". (**Answer 367**: Page 78).

When asked about the practice in relation to Minutes and whether they were drawn up in advance in relation to the formal meetings that took place in August 1995 Mr. Scholefield answered "it would depend really on the nature of the business to be transacted". (**Answer 380:** Page 80)

Question 381: If it was formal in the sense of seeking to record a transaction I take it that it would be more likely that you draft the Minutes in advance?
Answer: "Yes."

Question 382: If you were having a more open ended discussion on policy and strategy you would not know what that discussion was going to be.
Answer: "Absolutely yes…I think all of them, except I don't think the plc minute that was used on July 31st was drafted in advance but I think all of the others were." (**Answer 383:** Page 80).

Mr. Scholefield said that if people were recorded as being present or in attendance they were always actually there. Mr. Scholefield explained that the board meetings of the DCC plc., board normally were held at 8.30 a.m. and would normally last for about 3 hours until 11.30 a.m. They were held 7 times a year. Mr. Scholefield was asked if the board of DCC plc., ever discussed or had been informed of the proposal to transfer the beneficial interest in the Fyffes shares prior to the July 1995 meeting – "not that I am aware of". (**Answer 420:** Page 87).

Question 426: In relation to something as major as this would it be usual or unusual that the board as it were would be discussing it at the last minute?
Answer: "Not unusual – I don't think, no."

Question 431: But you don't know whether Mr. Flavin would have discussed it informally with any of his directors?
Answer: "I don't know." Mr. Scholefield qualified that by saying that "I suppose the Executive Directors may well have been aware (Mr. Gavigan and Mr. Crowe). I don't know whether they were, I am just saying that there might be a distinction between the executive and non-executive." (**Answer 435:** Page 89).

Mr. Scholefield was asked about the choice of words "corporate restructuring purposes" for the transfer of the beneficial interest to Lotus Green.

Question 438: That was a euphemism?
Answer: "Yes, well, sorry it was a euphemism and it was also part I think of you know I did mention to you yesterday, I think right back at the start, that at this point in time DCC was actually changing a lot of its structures internally and its shareholding structures because of its change to a separately listed investment group. So there was other restructuring that went on kind of subsequent to this, so you know it does reflect that as well."

Question 440: Well this wasn't corporate restructuring. This was a tax avoidance scheme?
Answer: "Well the two went together. It was tax planning."

Question 444: Again in terms of describing it, "corporate restructuring" was not accurate, in the sense that it did not give the real reason why it was being done?
Answer: "Well, you mentioned it was a euphemism, and I think I said it was a euphemism yesterday."

Question 445: Yes?
Answer: "Everybody was very clear and would be very clear what "corporate restructuring" purposes was. I mean you know I wouldn't write down a set of Minutes with 'tax planning purposes'. I will try and find another phrase to use and the phrase that I use was "corporate restructuring purposes."

Question 446: Yes and the reason not to write down "tax planning" would have to be some fear that that would be of advantage to the Revenue in any challenge?
Answer: "Yes. Yes."

Question 447: The Revenue had brought in Section 86. It was very wide ranging, draconian, anti-avoidance legislation which was general and sought to prevent people from avoiding tax?
Answer: "Right."

Question 448: Clearly having it put up in lights in your Minutes, which the Revenue could perhaps require to see, that that was the purpose of it would be less than helpful.
Answer: "It would."

When asked what was the point in getting the directors at the DCC plc., Board Meeting to concur with the views, the legal views expressed by Mr. Price. He answered, "well I think it was just to, I mean that they could see that it was signed on if you like and that they

were aware of, I think it meant that they were aware of Alvin's advice and comfortable with it." (**Answer 452:** Page 92). It was pointed out to Mr. Scholefield that this was to be contrasted with the wording used in the S&L Investment Limited Minutes where it says "the Directors considered letters from Mr. Alvin Price of William Fry in relation to Companies Act provisions on the notification of interest and insider dealing". And then went on "after ….consideration".

Question 455: I am just wondering why something that sought to, what might appear to bind the directors to the decision in a way that was arguably greater than necessary why it was worded in this way, firstly and then who decided it should be worded this way.
Answer: "Why I don't know. I mean it maybe had that intention, I don't know."

Question 456: These are your Minutes?
Answer: "Yes."

Question 457: Did you record this in the way that is stated?
Answer: "I don't think in the way that is stated but then I didn't record anything in the way that is actually stated here, I mean what I would be trying to do is summarise the Minutes and I would have discussed the draft Minutes with Mr. Flavin and then I would have circulated all the Minutes to all of the directors afterwards."

Question 458: Yes, but who chose to say "the directors concurred with the views expressed by Mr. Price".
Answer: "Who chose the words?"

Question 459: Yes.
Answer: "I don't know. It would either be myself or Mr. Flavin who had chosen that word."

Question 460: Yes. But do you agree with me that there is certainly an attempt to bind in persons to a greater extent than you would expect or was necessary?

Answer: "I would. Yes."

Question 461: Because if I am on the board and I receive letters of advices from my lawyers and I consider them, and I go on to reach a decision, if there is anything, if that advice is wrong, well I haven't actually formed a view as to whether I agreed with it or didn't".
Answer: "Yes."

Question 462: I take the advice for what the advice says and its worth, do you understand?
Answer: "Well I don't think I thought of it that way. I mean the only thing I can do is maybe reflect back to the agreed board position in the Chief Executive's Report. I don't know if we reflected back to that."

Mr. Scholefield's manuscript notes taken at that meeting were then discussed:

> "Jim Flavin, Fyffes, transfer of beneficial ownership in Fyffes.
> Corporate restructuring notification. Slight difference from Fyffes on this".

Question 481: Does that jog your memory as to what was discussed?
Answer: "I mean just only that it was Alvin Price's letters were discussed."

Question 482: But Alvin's letter didn't refer to a difference of opinion in relation to Fyffes?
Answer: "No but it did give the other, you know the sort of the more cautious view which I think may have been characterised at the board meetings. I don't know but it may have been characterised at the board meeting. I don't know but it may have been characterised as a view." Mr. Scholefield thinks that Mr. Flavin must have raised the issue about the difference of view but he, Mr. Scholefield, doesn't recall the discussion at all. When asked if he remembered any of the directors asking any questions about Mr. Price's advice Mr. Scholefield said, "I don't". (**Answer 488:** Page 98).

He thinks the discussion lasted something of the order of 10 minutes. There was also a note in his handwriting "minor tax risk – advice from CooperS&Lybrand and SKC and also Fry's/Cox's". Mr. Scholefield doesn't remember whether Alvin Price's letters were tabled or opened. He doesn't think there was an argument back and forth in relation to the letters. If there had been an extended discussion "maybe I would have remembered it". (**Answer 501:** Page 100).

Question 502: But therefore does that not suggest that there wasn't much of a discussion or any discussion about the issue?
Answer: "It probably does, that it wasn't a long discussion at any rate yes. There was obviously some discussion of it."

Mr. Scholefield couldn't remember why Mr. Breen and Mr. Murray became directors of Lotus Green for a short period of time but thinks it may have been because he and Ms. Tease were absent or were going to be absent. He was asked why the Lotus Green Minutes had no reference to the William Fry letters to which he replied, "I don't know why". (**Answer 515:** Page 101).

Answer 516: "I would suggest it was oversight."

Question 525: I just wonder can you assist me as to why there is no mention of the legal advice to Lotus Green Limited.
Answer: "I can't."

Mr. Scholefield says he didn't think the Dutch Directors who subsequently became directors of Lotus Green were ever informed or furnished with the advice in connection with the notification obligations upon Lotus Green.

Question 531: Why not?
Answer: "I don't know, I would suggest I don't know, I just don't know. I don't think it was anything deliberate."

…**Answer 533:** "If you like, the issue all got done and considered when the shares got transferred. They came on the Board later. You know I think it is as simple as that."

When asked if he knew of the civil consequences of a failure to notify back in 1995 where you were required to notify he said he didn't think so. When asked if he knew now he said he did, it came up in the court case.

Question 536: What were those civil consequences?
Answer: "I think it was something you could not sue in relation to."

Question 537: Who couldn't sue?
Answer: "I presume the beneficial owner that didn't have the legal title could not sue in relation to those."

Question 542: It is a big deal. I mean if for example a company as a result of a failure can't take action to enforce its right in relation to it.
Answer: "Yes."

Question 543: Having paid IR£34 million punts that is a big deal that is a pretty serious consequence?
Answer: "Yes, it was an inter group transaction. But I agree with you absolutely yes."

(b) Fergal O' Dwyer

<u>Day 1</u>

Fergal O' Dwyer gave his professional qualifications. He is a Chartered Accountant. He qualified with Craig Gardiner in 1982. In 1983 he left Craig Gardiner and went to work with KPMG returning in late 1985 to Craig Gardiner in their Corporate Finance Department until 1989 when he left Craig Gardiner to join DCC as an Investment Executive. From about 1991 DCC moved from being a venture capital company to being

the industrial holding group that they have become today. Mr. O' Dwyer explained how the Fyffes' profits were accrued into the DCC accounts. He explained that this was generally accepted accounting practice and applied where you had a "material participation" in what was called an associate company. The rule centred around having 'significant influence'. In some cases having a 20% interest you were presumed to have significant influence, if you had a lessor percentage you looked at the facts. It was all fact based. So you looked at the fact as to having an 11% shareholding. Where were you in terms of your influence, i.e. were you on the board and so on. (**Answer 11:** Page 10).

Mr. O' Dwyer explained that he had been a director of some DCC companies prior to 2000 but only became a director of DCC plc., in early February 2000. Prior to that he was probably a director of around 15 to 20 companies within the DCC group, including Lotus Green from August 1995. He explained that he had been asked to become a director of those companies by Jim Flavin. In 1995 he was Chief Financial Officer. He explained that he had been involved heavily in the floatation of DCC along with Michael Scholefield and a number of other people who would have been reporting to him and to Michael on the whole floatation process. He said it was very much a team effort. (**Answer 29:** Page 13).

The transition from a venture capital company to an industrial holdings company led to a different accounting treatment and he explained what you did was you took into account your share of the profits of the company that you had invested in, rather than the value of the investment in the shares. The investment was shown at cost. When asked if he had a compliance role in DCC plc., he answered that he would not have had a formal compliance role but that generally around DCC, "compliance permeated through a lot of things". (**Answer 50:** Page 18). He also cited his experience as a Director of DCC Corporate Finance and having worked with some of their investee companies including Fyffes on transactions which involved a degree of compliance. His announcement as Chief Financial Officer was actually made just a couple of months before the floatation in 1994. He reported to Jim Flavin directly. Prior to his appointment to the Board of DCC plc in 2000 he would have attended the Board meetings in part. As CFO, "there would be

a general presentation as to group performance so you would have had a number of DCC executives who were not on the board who gave presentations as to the various components of DCC". (**Answer 59:** Page 20). He was 'intimately involved' in tax planning as CFO in DCC plc. (**Answer 63:** Page 20). Insofar as internal resources were concerned it was essentially himself and Daphne Tease but they always used external advisers on the tax side. In 1995 the two most valuable assets in DCC plc., were Fyffes and Flogas. It was probably a toss up between Fyffes and Flogas as to which was bigger because they had a bigger percentage stake in Flogas even if it was a smaller company with a smaller capitalisation. (**Answers 58** and **59:** Page 21). Fyffes represented about 15% of DCC. He explained that S&L Investments acquired its shares in 1992 when it bought some shares off the McCanns. He explained that DCC held about 7% and S&L Investments held about 3% of the 10% stake in Fyffes. The original acquisition by S&L Investments of the stake in Fyffes which was purchased from the McCann Family went back to the currency crises in 1992. He agreed that he subscribed to the view that by 1995 the Fyffes stake in DCC had 'become anomalous'. (**Answer 82:** Page 24). He then explained what he meant by anomalous. He said, "in moving to being an industrial group and then a quoted industrial group, industrial groups by and large own things, own and control. They own and control things. They control cash flows…in other words we talked already about the fact that the profits of one our subsidiaries sitting in their bank account as opposed to DCC Head Office's bank account. But institutions by and large expect industrial groups to be able to control their cash flows. We had an 11% in another quite large public company. We did not control its cash flow. Given our style in terms of acquisitions it was unlikely that we were every going to control their cash flow." (**Answer 84:** Page 24 and 25). When asked why, he explained that "our general style in DCC in terms of acquisitions style is brick upon brick. We are not into headline deals that sort of transform, you know that you buy something bigger than yourself. I may be wrong but I expect Fyffes was bigger than us back then. (**Answer 85:** Page 25). Their position would have been "look we can't be categorical about this but if you take a long term view of DCC it is not core to us". (**Answer 88:** Page 25 and 26).

He agreed that the tax plan in relation to the Fyffe shares was the first time something like that had been done within DCC. (**Answer 98:** Page 28). He explained that consideration to 'tax planning' in relation to the possibility of a sale of Fyffes' stake first occurred as far back as 1990 as DCC was moving from a venture capital group to an industrial holdings group, i.e. to move from a tax point of view to being a consolidated Irish Group, consolidated UK Group and so on and they would have taken general tax advice on structures including disposal structures back in 1990 from CooperS&Lybrand. They did not take Counsel's view at that stage it was just general advice. (**Answer 102:** Page 28). It was not specific to Fyffes or anything else. Between 1990 and 1994 they spent a lot of time getting their structures right in the move to being an industrial holdings group. By the time they floated in 1994 they were probably 85% of the way there. Fyffes remained something that was going to be non-core, and would be disposed of at a particular time (**Answer 104:** Page 29). Mr. O' Dwyer was asked how long prior to March of 1995 would the tax scheme have been in the course of preparation. He said that it would have been prepared "pretty close" to March of 1995 and would have involved a meeting on at least one occasion with CooperS&Lybrand to arrive at this structure in the first place. (**Answer 109:** Page 30). He accepted that he was the DCC 'point person' with Coopers for this tax scheme. (**Answer 112:** Page 31). He agreed that the scheme was tax driven as DCC was trying to avoid Capital Gains Tax which was 40% back in 1995. He also explained that there were a whole series of reorganisations going on within the DCC group over a number of years and the 'reorganisation' in relation to the Fyffes shareholding was part and parcel of that process. Mr. O' Dwyer said it was a joint decision of himself and Pat Wall of CooperS&Lybrand to seek the late Tommy McCann's Opinion on the tax scheme. (**Answer 115:** Page 32). He had never had cause to seek his advice before "typically the accounting firms have worked with Senior Counsel and there are certain Senior Counsel with expertise in certain areas". (**Answer 118:** Page 32). When asked why they went to Senior Counsel in this case he said "this piece of planning was slightly different. Slightly is an understatement. We were looking at something here that from a DCC group perspective…where the DCC, not having disposed of its shareholding in Fyffes would be deemed to have a realisation and would have had to pay tax on foot of that realisation." (**Answer 123:** Page 33). "Capital Gains Tax of the order of €7 or €8

million." (**Answer 124:** Page 33). "This tax scheme had that sort of tale to it that says you might actually bring on a liability that ought not to exist from a group perspective." (**Answer 125:** Page 34). "That was probably singularly the most important issue in relation to this matter for me in any case." (**Answer 126:** Page 34). He stated that he looked very carefully at Mr. McCann's opinion when it arrived. (**Answer 131:** page 34 and 35). Mr. O' Dwyer explained that the first the Revenue Commissioners would have heard of Lotus Green on its acquisition of the shares in Fyffes was when it filed its accounts for the 13 months ended, 31st March 1996 which was done on the 19th December 1996. That was 16 months after Lotus Green moved to Holland. When asked if this was the first occasion on which the Irish Revenue Commissioners would have learned that Lotus Green Limited had acquired the Fyffes' shares, Mr. O' Dwyer answered, "I believe so – I mean just to step back here, Mr. Shipsey, your notification to the Revenue is done by way of your tax returns." (**Answer 157:** Page 41). He explained, "that is your formal way of liaising lets call it, with the Revenue". (**Answer 158:** Page 41). Although not germane or relevant to my investigation Mr. O' Dwyer confirmed that correspondence ensued sporadically between the Revenue Commissioners and DCC between June 1998 and 2004 concerning the transfer of the beneficial interest to Lotus Green. Mr. O' Dwyer fairly stated that they would have had an expectation in putting the plan together that it would most certainly have been reviewed by Revenue. (**Answer 159:** Page 42). When asked whether there was a concern about confidentiality in relation to the tax scheme between March and August of 1995 Mr. O' Dwyer answered, "no particular concern that I recall, no, bar the fact that pretty much everything that went on in DCC was confidential. So beyond that no particular concern, no". (**Answer 165:** Page 43). Mr. O' Dwyer explained that the real worry was that the transfer from Fyffes and S&L to Lotus Green in 1995 could have triggered a tax liability at that point in time, which could have resulted in a loss, an actual loss to the DCC group had Lotus Green sold the shares several years later and in the intervening period the value of the Fyffes' shares had fallen.

When asked if there was a concern that changes in the tax might impact upon such a scheme Mr. O' Dwyer explained "not in any sense at all from the point of view of there being anything that could happen, you know, within a couple of weeks …" (**Answer 178:** Page 46). Mr. O' Dwyer explained that as it happened the legislation changed in 1999 and

the loophole which allowed for the 1995 tax scheme was closed. Mr. O' Dwyer confirmed that they did not go for pre-clearance of the scheme with the Revenue but he said, "that would be highly unusual." (**Answer 185:** Page 48). When asked whether there was a concern that if the Revenue found out about this at any time prior to transferring the residence of Lotus Green to Holland there was a risk that the law could be changed and they would not get the advantage. Mr. O' Dwyer said, "it certainly wouldn't have been part of our thinking at all at that time but certainly what you say is just highly highly remote." (**Answer 189:** Page 49). He did agree that it was not something that they would have been writing to the Revenue about but said, "I would not like to suggest that that is unusual in some way. It is the norm in the way we carried out our business." (**Answer 191:** Page 49) i.e. that they would not look for pre clearance. Mr. O' Dwyer confirmed that he had seen the letter from Alvin Price to Daphne Tease of 7th April 1995. He thought it was more likely that Michael Scholefield asked Daphne to contact Alvin than that he had asked her. He confirmed that he had no recollection of discussing compliance issues with Daphne Tease. (**Answer 213:** Page 53). Mr. O' Dwyer also confirmed that he would have known about the compliance obligations under Part IV of the Companies Act 1990 as a result of his role as a Director of DCC Corporate Finance working with their investee companies. He also knew in a general way, not specifically, that there were civil and criminal consequences if you did not do what you had to do. (**Answer 225:** Page 55). He says he would not have known the detail of the sanctions but 'you know any non-compliance with the Companies Act was a serious matter per se'. (**Answer 226:** Page 55) When asked about the culture within DCC and the view within DCC in relation to compliance issues he answered, "it would have come from the top; it was always compliance; I mean do the right thing, do it right". (**Answer 227:** Page 55).

He then explained that the reason for getting Pat O' Brien of SKC involved was as a result of his concern that a liability might crystallise in 1995 in the DCC group and that when the shares were sold by Lotus Green several years later the price may have fallen giving rise to an actual loss and not just the loss of the tax saving. He did not see Pat O' Brien of SKC as a third opinion rather he regarded CooperS&Lybrand and Tommy McCann as

'Sort of one channel and Pat O' Brien or SKC as the other channel.' (**Answer 258:** Page 61).

He explained the reference in Pat O' Brien's advices to this being an aggressive scheme as meaning that it was only aggressive because it was being done in the absence of an imminent disposal. The principal concern for Mr. O' Dwyer was whether the scheme could in any way bring about a tax liability now without there having been a realisation by DCC. He described this, "as singularly the most important point about the transaction" and repeated just "singularly the most important point". (**Answer 269:** Page 63). He explained that the primary reason for only transferring the beneficial interest was to save on stamp duty. (**Answer 275:** Page 65). The saving was 1% of £38 million some IR£380,000.00. When asked if the issue of notification of an interest under Section 67 to the company, or Section 91 to the Stock Exchange, would not have come up again but for the fact that Fyffes made an issue of it he answered "I don't know". (**Answer 289:** Page 67). When asked if he had any recollection or understanding in 1995 that Fyffes did not want DCC to notify the transfer of the beneficial interest to Lotus Green he answered, "I don't believe so". (**Answer 314:** Page 72). When asked if he was conscious in 1995 that it was better that this was not publicly known because it put a 'For Sale' sign on the Fyffes' shares he answered, "I suppose my views were probably reasonably simplistic in the sense that if notification was required, notify. If notification wasn't required, well, for the sake of this perceived, call it overhang, call it misunderstanding from investors as to what is going on, what implications that might have and an overall sense of privacy." (**Answer 316:** Page 72). When asked about privacy from whom? He answered "just privacy generally. If you did not have to notify something, don't notify it." (**Answer 317:** page 72). He emphasised that he was not connecting the privacy issue with the Revenue Commissioners. He confirmed that he was aware of the thrust of the discussions between Mr. Scholefield and Mr. Flavin, Mr. Scholefield and Mr. Meghen and Mr. Scholefield and Mr. Carl McCann about the notification issue. (**Answer 322:** Page 73).

On one of his memorandums at Tab 13 there was an item on a check list "matters for Alvin Price – Insider Dealing" He was asked to confirm that insider dealing was something at least he was addressing his mind to which he answered, "it is on a check list

of things that has to be covered off. Not necessarily by me, it is on a check list of things that needs to be done." (**Answer 342:** Page 76) And what was the concern in relation to insider dealing in relation to this transaction. "I don't believe there was any concern, it was just a point that had to be dealt with. I don't think there was any concern. I am not conscious of any concern whatsoever." (**Question 343:** Page 77).

Question 344: But why was it even being considered if it was not a concern?
Answer: "I am presuming it was no different than the notification point; it was shares in a public company."

Question 345: Yes, but I mean a notification obligation arose in circumstances where there was a disposal or an acquisition. The insider dealing provisions are dealing with something else. Of course there has to be a dealing in the shares but dealing in the shares is not an issue, it is dealing in the shares when you are a person in receipt of inside information, isn't that right?
Answer: "Yes, this is not flagging any concern, this is not saying anything in the background that says there is insider dealing or anything that needs to be considered but it is a point you know in terms, and I am not belittling it, ticking a box; it needs to be done from a compliance perspective."

Question 346: But you don't recall any consideration as to how this could or could not or would or would not be construed as insider dealing?
Answer: "None whatsoever, no."

When asked about the memorandum from Michael Scholefield copied to him, of a conversation between Mr. O'Dwyer and Jim Flavin concerning possible insider dealing he explained, "that it was a point that had been covered – no more than that and no less. Again, not to belittle it it wasn't a big issue." (**Answer 348:** Page 78). When asked about his underlinings on the memorandum from Michael Meghen he explained that the letter from Michael Meghen did not raise "any particular alarm bells". (**Answer 363:** page 81). He explained this on the basis that the advice said that the sections "may be applicable. It

was not from our legal advisers. It is addressed to Carl McCann and I very much rely on our own legal advisers." (**Answer 364:** Page 81). He was reminded that this was the only letter in which the relevant provisions particularly Sections 67 and 91 were recited. (**Question 365:** Page 81). He said that the notification issue was not first and foremost in his mind at the time. (**Answer 367:** Page 82). "I suppose I was getting along with the tax side of things. Notification will deal with itself, if notification had to be done, we would do it." (**Answer 368:** Page 82). Mr. O' Dwyer explained that insofar as there was reference in the Pat O' Brien letter to 'the likelihood that it may have a reasonably high profile with Irish Revenue' as being connected to their concern that a tax liability would trigger long before any eventual sale. He said this was made clear in the Pat O' Brien letter where he stated "I make these points not to suggest any weakness in the tax structure. Rather I am pointing out that given the number of steps in the structure which have some Irish tax significance, that it must be possible that Irish Revenue will take some interest in it even if the shares in France are not sold for some time." The further reference in the letter to reluctance to give the structure the additional prominence which an election made under paragraph 15 would involve, did not suggest to Mr. O' Dwyer that 'prominence' was undesirable. (**Answer 388:** Page 86). He said he was not entirely sure why Pat O' Brien was advising them not to do something because it would give something additional prominence. He also explained the concern expressed by Mr. O' Brien that if you "postpone the tax structure you run a not insignificant risk of a change in the Irish legislation to close the loophole as in the UK" as being referable to a postponement of the restructuring and the sale. He then referred to the memorandum which he sent to Jim Flavin outlining the tax risks in relation to this transaction. The No. 1 risk was the fact that they could get taxed without there being a disposal. (**Answer 399:** Page 89).

[At the end of day 4, Mr. O' Sullivan reminded me and produced a copy of a Board Minute dated 8th May 1994 which refers to legal advice being circulated to the board on a Model Code issue. It was confirmed that this was the only other example in the period from early 1993 to 31st July 1995 where legal advice had been furnished to the board.]

Day 2

Mr. O' Dwyer was asked about his recollection of the letter from Alvin Price of the 21st July 1995 addressed to Michael Scholefield. In general his recollection of the letter is that there was no issue that he can remember that came out that said, "this is an issue". (**Answer 6:** Page 6). When asked who he understood to be the true owner of the Fyffes' shares after the payment of the €38 million he answered, "Lotus Green, as part of the DCC Group". (**Answer 15:** Page 9). When asked who owned the shares for the purpose of the tax scheme he answered, "Lotus Green". (**Answer 17:** Page 9). He explained his different answers on the basis that "in tax you do the analysis based on entities". (**Answer 18:** Page 9). He was then referred to the final paragraph of Mr. Price's letter where he stated that, "making notification is clearly the more cautious approach" and Mr. O' Dwyer was asked when faced with that situation why the less cautious approach of not notifying was taken. He answered that the advice was there that said "I take the view," (that notification was not required). (**Answer 21:** Page 9). He took that to be the legal advice. "It was not something that registered as anything that made me have a different view than the more generic piece of advice we got back in April." (**Answer 29:** Page 12). When it was suggested that there was no particular difficulty in notifying he answered, "certainly not from a tax point of view – bar perhaps an overriding feeling that it would cause some confusion, misunderstanding". (**Answer 30:** Page 12). He suggested that the confusion or misunderstanding would be caused with investors. (**Answer 31:** Page 12). When asked how this could be so if the view was that this was all within the DCC Group he answered, "I suppose as to why DCC was transferring a publicly quoted share from one company in the Irish group to another company, one company in the DCC Group to another company, not necessarily within Ireland."

Question 33: And why would that cause confusion, I mean there were a number of Companies within the DCC Group?
Answer: "Certainly yes."

Question 34: Different holdings were held by different companies.

Answer: "I suppose just why, why were they doing it and I suppose it feeds back to maybe conversations that we would have had from an investor presentations point of view. I am speaking here of investors, Mr. Shipsey, not necessarily the general public."

Question 35: But does that suggest, apart from stating that it might have caused some confusion, that there was a preference not to notify, all things being equal?
Answer: "When you say 'all things being equal'? I mean, just to understand, it didn't matter from a tax point of view."

Question 36: What?
Answer: "It didn't matter from a tax point of view. The advice was there that said you didn't have to notify, I have already said in evidence that if the advice was that we didn't have to notify you wouldn't notify and there was a general preference from that point of view."

Question 37: When you say "it didn't matter from a tax point of view," it didn't matter in the sense that it wasn't going to upset the tax scheme?
Answer: "It wasn't going to change the tax analysis one bit."

Question 38: No, the tax analysis wasn't going to be changed, but therefore, where a cautious and less cautious approach is open to you, do you not take the more cautious approach?
Answer: "No, as I say, if there is advice there that says you don't have to notify and you have a feeling that making the notification will cause some misunderstanding in the market place."

Question 39: And was there a misunderstanding about the effect on the price or what misunderstanding?
Answer: "Conceivably an impact on the price, I mean I am not an expert, so I can't attest to that, but in relation to investors generally who will have been aware of comments we

would have made over a number of years as to how core or non core the Fyffes' investment was going to be over an extended period of time."

Question 40: But again in terms of your being able to think that through, the answer, if such concern or confusion had arisen in relation to analyst or investors, was; "we have done this to save 40% Capital Gains Tax". And in those circumstances your investors would presumably have lauded your efforts to ensure that when this anomalous, non-core asset was sold that they would reap 100% benefit rather than 60%.
Answer: "I suppose at the end of it I can only say what we did and the view that we took. To start getting into conjecture as to the other way of doing it, I have difficulty with. I know what we did."

When it was explained to Mr. O' Dwyer that there was a query in my mind as to whether there were other concerns operating which were related to the tax scheme, that it was desirable or more desirable that this scheme would not be put up in lights until it had to be put up in lights Mr. O' Dwyer answered, "no, it didn't fall on tax at all Mr. Shipsey, the advice was there OK? We had this lingering concern about misunderstanding within the market place. If the advice had been different we would have notified." (**Answer 41:** Page 15). When asked about the 'lingering concern' he said that "Jim Flavin had it, Michael Scholefield had it but beyond that it was difficult to be specific." (**Answer 42:** Page 15). He does not believe that he knew that Fyffes had a concern about the impact it would have on their share price at the time. Mr. O' Dwyer was asked what he thought the 'commercial consideration' was that Mr. Price was referring to in his letter. "The one that I can think of is just this misunderstanding point, but that is me, that is all I can say." (**Answer 50:** Page 20). When asked if in fact that commercial consideration was whether DCC would save the tax or wouldn't save the tax he answered, "certainly I don't read it now as a tax point". (**Answer 51:** Page 20). When pressed as to whether it struck him that it suggests Mr. Price was mindful of some conflict between the legal and the commercial considerations involved he answered, "well he says it so I presume he was, but again I can't go the extra bit that says commercial equals tax". (**Answer 53:** Page 20)

Question 54: And you can't go that extra bit, why?
Answer: "Because I suppose when I read it I think 'misunderstanding'. Because the notification pointed nothing to do with tax. The tax analysis didn't change one iota as a result of notification."

Question 55: And therefore that leads you to conclude that it was referable to and the only issue was whether there would be confusion?
Answer: "That is the only issue that was sort of in the back of my mind."

He was then asked about the second letter on the 25th July which dealt with concern about insider dealing. Mr. O' Dwyer was emphatic "that compliance with the Companies Act, all aspects of it, was a serious matter" both from a personal point of view, corporately and in terms of reputation. (**Answer 63:** Page 23). When asked if he thought that insider dealing was to be taken more seriously than notification he answered, "I couldn't characterise it as to be taken more serious, you know compliance with the Companies Act was a very serious matter." (**Answer 64:** Page 23). When asked if he was surprised that Jim Flavin was trying to get an agreed board position in relation to letters of advice from lawyers he answered, "Jim's style was to get agreed positions generally, be it on, you know, preliminary statements, interim statements and so on. So beyond that it is difficult to comment." (**Answer 69:** Page 26). Mr. O' Dwyer was then referred to the Minutes of the meeting of S&L Investments Limited on the 3rd August 1996 at 6 p.m. He explained that he was not at the meeting. Referring back to the Minutes of the DCC plc Board Meeting at which he was present for part of the meeting, he was asked whether he had any recollection of the expression or the phrase 'corporate restructuring' being used as a description of the transfer of the beneficial interest in Fyffes. He said he had not. (**Answer 81:** Page 29). When asked if it would have been more accurate to describe it as being for tax planning purposes he answered, "I'm not sure I necessarily agree with that comment". (**Answer 82:** Page 29).

Question 83: And why not?

Answer: "Because I have explained yesterday that the whole move in DCC from being a venture capital group to being an industrial group required major restructuring. I explained that the Fyffes part of it was outstanding, the outstanding part of that restructuring. So I don't take huge issue with the words 'corporate restructuring'."

When asked how the transfer into Lotus Green was 'for corporate restructuring purposes' he answered "it was all just part of that restructuring that said basically our Irish assets would be held by Irish subsidiaries, our non-Irish or non-Irish focused assets would be held either in the UK, which would in turn be held by a BV." (**Answer 86:** Page 30). When asked if he accepted that it would be more accurate to describe it as being 'for tax planning purposes' he answered, "I suppose to say corporate restructuring done in a tax efficient way." (**Answer 88:** Page 30). When asked why one would not refer to tax efficiency or tax planning in the Minutes he answered that "he would put it down to style more than anything else. Nothing more than that." (**Answer 90:** Page 30).

Question 91: Then the minute goes on:-

> "The Directors concurred with the views expressed by Mr. Alvin Price in his letters in relation to Companies Act provisions on the notification of interest and insider dealings which had been circulated."

Had you ever seen a circumstance in which directors were being asked to agree with legal advice that was provided as opposed to either noting it and either accepting it or not accepting it.

Answer: "I wasn't on the board then, so not from that point of view."

Question 92: Or since?

Answer: "Have I seen it since? Unfortunately, probably there has been a lot of legal advice in relation to that Fyffes case and a lot of that would have been put to the board.

But can I remember an actual specific reference in a minute, no not off the top of my (head)."

Question 93: Not a reference in a minute, but where persons are asked to concur with that advice. I am just wondering do you attach any significance to that as opposed to what was in the S&L Investments Minutes where the advice is considered and then, as it were noted?

Answer: "No particular significance, to be honest Mr. Shipsey."

He explained that he became a Director of Lotus Green on the 24th August in Ireland then he went to Holland on the 25th August. He explained that they had already lined up directors at that stage and had lined up a Company Secretary. (**Answers 98** and **99:** Page 32). The legal advice furnished by Mr. Price was never furnished to the Dutch Directors nor was there any consideration given as to whether they would or would not furnish that advice. The tax structure was explained to them however as to what the reason for Lotus Green being there was. And they knew they were becoming directors of an Irish company. When asked how they came to select the Dutch directors and then ING Trust as the Secretary he explained that it went back to their overall corporate restructuring in 1992 when they set up DCC International Holdings BV which was and still is Lotus Green's parent company. DCC International Holdings BV owns the UK Group which owns all the UK trading companies within the DCC group. The BV is owned by DCC and on that board was Henry Roskam, Tom Dipenhorst, Gerard Jansen Venneboer and Mr. O' Dwyer. He explained that he had known them since 1992 and ING was a Corporate Secretary of Lotus Green but was a Corporate Director of DCC International Holdings BV which is allowed under Dutch Law. "These were people, we, the DCC Group, had known for a number of years." (**Answer 107:** Page 33).

(c) Jim Flavin

Mr. Flavin explained that he was born in Dublin and grew up in Blackrock. After leaving school he worked for a short period in a firm of stockbrokers and then went into the National Bank which subsequently became part of the Bank of Ireland. While in the Bank

he studied for a Diploma in Public Administration in evening classes in UCD that gave him an exemption from first Commerce. He did second Commerce and then went full time for final Commerce in UCD. He subsequently did Chartered Accountancy with a firm called Kinnear & Company. On qualification as a Chartered Accountant he moved to Kennedy Crowley spending two years there on general audit activities. In 1971 he joined Allied Irish Investment Bank. This was a very young investment bank at the time having been founded in 1968. A year later he was appointed manager of their venture capital activities which were fledgling activities at that stage. He described this as a 'dream come true for him'. (**Answer 25:** Page 10).

He was managing a company called Allied Combined Trust which was a consortium company between AIB, Irish Life and New Ireland Assurance. He ran that business for four years after which he decided he would like to set up an independent venture capital company. He approached Irish Life and New Ireland Assurance and 11 other institutions to raise a sum of £1 million to found Development Capital Corporation. He explained that he had the backing of people who had worked with him or who had had exposure to him at ACT. He explained that he also approached Alex Spain whom he had known as he had worked for him to some extent in Kennedy Crowley. He had a huge respect for Alex Spain. Alex Spain subsequently became Managing Partner of Kennedy Crowley in 1977. He was also President of the Institute of Chartered Accountants at the time. "He was somebody I just had a lot of respect for – indeed affection for." (**Answer 32:** Page 11).

Mr. Flavin was 34 at the time and explained that he spent 32 years building up DCC and stressed that, "I feel very proud of DCC. I feel proud of its success." (**Answer 34:** Page 12). He said that "DCC is my CV for the last 32 years. If you are interested in corporate culture I feel, if anyone asked me, despite all what has happened, ten feet tall in relation to how we always did things in DCC. In relation to the quality of the non-executive directors team that we attract in DCC. Indeed I approached most of them…the executive team, I was very fortunate in attracting a wonderful team of people, a terrific team of people. I feel proud having left DCC. It was an excellent non-executive board, a fabulous executive team who could take over. I am proud of the fact that DCC is now currently the ninth

largest company on the Irish Stock Exchange by market capitalisation." (**Answer 35:** Page 13). At the outset Mr. Flavin explained that he came "to all this process feeling that DCC and I personally, you know, I think it unfortunate that we are here – I feel that quite deeply. If at time in answering some of your questions, if I come across at any time with strong views on some things please understand it means no disrespect for you, certainly no disrespect to the High Court or the Supreme Court or its findings but I do feel it incumbent to try and express pretty clearly the deeply held views I have." (**Answer 36:** Page 13).

Mr. Flavin then set out to explain how DCC developed from 1976 into the 1980s and how he first became involved with the 'Fruit Importers of Ireland'. He explained that DCC or Development Capital Corporation Limited as it was then known started literally in an office in Merrion Square. There was himself and his former Secretary from Allied Irish Investment Bank and then he recruited two executives. In the 1970s they made a small number of venture capital investments. He explained that they were always making out lists and thinking and calling at doors of interesting companies in Ireland. 'Fruit Importers of Ireland' that is the full name, was known to be a very successful fruit business and Neil McCann was known to be quite a dynamo of a businessman if you like. So it was an obvious company to enquire about and I knew that Alex Spain knew him (Neil McCann). Through Alex Spain I got introduced to Neil McCann and we hit it off really and we did business. (**Answer 42:** Page 15). That was in 1979. By that stage it had become the largest produce and fresh fruit company in Ireland. By Irish standards it was a large private company. He explained that, "Neil McCann's door was knocked on by many people. It was seen as an attractive business. So we invested." (**Answer 46:** Page 15.). He explained that in 1979 the shareholding in Fruit Importers of Ireland was tightly held. The McCann family had about 60% but there was about 40% or thereabouts held by various people. It was mainly people who were the smaller proprietors of smaller fruit businesses. At the end of 1979 or the beginning of 1980 DCC purchased a 25% stake in the Fruit Importers of Ireland. The holding was taken in the name of DCC and DCC nominees and DCC brought in a consortium of institutional investors to co-invest alongside us. DCC actually ended up with 9% and the balance was held by a consortium of shareholders. They were all shareholders who were actually shareholders in DCC itself.

They had not been shareholders in Fruit Importers of Ireland before that. This was the first time that there were institutional investors in Fruit Importers of Ireland. From the word go there was an understanding that together with the McCanns they would try and take Fruit Importers of Ireland public at the earliest stage. FII, as Fruit Importers became known, went public with the assistance of DCC in 1981. Gradually over the years the DCC shareholding of 9% increased to some 10.3%. Mr. Flavin explained that there was an informal understanding between himself and Neil McCann that DCC would not take their stake above the 10% figure. "I think they were always concerned that we might seek to take effective control or increase our holding to a level that would give us more effective control if you like, of the company." (**Answer 76:** Page 21). Mr. Flavin went on the board of FII from the time that DCC took its stake in FII in late 1979 or early 1980. There was an understanding that for so long as DCC held a stake in FII that DCC would be entitled to representation. It was not personal to Mr. Flavin. DCC could nominate whom they wished.

Mr. Flavin then detailed his involvement with the McCanns in the acquisition of Fyffes from Chiquita in the mid 1980s.

Mr. Flavin went on to explain the nomination process for directors, including non-executive directors in DCC. The process in DCC was to have a nomination committee of the board. The issue of board development would be regularly discussed and names would be brought forward and they would keep a running list of potential candidates. Before anyone was appointed there would be a discussion about each and what role they would fulfil.

Mr. Flavin was asked if DCC ever had a lawyer as a non-executive director to which he replied that, "the closest we came to that is Paddy Gallagher…he is qualified as a Barrister. He never worked as a Barrister." (**Answer 124:** page 30).

When asked if he ever considered appointing somebody as a non-executive director with a legal qualification he answered that he was ambitious in terms of the quality of the non-

executive directors chosen. "I personally set out to find the best most respected non-executive directors you could get. So it was all about the quality of the person, their standing, their experience, their accomplishments and achievements. If you could tick those boxes, they are likely to be pretty aware of compliance." (**Answer 126:** Page 31).

At the beginning DCC had five directors, one executive, Mr. Flavin and four non-executive directors. Alex Spain was Chairman. Desmond McGuane, now deceased had been an investment director of Irish Life "a very well respected figure and a very fastidious person and a careful and excellent non-executive director and very informed. He was subsequently Chairman of Jacobs…Michael Maher who was Chief Executive of Ulster Investment Bank, subsequently moved to the board of the Bank of Ireland and Managing Director of the Bank of Ireland Corporate Banking. Michael was and is a most respected figure and anybody who knows anything about Michael Maher, knows that he a very meticulous person. Then Paddy Gallagher, who came from his background in Guinness and would be aware of company secretarial practice with Guinness plc., and indeed was Chairman of the Irish Association of Pension Funds, and is still on the board. It was that ilk of director in DCC." (**Answer 128:** Page 32).

Mr. Flavin was then asked about the progression from venture capital company to industrial holdings company between 1990 and the floatation of DCC in May 1994. Mr. Flavin explained that in working towards that floatation they had to work very closely with professional advisers. Alvin Price of William Fry had been the principal legal adviser to DCC from a very early stage. "Alvin was just very close, we just regularly picked up the phone to him." (**Answer 137:** Page 33). "We were a reasonably active client and a growing one and a very institutional one, it would have been known that when we were private that we were 95% institutionally owned by major institutions and we got a superb service from Alvin and from Fry's." (**Answer 138:** Page 33). Mr. Flavin explained that he had about 3% of the shares in the company plus options over 2% 'so a 5% economic interest if you like'. (**Answer 141:** Page 34).

"As I speak here today (I hold) 3.3%. I am still the largest private shareholder." (**Answer 144:** Page 34).

Turning to his awareness of the Companies Code and Companies Act obligations Mr. Flavin said he was "not an expert – but as directors go I think I was at least as well informed as any layman." (**Answer 149:** page 35).

Question 150: Did you have a consciousness or awareness in 1990 that a piece of legislation had come in?
Answer: "Absolutely. You couldn't not be aware."

Question 151: How did you arrive at that awareness?
Answer: "I was just aware. I recall it. Lawyers were circulating you know just as Accountants now circulate something on new Finance Bills."

"Lawyers at the time were circulating things about the new act. It was just something talked about..." (**Answer 152:** Page 35). "Certainly one would have read things. I don't particularly remember now what I got but I know I got and everybody in DCC would have got documents from Lawyers and from probably not only our own lawyers, lawyers would have used it as a marketing tool, people might have encroached on Fry's, or whatever, it could have come from anywhere." (**Answer 153:** Page 35).

He also stated that he would have encouraged the relevant people in DCC to attend presentations on the Act but he could not remember any detail of same.

As for his awareness of his obligations as a director of Fyffes, he explained that it was normal for him to have an understanding of his obligations "by virtue of the fact that I had, for what it is worth, studied Commerce and qualified as a Chartered Accountant. I would have been very aware of the 1963 Companies Act." (**Answer 162:** Page 37). At one stage while studying Commerce he had given consideration to studying law. Mr. Flavin explained that as far as he was concerned there was no real difference in his attitude or in

the attitude within DCC to compliance matters after the company went public "other than we had new compliance requirements. The new compliance in terms of Yellow Book and Blue Book and all that sort of thing which didn't apply for a private company, but in terms of the Companies Act I don't think there were that many major differences or – I know the notification issue is well known, but they would exist in a private company too – it was more to do with Stock Exchange listing rules and Blue Books were the new things. I don't think it would have changed the culture an awful lot." He went on to explain that DCC Corporate Finance had become a member of the London Stock Exchange and "I would have been very aware of the importance there of compliance and the compliance culture. So when the new Act came in I do particularly remember Hugh Keelan, we volunteered him to get involved with the Committee, the Irish Stock Exchange was setting up to examine insider dealing legislation. Hugh had been a good honours graduate in law from Trinity and subsequently did Chartered Accountancy and he seemed to me, the obvious person to make both the Compliance Officer in DCC and get him engaged in that activity. We would have had as a plc., had a particular knowledge I would say of the whole insider dealer legislation. When I say "we, I mean we through Hugh Keelan. He would have disseminated to us various things". (**Answer 165:** Page 38).

When asked about DCC's intentions in relation to its continued involvement in owning a shareholding in Fyffes post the floatation in 1994 Mr. Flavin answered, "the honest answer to that is, you know, by 1995 I would have been delighted if, speaking personally and corporately, somebody came along and made a decent offer. It was, as I know you have heard lots of times, anomalous, but was more than that, it had become a bit of a distraction, it was taking a disproportionate amount of my time, it was an onerous involvement." (**Answer 171:** Page 40). Mr. Flavin explained that he was on "lots of boards" and was Chairman of about three or four public companies for a period of time. He explained however that the involvement in Fyffes was more onerous. "It was exciting, productive and enjoyable and if you had asked me that question in 1989 or something I would have said we had an excellent relationship, it has been a wonderful partnership between the strengths and skills and industry knowledge of Neil McCann and the little bit that we could bring to bear in terms of corporate development and acquisition skills and

financing that was great. It changed in the 90s." (**Answer 173:** Page 40). Mr. Flavin recounted the deteriorating relationship between him and the McCanns from that time onwards and particularly from 1994 onwards. From that time onwards he would have said, "DCC wants out. I would have added an aside, I personally would love to be out. I would have further said, I think it is going to happen because I think there is going to be rationalisation, I think Chiquita, or somebody, are going to come through the door some day and make a bid. That is what I would have believed." (**Answer 190:** Page 45).

Mr. Flavin also explained that if they were to sell it would not have been in "bits and pieces" since if it went below the 10% "we wouldn't have been able to associate account". (**Answer 198:** Page 46). Mr. Flavin agreed that if the shares in Fyffes had been sold in 1994 there was going to be a significant amount of Capital Gains Tax to pay. He explained that at that time the rate was 40% as opposed to 20% and there was no 'participation exemption' in Ireland until some time in or around 2004. The absence of participation exemption meant in Mr. Flavin's view, that the effective Capital Gains Tax was 64%. "Think hypothetically of a company that has just one asset and it has made a profit of 100. You get 60, and a shareholder then sells his shares. He then pays 40% of the 60, so he pays another 24, so you have ended up with a situation where the effective Capital Gains Tax is 64%. I always believed that was crazy. The law is the law, I accept that, but I thought it just didn't make sense. In addition to that any dividends paid were taxed…it became well recognised that this is something that should change and I was very aware of that yes." (**Answer 209:** Page 48).

Mr. Flavin stated that as he saw it he owed a duty to his shareholders to minimise the exposure to tax in a lawful manner when DCC exited from Fyffes. "Yes if there was a good and proper way. I would not have been the only person thinking of that. In fact whether I first mentioned it to Fergal or he first mentioned it to me it is something frankly we would all have been aware of, certainly I would have been aware of it and told about it." (**Answer 217:** Page 50). Mr. Flavin thinks that the idea for the tax scheme which was devised in 1995 came about as a result of a discussion between Fergal O' Dwyer and CooperS&Lybrand. Mr. Flavin also explained that the tax scheme was also part of the

restructuring for the UK group and the Irish group at around that time and following the flotation. He also explained that the Capital Gains Tax issue was not the major tax issue being looked at by DCC "I would say that for most companies and public companies the issue is what is your annual rate of Corporation Tax…is probably the bigger issue." (**Answer 229:** Page 53).

Mr. Flavin says he believes that the first time the scheme whereby the shares in DCC and S&L Investments Limited would be transferred to Lotus Green came to the board of DCC was at the meeting of the 31st July 1995. "I think it is unlikely that I would have brought it as something to the board, that is, in the concept, and I have no recall, before the plan was in place." (**Answer 234:** Page 54). He also confirmed that this would have been the norm. "I would only have felt it necessary to or I would only have called Alex (Spain) in between board meetings when I felt there was something that I should discuss with him in advance of a board meeting, that you should probably talk to, alert the Chairman to, if you like. Sometimes a Chief Executive will talk to a Chairman to know, look, is this something that I should bring before the board? Would you like it to be brought before the board? Frankly if I had any doubt about whether something should be brought before the board I brought it to the board." (**Answer 235:** Page 55).

Mr. Flavin was keen to counter the suggestion that DCC was dominated by him. "There is an image out there that this was a sort of entrepreneurially dominant thing. I would have to say that I always had full recognition of the importance and supremacy of a plc board. In no way was I ever presumptuous about the board or anything else…this is something that I would have taken very seriously bringing forward the formal proposition to the board but I doubt if I would have advised them of the concept at an earlier stage." (**Answer 236:** Page 56).

Mr. Flavin was then asked about the extent of his involvement in the scheme that Fergal O' Dwyer was dealing with CooperS&Lybrand to put together. "It wouldn't have been my style at any stage in DCC to get involved in the detail of some tax things. I would have been interested absolutely in the board principles of what we were doing, what tax

planning was going on and why. You know, that I would very much have been interested in. The actual details of the scheme and minutiae of that I wouldn't have gone into in too much detail, no. In relation to this particular transaction I can't recall how often Fergal talked to me. I certainly know he did talk to me and I know since of course he would have kept me informed of the key developments and some file notes." (**Answer 240:** Page 57). He said in general it was true that he let his managers manage. "I would have talked literally every day of the week to those who were sort of managing directors of divisions about how is the thing going. I would nearly be asking daily about how it's trading and I would take a very close interest and, frankly, more interested in trading in the business and what was going on, if you like. The details of the tax scheme wouldn't particularly excite me and I wouldn't have spent an awful lot of time, I would be more interested in trying to make sure sales were pushed and costs were being controlled." (**Answer 243:** Page 58). Whilst he doesn't have a clear recollection of what he was told in March 1995 he said "I am sure Fergal would have said to me 'listen, Coopers have come up with a scheme'." (**Answer 244:** Page 58).

He believes he was aware that Senior Counsel's Opinion had been sought in relation to it but he wouldn't have suggested getting Senior Counsel's Opinion "I would have thought it would be left to CooperS&Lybrand. It's like you go along to your doctor and you say you have a pain or something and it's the doctor who decides whether you need to go to a specialist …" (**Answer 247:** Page 59).

When it was put to him that the detailed scheme was put in place by CooperS&Lybrand, a very detailed Opinion was obtained from the late Tommy McCann and a further Opinion was obtained from Pat O' Brien in KPMG it was clear that a huge amount of effort went into the tax side of the scheme. He agreed that this was so.

Question 256: Comparatively, though, in relation to the legal issues that arose, no Counsel's Opinion was sought.
Answer: "Yes."

Question 257: Again, would you have had a view about not seeking Counsel's Opinion or seeking Counsel's Opinion or would that be left up to the Solicitors to decide?
Answer 258: "Well we never thought of getting a Counsel's Opinion. It wasn't something that we ever thought of. You know I can understand now why we didn't and why we would have had the thoughts at the time that it wasn't necessary."

Mr. Flavin explained, "this issue of the notification I have no recall of it being a particularly big deal in my mind". (**Answer 260:** Page 61).

Answer 261: "You know we got advice from a fairly well trusted, reputable commercial lawyer from a reputable firm" (who had written "a letter in the full knowledge that it was going to be brought before the board) and knowing Alvin Price and knowing Fry's if he had any, any doubt about this thing and had been asked to write it he would have expressed a view on it. So he would have sort of said "look I think you should actually announce". So there was no reason to go and second guess him. He had given an unequivocal personal view that it wasn't. So it never struck us (to seek Counsel's Opinion)."

Question 266: So taking that on board, was there ever a concern that in terms of one's closeness to one's commercial solicitor in the way that Alvin was, that at certain times some greater objectivity might have been called for or needed?
Answer: "Well I mean frankly no, I mean I would have to say I can say with deep conviction that I would, if you asked me to categorise Alvin Price as a commercial lawyer, I would say he was cautious and careful, would be his style. I mean, I have no doubt about that because I think that was his style and so I would have and all of us in DCC would have just a lot of confidence in where that advice had come from. I didn't mean earlier we would go jumping into things but it is sort of relevant because I can't answer the question other than the context that was (his) advice."

Also, if a second opinion was desirable in some way, I don't actually think – I think in the first instance it would have been up to Alvin to suggest it but frankly I don't think he ever

would have suggested it because I think he would have had more than enough confidence in his own views and if he thought at all that in fact this is a matter that needed a second opinion I think he would have written us a different letter and said, "Look there is sufficient doubt on this." (**Answer 267:** Page 63). "That if there is doubt at all you better announce. It wouldn't have come to a second opinion. If we thought we had to go to a second opinion, either at my instigation or at Michael Scholefield's instigation or Alvin's instigation we would have announced." (**Answer 268:** Page 63).

It was then put to Mr. Flavin that there was another way of looking at this. He was referred to the fact that in the High Court litigation Mr. Price had articulated a belief that DCC did not want to notify either under Section 67 or Section 91. "He had at least a perception that the desire of DCC was not to notify." (**Question 270:** Page 64). "Well I mean I wasn't there but I knew he said it but I don't know the exact words." (**Answer 276:** Page 65).

Question 277: Again you can't read Mr. Price's mind. Do you have any sense of how he would have had that or do you have any insight?
Answer: "Well first of all, in fairness, I asked Alvin Price this recently because I had no recall of ever having a conversation with Alvin Price in relation to this whole Section 67 thing. I have no recall of that at any stage. Indeed I asked Alvin that the other day and all my interplay on this was with Michael Scholefield and Daphne Tease perhaps. I just don't recall whether she talked to me at any stage or whether it was a matter that Fergal and I talked about so what Alvin knew, presumably, was, if you like, the house view from whomever he was dealing with."

Question 278: Michael or Daphne?
Answer: "Yes."

Answer 279: "I'm saying I have no recall that we ever spoke about it, none at all."

Question 280: Are you telling me that it is a mystery to you how he could have had the perception …?
Answer: "Ah no, I wouldn't go so far as to say that, no…I mean all things being equal was it my view and the view in DCC House and those who were informed in this thing. Did we want to go announcing about the shareholding going off to a Dutch company and more particularly setting a hare running."

Question 281: That didn't have to run?
Answer: "Yes exactly. Effectively misleading the market. Now, I will come back to that again because it was a potential of that. So all things being equal, certainly if you asked me at the time what I would have said, well I'd rather not have to announce this."

"It wasn't that we can't announce this. It was just look, all things being equal." (**Answer 282:** Page 66).

When it was suggested that the knowledge that that was DCC's preferred view could have put 'some pressure towards a particular direction', Mr. Flavin stated, "I totally trust Alvin's independence and his protection. I would regard him as a very protective sort of person and protective of me personally too I would say. I think he would have been careful in DCC and had been a long standing adviser and I would have huge trust…I think he was asked the same question (in 1994) in relation to Flogas and gave a very clear answer." (**Answer 286:** Page 67).

"So I am just giving that as backup that Alvin's independence, professional independence, I would just place it very highly and that is borne of a lot of experience." (**Answer 287:** Page 68).

<u>Day 2</u>

Mr. Flavin was asked about the memorandum from Michael Scholefield to him at Tab 18 of the core booklet. Two issues were dealt with in that memorandum whether Mr. Flavin

had to notify the details of the transactions to Fyffes and also whether any of the insider dealing provisions of the Companies Acts were applicable. Mr. Flavin explained that Fyffes always wanted to be notified of any potential change in the DCC shareholding. They had contended that the Model Code applied to him which he insisted it didn't, that he had to seek the permission of the Chairman of Fyffes before DCC could deal. "The only circumstances where that would have applied under the Model Code is that I controlled DCC. So it wasn't a requirement." (**Answer 274:** Page 69). "…It was a pretty black and white view." (**Answer 275:** Page 69).

In his answer to **Question 276:** He explained the background to this issue and that Fyffes were keen that if the holding was ever going to be sold that they might get advance notice of it in order that they might perhaps buy it themselves or they might try and influence that it doesn't go to where it might go. Mr. Flavin couldn't put an exact date on when the issue first arose. He also explained that by June of 1995 the relationship with Fyffes had sadly come to a point where he was always being careful with regard to matters concerning Fyffes. When asked whether his disagreement with Fyffes about whether he had to pre-notify them of DCC's intentions in relation to its shareholdings in Fyffes caused tension he confirmed that it did. From his perspective DCC held shares in a public company which were tradable "I was always very conscious that I should do nothing to fetter DCC's (discretion)". (**Answer 285:** Page 72).

Question 287: And to the extent there was a suggestion of a fetter it is something you would push back against wearing your DCC hat?
Answer: "Yes. Well of course wearing my DCC hat. But it was an unreasonable request. It was just something that went right against the right of holding shares in a public company."

He explained that throughout the 1990s it seemed to him that Fyffes were increasingly concerned that DCC would either sell to somebody that they Fyffes didn't want "and frankly we would have been slow to do that…we would have had to have regard to our partnership responsibilities, if you like to the extent that we could discharge our own

fiduciary duties to DCC…but on the other hand I think they would have had a concern that we would try and team up and get more control…at the time they (the McCanns) had about 11% of Fyffes so the McCanns and DCC were more or less similar sized shareholders except…they had the steering wheel, the clutch and the brakes." (**Answer 289:** Page 73).

Mr. Flavin explained that in approaching Mr. Scholefield for advice in June 1995 he wanted to be armed in relation to what the precise position was under the Model Code. He stated that DCC were 'pretty unique' in having a Compliance Officer back in 1995. (**Answer 292:** Page 74).

When asked whether the statement in Mr. Scholefield's memorandum 'given that Fry's have confirmed that there are no requirements to notify the proposed transactions under the Companies Acts' was the first time he learned of that. He answered that he would be amazed if he wasn't told about the advice on inter group transfers surrounding Flogas back in 1994 and the advice that Daphne Tease had verbally obtained from Alvin Price. He also said that it was 'at least 90% likely' that he would have been told about the advice obtained from Alvin Price in April 1995. (**Answer 298:** Page 76). When asked whether his understanding was that DCC could not have dealt in the Fyffes' shares in the close period (being May and June) Mr. Flavin confirmed that, "yes, he felt that he and the entire DCC board would have been insiders in June 1995 as well as the Financial Controller Fergal O' Dwyer". Going on with the memorandum from Mr. Scholefield he stated "I am not aware that there are any agreements between DCC and Fyffes or indeed between you in your capacity as a director of Fyffes and Fyffes in relation to corporate governance matters which would require notification of the example 'transaction'." He was in effect telling Mr. Flavin that the listing rules don't apply. Mr. Flavin was then asked whether he had cause to consider the insider dealing provisions before June of 1995. He answered that he didn't know. When asked what triggered his interest or concern about the insider trading provisions he said, "well the whole issue of you know, I was on the board of Fyffes. It is a pretty natural thing to do. I mean not only as I have said was I an insider in Fyffes but the whole board of DCC was an insider in Fyffes. Fergal O' Dwyer wasn't on

the board but he would have been an insider in Fyffes and his deputy at the time a chap called Gavin O' Hara would have been an insider in Fyffes." (**Answer 334:** Page 85).
"But necessarily the whole question of insider dealing in relation to an insider transfer etc., and all the rest it would have been a relevant question." (**Answer 336:** Page 86).

He stated that having appointed a Compliance Officer and having gone down that route it was natural that insider dealing obligations would be looked at in the context of the transaction. "I mean it is an obvious element there is going to be a major deal if you like in a public company in which you are an insider. So just whether the rules applied, whatever, yes." (**Answer 339:** Page 87).

Question 341: Did you have a consciousness at this time in 1995 of the ramifications of the insider dealing provisions?
Answer: "Oh I would have always had."

Question 342: When you say "always" they came in in 1991.
Answer: "But as I have said and forgive me for saying it again, because of particularly Hugh Keelan's involvement with the Stock Exchange and their Committee which led to a set of practical guidelines to help interpret the legislation …"

What Mr. Scholefield said in his note was then read to Mr. Flavin along with the "would you like me to get Alvin Price to confirm". When it was put to him that the note didn't say that the decision of DCC to sell the shares in Fyffes could never itself be or give rise to insider dealing he answered "I don't believe we every discussed it and if you ask me why not, forgive me for saying it I think it is such a far fetched proposition in the first instance that you wouldn't even begin to think about it." He explained that when Mr. Scholefield in his note was referring to insider information he was referring to inside information about Fyffes be it transaction or trading results. He explained also that his conversation with Mr. Scholefield in June of 1995 was stage 1 of a process and at the end of that stage 1 he asked, "would you like me to get Alvin Price to confirm any of the above".

"So it was a stepping stone. And of course I did. (Ask him to ask Alvin Price.) So this is the first step of a work in progress." (**Answer 352:** Page 94). Mr. Flavin was then asked about Mr. Scholefield's jotter notes and whether it was likely that they were taken as a result of a conversation with him or as a result of a conversation with Alvin Price. Mr. Flavin thought it was unlikely that they were notes of a conversation with him.

Question 362: The thing about "I don't think we will be prosecuted" is that something if he had discussed it with you, you would be likely to remember?
Answer: "I think so."

Question 363: I mean the possibility of prosecution would trigger minor or major alarm bells depending on what was involved?
Answer: "Yes. Absolutely. Although all compliance with the Companies Act we took seriously."

Mr. Flavin was then asked about the qualifications of Mr. Scholefield for the post of Company Secretary and Compliance Officer.

Question 364: You were mentioning the point about him being a fairly experienced Compliance Officer, he had been in post about 6 months, 5 or 6 months at that stage. Why do you say he was fairly experienced?
Answer: "Sorry I might have put that inelegantly. I probably should have said in my decision to appoint him Compliance Officer in 1995."

He said, "I would have regarded and regard Michael as a most conscientious hardworking person and somebody whose mind (some people are wheeler dealers) Michael won't mind me saying he is not a wheeler/dealer. Some people are, by nature, more disciplined and process lead. And Michael right back to his B.Comm days he was first place, first class honours, so disciplined. So he, by nature, is thorough and conscientious. So I couldn't think of anyone actually more suitable in DCC House at the time." (**Answer 365:** Page 99).

Mr. Flavin was asked if he knew that there were specific obligations on the board of a public company in relation to the appointment of the Company Secretary to which he answered, "very much so". (**Answer 366:** Page 99). When asked about the specific provisions in the 1990 Act and as to whether he was aware of that, he answered, "in truth I am not familiar now, whether I had any familiarity in the past one does forget things. It is not jumping out at me. I am very aware though and conscious that the appointment was a board appointment and that he becomes an officer of the company." (**Answer 368:** Page 100).

Mr. Flavin expanded upon the qualifications to be a Company Secretary of a public company. " … I am very familiar with this, the issue of who is qualified to be a Company Secretary. I think a well qualified graduate Chartered Accountant as a starting qualification is very well qualified." (**Answer 369:** Page 101).

"So I would have to give you the most affirmative view that in my opinion Michael Scholefield was eminently qualified to be a Company Secretary of a plc., in 1995 and indeed today. By his nature, background, training, expertise, diligence and conscientousness, I would." (Part of **Answer 369:** Page 102).

He also stated that it was entirely logical that the Company Secretary should also be the Compliance Officer since the Company Secretary "is a bit of a custodian and adviser, keeping up to date on Model Codes and all the rest of it." (**Answer 370:** Page 102). Mr. Flavin said he didn't recall being aware of the specific provision but insisted ('with absolute conviction') that the role of Company Secretary was something they always took very seriously and it was always carefully considered as to who should be Company Secretary and were they properly qualified. "So if you think about legislators enacting something because they think it is sensible, we were probably doing and thinking all of these things ahead of the legislation. And, you know, as companies go I would say we gave particular care and attention to who should be Company Secretary and who should be appointed." (**Answer 373:** Page 104).

"Whatever we did, right or wrong, and we all do things wrong by mistake sometimes but we got the appointment of Company Secretary right. I mean, in fairness I think we gave great care to it." (**Answer 374:** Page 104).

He also explained that everybody on the board would have known Michael Scholefield before he was appointed.

Day 3

On day 10, the interview with Mr. Flavin continued dealing with the memorandum from Michael Scholefield at Tab 20 following his conversation with Alvin Price. At the outset Mr. Flavin wished to draw my attention to a distinction he wished to make between 'inside information' as opposed to 'price sensitive inside information'. "The memorandum from Michael of the 9th of June referred to price sensitive information and not 'inside information'." Mr. Flavin then explained how Fyffes' management of account information was incorporated into the accounts of DCC prior to April of 1996. He explained that the Fyffes information which came to DCC was at the very least 5 months out of date. For example if one were talking about the July 1995 DCC board meeting that would have dealt with accounts of Fyffes up to January of 1995. These accounts would then have been incorporated into DCC's accounts to the end of June, which in turn would have gone to the July Board meeting of DCC. By this stage the Fyffes results had actually been published, not the individual results of those months but the Fyffes actual returns for their half year to the 30th April 1995.

Mr. Flavin was then asked what the position would be if they had obtained price sensitive information at a Fyffes' board meeting. Mr. Flavin answered that "price sensitive information is either of a trading or of a development nature. On trading a company Fyffes, is the best expert if they were a responsible company and know their business and are reliable and have a history of knowing their business they are the best judges as to whether they have price sensitive information."

Mr. Flavin mentioned that once in 1997 at a Fyffes' board meeting he expressed the view that as a result of trading information that an announcement was necessary. There was a debate around it and an announcement was made. At a later stage it turned out that an announcement was not necessary because in fact Fyffes had a bumpy year that year and "I learned my lesson that this is a volatile trade".

Mr. Flavin was then asked about the paragraph in Michael Scholefield's memorandum to file dated 20th June where he stated "I have discussed with Jim Flavin his current knowledge of corporate development and other relevant matters within Fyffes plc. I am satisfied on the basis of my discussion with Jim that he is not aware of any matter that would cause a material movement in the share price of Fyffes plc., and on that basis I conclude that he is not in possession of price sensitive information in relation to that company." Mr. Flavin was asked how that process worked. He responded that first of all he didn't recall the particular discussion. He explained 'price sensitive information' breaks down simply, generally into whether you have trading price sensitive information or you have some price sensitive information in relation to a development. (**Answer 95:** Page 36).

Question 96: Stop there, are they the only possibilities?
Answer: "I have never thought of anything else and I have been around the course a lot on this. I don't believe there are any other circumstances. I mean, there is only how is the company trading? When I say 'development' I am using that term…"

Question 97: Loosely?
Answer: "Yes. I am saying about to make a major acquisition, about to have a rights issue, about entering discussions that there is a reasonable probability or going to result in a transaction. You know where there is real possibility, you are talking to companies every day of the week (and if that was 'price sensitive information') you could never deal, but you know if there is a real possibility of a transaction taking place but not just transaction, a transaction that is going to be materially price sensitive."

Question 98: Theoretically, if there was some scandal within Fyffes. Somebody was going to have to resign for embezzlement I take it you would include that?
Answer: "Yes, that is a good example, yes. If it was price sensitive."

Question 99: Or resignation of some key person or, you know, somebody going off to a competitor. Now it may not apply in Fyffes as much as in other companies but that type of information could be, I mean, it would have the potential for price sensitivity? Mr. Flavin agreed that "there could be other things that you mention, reputational things yes." (**Answer 102:** Page 38).

Mr. Flavin reiterated that he didn't recall the discussion with Mr. Scholefield "but I would guess it was the sharing of, you know, is there anything going on in Fyffes at the moment any transaction or whatever that could be potentially price sensitive. He would have enquired of me what was my state of mind if you like on that." (**Answer 111:** Page 41).

Question 112: State of knowledge?
Answer: "State of knowledge and what I thought about that."

When asked if this was likely to have been an informal meeting himself and Mr. Scholefield he answered that DCC is very informal. "He would just come up and if there was a meeting there was a meeting otherwise come in. It is a sequence of events and this would be a follow up on this and he would come in and sit down and talk about it." (**Answer 113:** Page 42).

Question 115: …Was this an important matter?
Answer: "Yes, yes."

Question 116: Or was this just going through the motions?
Answer: "Yes it was absolutely an important matter. Look you know what I tried to say yesterday, I mean, you have to relate the process to the person as well. Michael Scholefield, I haven't had the opportunity to say it but I wanted to say it is an extremely

conscientious person you know. So you were having an exchange with a conscientious person…now you know so he would have asked me was there anything of a developing nature but I don't recall the discussion but I would believe that he saw it as an important discussion and I saw it as an important discussion."

When asked if he thought it was difficult for Mr. Scholefield to 'interrogate' his boss in relation to this matter. In a roundabout manner Mr. Flavin answered that he did not think that Mr. Scholefield had a difficulty in interrogating him as his boss. Mr. Flavin was then asked about a handwritten memorandum of the 19th of June written by Carl McCann. The note read:-

1. Suicide tax scheme.
2. DCC directors all aware of our figures and business on an ongoing basis.
3. They should not have any information other than the market generally.
4. Particularly in the light of Jim Flavin's (I take it) statements that if he did not get a board position that DCC would intend to be a seller of shares then "suicide" tax scheme. It involves our shares being transferred to a foreign resident company with no JF or any DCC director on its board and for the purposes of the scheme.

Mr. Flavin was also directed to the Carl McCann memorandum to file dated 21st June where he said, "we had the Audit Committee meeting today (20th June 1995). The Committee approved the interim results. Jim Flavin turned up over an hour late when the meeting was finished but then proceeded to go through the numbers and process. He looked at the adjustments between the management accounts and the interim accounts and he probed the necessity for the various adjustments. He then announced that our monthly figures would be consolidated into DCC's monthly figures being presented to the DCC board as part of their package not perhaps in detail but rather as the one line net profit attributable. The meeting including Denis and Gerry were rather surprised. Denis challenged him on the point and Jim said this was perfectly normal practice and a reasonable thing to do. I think everyone was too surprised to say any more about it. This

follows on Jim's phone call to me the previous evening at circa 6.15 p.m. where he indicated he was planning to transfer ownership of DCC shares in Fyffes to a Dutch BV. He sought waiver of any requirement to inform the Chairman and so on. He said his advice was that there was no requirement to be made. I told him I felt there was a requirement. I told him that I would try and revert to him on this point."

For completeness Mr. Flavin also referred to the memorandum of the 23rd May 1995 where Carl McCann had said "Dad, Denis, During lunch Jim mentioned he was transferring his Fyffes stake to an offshore structure so that he 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 the directors who reside offshore. This implies a technical chance of control perhaps such an event requires one, the Chairman's formal approval and/or two, disclosure which might be self defeating both in 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 your permission to make any such change. Maybe he is trying to keep the file right by deeming his casual reference last Thursday to be noticed – would he try to construe the fact you didn't openly disagree to be your technical acceptance? Perhaps we need to drop 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."

Mr. Flavin was asked would he have used the expression 'suicide tax scheme'. To which he replied "certainly not me". (**Answer 173:** Page 57). Mr. Flavin then explained that the relationship between him and the McCanns was becoming "pretty difficult". He also explained that there was a certain competitiveness and, although it was only speculation, his sense was that if DCC had thought of something that was going to mitigate Capital Gains Tax Fyffes may have wanted to throw cold water on it.

Mr. Flavin explained strong feelings about all the effort he put into Fyffes over a long period of time. When asked what remuneration he got he answered, "I personally got absolutely nothing. DCC got a fee. It varied from €15,000.00 and then eventually

€25,000.00 when I left…I got nothing personally, I was DCC's nominee." (**Answers 180 and 181:** Page 60). He explained that DCC would have got some fees from time to time where they were involved with transactions. Mr. Flavin explained that he took his role on the Audit Committee of Fyffes very seriously. "I used to take the lead on the Audit Committee and the Minutes of the Audit Committee over the years will show that I would be the person most enquiring if you like." (**Answer 196:** Page 63).

When asked for his recollection of how he came to call Carl on the 19th June he explained that he was regularly in contact with Carl. "I could have been talking to Carl about anything that evening. It could have been about something entirely different and then we would have gone on to this subject if you like." (**Answer 208:** Page 68).

Mr. Flavin can't recall whether he knew that Carl McCann was contacting Mike Meghen about the notification issue. Mr. Flavin was sure that the Fyffes "concern about whether DCC made an announcement under Section 67 was not keeping them awake at night and that the real issue they were concerned about was insisting that he seek the Chairman's permission before they could sell the shares. I would have seen all of this to do to with controlling DCC's stake." (**Answer 224:** page 75).

Mr. Flavin also said he didn't take kindly to being reminded about his obligations as a director and DCC's corporate obligations "it would have been a view – Look we have our own excellent legal advisers and I don't need Carl McCann telling me that we need second advisers." (**Answer 226:** Page 76). "…My instinctive reaction without having to think too much is that there is an agenda here." (**Answer 227:** Page 77).

When asked about the long memorandum from Neil McCann at Tab 32 and asked what would cause Neil McCann to go into print in relation to this or whether it was his style Mr. Flavin answered, "I am not putting a tooth in it but this is for the record…to go off and write a page in detail like this surprises me." (**Answers 230** and **231:** Page 77 and 78).

When asked if, as the memorandum suggested, Mr. Flavin had conveyed upset and a suggestion that Fyffes were being difficult he said, "I could have, that's possible". (**Answer 235:** Page 79).

Mr. Flavin doesn't understand the reference to him insisting that the matter was urgent. "Maybe there was some step or something that was going to happen on Monday, I just have no recall and it doesn't make sense." (**Answer 241:** Page 81). Mr. Flavin was in broad agreement with and thinks its likely that he agreed to get Alvin Price to contact Mike Meghen to prepare a separate letter of comfort.

When asked about the reference in the note to 'commercially DCC would probably go ahead' and whether that suggested that DCC were going to go ahead with the transaction because the commercial considerations outweighed their concern about a technical obligation to notify Mr. Flavin answered, "it makes no sense to me…what he wrote down or what he thought I haven't a clue…I think 'but commercially DCC will probably go ahead' is simply saying this tax scheme is likely to go ahead. I think there are two separate things. Is he trying to link them? I don't know." (**Answer 249:** Page 85 and 86).

When it was suggested that there might be a connection between 'Mike (Meghen's) opinion being correct but that commercially DCC will probably go ahead' Mr. Flavin said he wasn't sure. Mr. Flavin also explained that he was not the type of person that sent notes to file "I think that's what came out in the case – (**Fyffes -v- DCC and Others**). There were very little notes to file on my side and volumes on the other side. (**Answer Page 258:** Page 90).

<u>Day 4</u>

When Mr. Flavin was asked whether DCC weighed up the tax saving of IR£7 million against the consequence for not notifying of a fine of €1,000 he replied, "I can only say that taxation never reared its head in keeping the thing from the Revenue good bad or indifferent. It just was not an issue." (**Answer 290:** Page 69).

Question 299: If there was a desire or a preference, all things equal not to notify what was informing that preference.

Answer: "Well I would have that view and I am sure to the extent, how much we talked about the different views I don't recall. I just can't recall. But certainly my recall is that, you know, you could set, it could effectively be misleading information. You asked me earlier would we like to have sold our holding at that time and I said yes, corporately and personally I would have said yes, but if you had asked me a second question do you think it is likely to be sold in the near term I would have guessed no. I would have thought it neither served Fyffes' interest nor DCC's interest to be setting a hare running at the market which wasn't, it was actually misleading them rather than properly informing them."

When it was suggested to him that if they had no intention of selling immediately and it was not likely to happen for some time, any misleading of the market that would have been caused by a notification would dissipate over time. He answered, "yes, I would agree". (**Answer 301:** Page 71).

Question 302: From your perspective where you had no proximate intention of disposing of the shares you would be unlikely to be worried that you would have caused any adverse impact upon the price of Fyffes' shares that might arise by putting a "For Sale" sign or a more formal quote "For Sale" on it, doesn't that follow?

Answer: "Yes, but I hope this will help. There was no weighing scales at all before us even like let's have an extra cautious approach and announce and all the rest of it. Weighing scales never came into it. I mean we just quite simply believed it didn't have to be announced. Personally I can recall a view that look, this is an inter group transfer, just the logic of it if you like. You know it didn't get much agonising and so if I could impart that message to you more than anything else to give you a sense of the time even though it was brought formally to the board and I brought the letters from the Solicitors and everything else, that was procedural more than gosh we've got some grave concern about this. We just didn't."

When asked if it was likely that the matter would have come to the board of DCC in July 1995 if Fyffes hadn't made an issue of it, i.e. that "Fyffes created the necessity to go to Alvin (Price) In July 1995?" Mr Flavin answered "well I would have to say that yes, Fyffes having raised it, I think it was then always going to be highly likely that I would have brought it to the board yes because I would have wanted to give transparency to that". (**Answer 312:** Page 73).

Question 313: And also a measure of protection. I don't mean anything wrong in the sense of that, but well maybe transparency, there is also a bit of protection?
Answer: "Well it depends on who the protection is for."

Question 314: For you?
Answer: "Oh no I don't think so. I think protection for the board as a whole. I mean it would have been my style to, I mean if you think about this conversely, had I not brought it to the board, lets say we were sitting here today and I never brought that to the board would the directors be entitled to think, gosh you never fully informed us about anything, we never saw the letter, we didn't hear advice, apparently we should have announced this or something – if the view is formed that we should have announced it or if that is the necessary legal interpretation, if that is the case I could be criticised. But I can only say it would have been my style with something like that and I can only answer the question in the context of what actually happened taken step by step, I would have had a clear view that full transparency should be given to the issues of the Board as the matter was coming before the board."

Mr. Flavin said he would not have done so to protect his own position "I felt that it would never have entered my mind that, gosh, I've got to protect myself. It would have entered my mind that directors are entitled to be fully informed when making a decision on something to have all relevant information." (**Answer 315:** Page 75).

When asked again whether the issue probably wouldn't have come to the board on the 31st July 1995 had it not been raised with Fyffes in June and July and exchanges going back

and forth between Alvin Price and Mike Meghen, and Mike Meghen and Michael Scholefield, Mr. Flavin said "my answer has to be conjecture you understand that". (**Answer 318:** Page 75).

"In fact, I have been thinking about it as you were asking and in fact you know I might have initially been nearly inclined to say to you 'yes' but in fact as I think about it, I think it probably would have come up because I think the fact that there were compliance issues here or issues to do with the notification to do with insider dealing and, you know, to check on the insider dealing is quite a separate matter that I had raised as to whether insider dealing laws were applicable and – I can't put a percentage on it but it is at least possible, if not probable at least…that I would have said to Michael Scholefield or something 'could you organise a letter from Alvin about legal requirements in connection with this thing for the morning'. It is possible that I would have done that, I can't sit here and say that I would have done it. I just don't know." (**Answer 319** and **320:** Page 75 and 76).

Turning then to the documentation, Mr. Flavin can't remember whether he saw the letter of instructions from CooperS&Lybrand to Tommy McCann in March of 1995. He was then referred to the short letter from Alvin Price to Daphne Tease in April of 1995 and he stated that the letter was 'totally unequivocal'. (**Answer 337:** Page 79).

Mr. Flavin believes that this letter would have been brought to his attention by Michael Scholefield at a point in time "when compliance came up. I have no doubt it would have been brought to my attention, I don't actually recall it but I am certain it would have been." (**Answer 350:** Page 81).

Mr. Flavin had no recall of seeing the note from Brendan Heneghan to Daphne Tease on the 25th May referring to the necessity for the directors of Marjove Limited and Lotus Green Limited to notify their shareholdings in DCC to each company under the Companies Acts and that this should be done "within five days of the company becoming a DCC subsidiary." (**Question 369:** Page 85).

Mr. Flavin did however say that he was familiar with the requirements of Part IV, Chapter 1 dealing with the notification obligations imposed upon directors "because it was something we had to do regularly in terms of personal holdings and that came up absolutely." (**Answer 375:** Page 87).

Mr. Flavin was then asked did it strike him as daft that he and other directors had to notify his shareholding in DCC when he became a director of an inter group company to which he answered "no…I mean somebody had to do it". (**Answer 378:** Page 87).

Question 379: Well why did you have to do it?
Answer: "Well I think it is – I think it is important that the market knows who controls companies, really, particularly in a public company situation."

Question 380: But within an inter group situation how would it like, here, what benefit would be served by Marjove and Lotus Green being told that its directors have shareholdings in DCC.
Answer: "Frankly, none I believe."

Question 381: And yet you have to notify?
Answer: "Well it seems to be the case here."

Mr. Flavin was then asked who decided who would become a director of any of the DCC companies. "Well, I mean, I would make a distinction between corporate companies, which for tax or treasury reasons or whatever existed and commercial companies. The trading subsidiaries and trading associates would have been very much me in terms of who would be the best person…when it came to directors of corporate subsidiaries like this what would generally happen is that somebody would say, well "X", "Y", "Z" has been informed and we need some directors, you know to discharge the function of directors as opposed to some commercial skill if you like." (**Answer 386:** Page 89).

Answer 387: "I would be told some directors and sometimes it might be suggested to me …but in all cases I always insisted that I should approve who directors are. Indeed I would have developed a process so that nobody ended up on a board that I didn't know about. As best I recall I got to a stage where whoever it was would put it in writing to me and I would formally note approval of it. So I am making distinctions. Sometimes I would initiate it and approve it. Other cases, I would just approve it."

Answer 388: "And around those companies (Marjove Limited, Lotus Green Limited) the more the latter."

(d) Daphne Tease

Ms. Daphne Tease is now head of Group Treasury in DCC. She graduated in 1975 from Trinity College, Dublin with a Degree in Economics. After a brief period teaching in Northern Ireland she and her husband relocated to Dublin and she commenced her Chartered Accountancy Training with Ormsby & Rhodes qualifying as a Chartered Accountant in 1983. In late 1986 she applied for a job in DCC and joined DCC on or about the 3rd January 1987 as Associate Director of Finance reporting to the then Financial Director a Mr. Ken Rue who was at that time, she believes Company Secretary. Apart from a 14 month period commencing in 1996 she has worked continuously with DCC. She explained how DCC had evolved considerably over the last 20 years. When she joined she actually had quite a lot of treasury involvement. Back then "we were just a completely different animal". She recalled how the company changed direction in 1990 and then after flotation in 1994 DCC has evolved and grown exponentially and now has a completely different corporate structure. She explained that she had some legal training and did a law module as part of her economics degree in first year at Trinity College, Dublin. She also would have done some company law during the Chartered Accountancy Training.

She explained that she became Company Secretary of DCC in or about 1993 shortly after Ken Rue departed and she was the Company Secretary at the time of the floatation in

1994. Prior to becoming Company Secretary of DCC she had acted as Company Secretary of a number of subsidiary companies. When asked what qualifications she had, or was perceived to have, to act as Company Secretary of DCC both before it became a public company and then afterwards she stated that she would have done the normal professional development courses that would have touched on companies. She explained that in DCC there was always "ongoing professional development courses that we would have gone to, maybe not that many, but from time to time and there was a lot of emphasis on company law at that time and Jim was a stickler as well. He would have been very up to speed." When asked what she meant by Mr. Flavin being a stickler she said, "he was very particular that people kept up to date and read well and kept up to date on things – that would have been something that he would have really encouraged and focused on". (**Answers 19** and **21:** Page 10).

She then went on to explain that there was 'an ethos' in DCC that with a relatively small number of staff that they would have had access to Fry's for help when needed. She stressed there was never any restriction on looking for help from Fry's, "anything at all we had to get help or take advice from there was never any restriction. In fact Jim would be more likely to say 'have you consulted with Fry's on this' than not. He would have expected that nearly as the minimum." (**Answer 23:** Page 10).

She explained that there was no legal budget and one would have been more likely to be criticised if one went to Mr. Flavin and saying something, if you had not taken legal advice than if you had. (**Answer 26:** Page 11). She explained that the year of the floatation in 1994 was a very demanding year and they were all working very closely as a team including Hugh Keenan who at that time was Compliance Officer. After the floatation in May 1994 she explained that she discussed with Mr. Flavin that she wished to restrict her hours to more family friendly hours. As a result Michael Scholefield was appointed as Group Secretary and Compliance Officer in January 1995.

When asked what familiarity she had in 1994 with the provisions of the Companies Act of 1990 as far as notifications and compliance matters were concerned she answered that she

was "certainly aware that there were notification requirements. I would not have been a letter reader of the Act as such." (**Answer 33:** Page 12). "I would have known that there were Directors notification obligations and 'significant shareholdings' notification obligations." She referenced the fact that at certain points DCC would have been in receipt of such notices that they had to pass on to the Stock Exchange. (**Answer 34:** Page 13).

Significantly, the issue of notification under Part IV Chapter 2 of the Companies Act 1990 "came up with Flogas where we did the Flogas transfer in 1994". (**Answer 35:** Page 13). She explained that she took advice on the Flogas transfer in 1994 from Alvin Price of William Fry's. She explained that whilst she had read the provisions of the Act concerning notification she would not have been "her own lawyer". (**Answer 41:** Page 13). She explained that she had "Alvin Price as my adviser, as my approved legal adviser". (**Answer 43: P**age 14.). She explained that she was always going to be asked in the end "did Alvin give you advice?" (**Answer 44:** Page 14). When asked what type of vetting process went on before she was appointed Company Secretary of the company that subsequently became the plc, she answered that the vetting process was Mr. Flavin "I could not put it any higher than that." (**Answer 46:** Page 14). When asked what that meant she said, "well you know Jim was a very demanding employer, but a very good employer, but a very demanding employer". (**Answer 47:** Page 14). "He did not suffer fools gladly at any stage." (**Answer 48:** Page 14). "He had, he has very, he had high standards…Jim was very demanding." (**Answer 49:** Page 15). "He was a stickler for doing things." (**Answer 50:** Page 15). When asked if people were afraid of him, in awe of him, she answered, that "I would have said respectful". She always had a very good relationship with him. "Jim was the sort of person that might disagree with what you said but he would always listen to what you had to say. I always felt that." (**Answer 52:** Page 15). When asked how she would describe the 'compliance culture within DCC' she answered, "very strong, very strong. Jim, you know, was very aware of everything and expected the same level of awareness from everybody else." (**Answer 54:** Page 16). "He seemed to read things before everybody else had read them. If you mentioned anything new he always had got there first." (**Answer 55:** Page 16). When asked if this included

company compliance matters she said, "absolutely…Jim was ahead of the game". (**Answer 56:** Page 16). "I always felt that working in DCC you were never in the 'B' stream. We were always in the 'A' Stream." (**Answer 57:** Page 16).

She explained that she was the first female executive in DCC. She then explained the Flogas transaction which had taken place in 1994 whereby DCC plc., had transferred the shareholding that it held in Flogas into a wholly owned subsidiary DCC Corporate Partners. From recollection she said it was about 30% of Flogas. When asked what she remembered about the Flogas transaction and how she came to be involved in it and how she came to look for advice in relation to it she said, "well I think it was very straightforward. It was all to do with advance corporation tax and the fact that they had manufacturing relief at the time, which would have meant that their tax credit was low. So, therefore DCC plc., at the time it would issue its dividend, it would take account of the tax mix of its income and the tax credits attaching thereto. So, if you had a weak stream of incomes coming through plc., it therefore had an adverse affect on the tax credit level that those dividends would have. So, to have some sort of control over, not necessarily to improve it or decrease it, but to just have an option of changing the strength of the mix, it is more, it would sort of be a normal thing you know, where you would just put it into another company, move it sideways so that you would have control of the strength of the tax credit that would come out of DCC plc." (**Answer 70:** Pages 18 and 19). "With a plc., what you really want to do is not have too much hanging in there because it is really the very top company, you are only really cluttering up the balance sheet and cluttering up everything else if you have too much." (**Answer 71:** Page 19). She agreed that the tax scheme put in place in 1995 with the Fyffes' shares was a different scheme that was put in place in terms of Flogas. The Flogas scheme was 'not as focused on tax mitigation or avoidance'. "It would have had a tax implication ultimately for the people who would receive the tax credit dividend." She agreed that the Flogas scheme had nothing to do with trying to avoid Capital Gains Tax and just had to do with controlling or being able to control the level of the tax credit in the plc. (**Answer 81:** Page 20).

When asked whether she thought the Fyffes tax scheme was 'aggressive' she said, "I suppose I might think it is ambitious tax planning. Is it something that is of sufficient scale and materiality that the Revenue would have due regard to, which of course they would have." (**Answer 95:** Page 22). "What we were doing I would not have seen as being out of the normal course of business in terms of tax planning." (**Answer 96:** Page 22). She agreed that she would not have had an expectation that the Revenue would look at the Flogas transaction.

She could not really remember who raised the issue of notification of the Flogas transaction in 1994. She referred to the fact that she did a memorandum in August 1994 and addressed it Fergal O' Dwyer. To the best of her recollection she didn't get anything in writing from Alvin Price. "I just confirmed to Fergal what Alvin had verbally confirmed to me." (**Answer 117:** Page 26).

The memorandum she sent to Fergal read "Fergal, Alvin Price has verbally confirmed that an inter group transfer of shares is not a notifable event. It was as brief as that". (**Answer 118:** Page 26). She could not remember precisely how the conversation with Alvin went except that she presumably just rang Alvin since she 'always rang Alvin about things'. (**Answer 121:** Page 26). She believes that before she rang Alvin she and Fergal O' Dwyer would have put their heads together 'the whole issue was to get things right because it was a plc transfer for a start…these things were always looked at very carefully from a plc point of view…so everything had to be properly documented'. (**Answer 124:** Page 27). Although she did not remember the precise conversation with Alvin Price she believes that Alvin would have gone through a pretty long conversation with her on the phone about the inns and outs of it but at the end of the day she would have said to him "look, do we need to notify or not and what is the answer here? and he would have said that to me. I cannot remember that conversation but I am just saying Alvin would have thought about it certainly, he could have considered it carefully." (**Answer 139:** Page 29)

When asked why the 1995 notification advice was discussed and minuted at the DCC plc., board whereas the 1994 Flogas transaction was not, she answered, "maybe it should have been done". (**Answer 145:** Page 30).

When asked whether she was aware in 1994 of the consequences of getting it wrong in relation to notification she answered "the Companies Act 1990 was important…the Companies Act requirements are important especially when you are a public company". (**Answer 155:** Page 32). "I would be very aware of the fact that, you know, my job would be at stake if I did not do my job right." (**Answer 157:** Page 32). "I would always have had due regard to what was necessary." (**Answer 159:** Page 32). When asked if she was aware that it was sufficiently serious that you would not want to get it wrong, she answered, "absolutely".

When asked why then she did not get something in writing in 1994 she said, "well I certainly got it in writing in 1995". (**Answer 167:** Page 33). She did emphasise however that she did a memorandum in 1994 recording her conversation with Alvin. Moving on to the 1995 transactions she explained that she stepped down as Group Company Secretary in January 1995 and her official title at that stage was Deputy Group Secretary reporting to three people, Jim Flavin on certain matters, Fergal O' Dwyer on other matters and Michael Scholefield on certain other matters. She confirmed that she was working with Fergal O' Dwyer on the 1995 scheme that eventually led to the transfer of the beneficial interest in the Fyffes' shares. She confirmed that she was actively involved with Fergal O' Dwyer in liaising with CooperS&Lybrand in the early part of 1995. She confirmed that she was kept in the loop throughout in relation to the scheme. (**Answer 209:** Page 40). She was then referred to the short letter from Alvin Price dated 7th April which was faxed to her at 2.50 p.m. on that day. "Dear Daphne, I refer to our telephone conversation. I wish to confirm that in my view where there is no change in the registered shareholder and no movement in the beneficial ownership of the relevant shares in a company (say company A) outside the shareholders 100% owned group, no new requirement to notify company A arises."

When asked why she needed to go back to Alvin Price in April 1995 to get the advice which she had already obtained in August 1994 she answered, "to get in writing what I had not got in 1994." (**Answer 224:** Page 43). She explained her understanding of the rationale for the notification obligation as being "all about knowing who the shareholders are and who would have significant interest in the company". (**Answer 237:** Page 44). "I suppose it is keeping everybody fully up-to-date about what is going on." (**Answer 238:** Page 44). Her understanding was that it was the beneficial ownership rather than the legal title that was more important "I would have thought that the spirit of the whole thing would have been the beneficial ownership, who had control of the shares." (**Answer 242:** Page 45).

As to why the note from Alvin Price was so short she said, "I knew his style and I could surmise that we would have a reasonably full discussion on the phone but at the end of the day I needed something on file to say that what he was telling me and I had not misheard it or anything like that and got it down correctly." (**Answer 246:** Page 46). She suggested that if she had been going to a completely strange lawyer she would have asked them to go into more detail and set it all out but Alvin worked very closely with DCC and was very highly respected and Jim totally respected him. She also knew him as a specialist in company law 'so he knew what he was doing'. (**Answer 246:** Page 46). She was asked how she squared her suggestion that Jim Flavin was a stickler with the lack of specificity in Alvin Price's letter. She answered that later on she did have to go back and get more detail. She stated that she did not know that Fyffes had raised it as an issue in June and July of 1995. She subsequently learned this and when asked whether it was likely that anyone would have gone back to Alvin Price in July 1995 if Fyffes were not making it an issue. She answered, "there are two answers to that. Number one you know you might be inclined to say well, certainly not, you know to the level that it did. Then you know Michael is a very detailed person, he was Compliance Officer and he was Group Secretary, it would not have surprised me either way…he was a very thorough, focused person on doing what he did." (**Answer 262:** Pages and 49).

When asked how secret the tax scheme was she answered, "it was not unduly secret". (**Answer 326:** Page 60). "It is a pretty technical tax planning scheme…It was nearly like a follow on from the Flogas deal…It was something else we had to do to structure ourselves properly for what we wanted to do." (**Answer 329:** Page 61). When asked about her worries from the Revenue's point of view she agreed that there was a worry that it would trigger a Capital Gains Tax liability in DCC and there was also a worry that the anti-avoidance provisions in Section 86 might apply. (**Answer 332** and **334:** Page 61). She denied that there would have been "an undue sensitivity to the Revenue knowing what we were doing except you know in the normal. It would have been normal, if you know what I mean." (**Answer 336:** Page 62). When asked was it more desirable that the Revenue found out later rather than sooner about the tax scheme she answered, "if you are talking about the fact would we have wanted not to notify because we thought we might have alerted the Revenue, if that is specifically the point, I would have said that that would not have come into the analysis of the notification issue itself, in my opinion". (**Answer 340:** Page 63). She does not have a very clear recollection of how she came to ask Alvin for a second opinion. When asked would she have known that the letter was for the DCC Board she answered, "possibly". Ms. Tease was asked for her recollection of the S&L Investments board meeting at 6 o' clock on the 3rd August. When asked if she recalled having the letters from Alvin Price at the meeting she answered "I don't recall having them, I don't recall not having them, I would have expected them to be there." (**Answer 449:** Page 83). The Minutes of that meeting stated 'the directors considered letters from' Alvin Price of William Fry in relation to Companies Acts provision on the notification of interest and insider dealings'.

As for the change of Directors in Lotus Green in August 1995 she believes that was because people were going on holidays and out of a fear that they would not have a quorum of directors to get things done. (**Answer 457:** Page 85). She cannot recollect why she was marked absent from any of the meetings which took place on the 9th and 10th August 1995.

9.1.2 The Executive Directors

(e) Morgan Crowe

Mr. Crowe qualified as a Mechanical Engineer. He worked for some years as an Engineer part of that time in the United States. In the early 1970s he came back and did an MBA in Trinity and worked for a couple of different companies and then joined Development Capital Corporation on day one when it opened its doors in September of 1976. He had known Jim Flavin very vaguely. Mr. Flavin had been the year ahead of him at school in Blackrock but he didn't really know him. Mr. Flavin took on two people and he was one of those people. The other person he took on was David Doran who didn't stay with the business that long.

Mr. Crowe became a director in 1979 and remained a director of DCC until July 2004. In July 2004 he "substantially retired". He stayed involved with DCC in a non-executive capacity in the healthcare business. He has worked with DCC over the years on one or two things that were in his 'bailiwick' which were deemed to be better that he follow through on than somebody else. (**Answer 527:** Page 98).

When asked to explain what his 'bailiwick' was he said at the outset it was 'everything'. (**Answer 528:** Page 98).

As things developed he gradually took responsibility for the healthcare business apart from being a member of the board for all of those years. He explained that he was the Managing Director of the healthcare division and as such his reporting line was back to Mr. Flavin. By the year 1995 in terms of seniority Mr. Crowe was the second most senior executive to Mr. Flavin. He said over the years the business progressed with a very "flat" management structure. "I mean people would have evolved. We didn't operate on the basis of there being a senior executive director who was more senior than the others." (**Answer 537:** Page 100).

"There was no standing on ceremony." (**Answer 538:** Page 100).

Question 539: But the boss was Mr. Flavin?
Answer: "Yes."

He explained that Mr. Des McGuane and Mr. Patrick Gallagher who were on the board from the outset were representatives of the individual investor bodies that had backed DCC in 1976.

Prior to becoming a director of DCC in 1979 he had been a director of a number of the investee companies. He explained that he had gained considerable experience as a director of the various companies throughout the 1980s and in taking certain companies to the market and subsequently when DCC itself went public. "So that inevitably meant that one was on a learning curve of corporate finance issues and activities and structures and Articles of Association and functioning of boards and so on." (**Answer 551:** Page 103).

Question 552: But it was something you learned on the job?
Answer: "It was learned on the job yes."

He also explained that if they needed a particular expertise in any area they got advice. There was no budget for legal expenses. "If it was necessary the culture was that you never did anything in an ill advised way. The other part of learning on the job you know was whereas as a matter of practice we would have updated ourselves every year on the City culture for example. We would have paid good attention to things like Cadbury's and Hicks and so on because the whole corporate governance thing was evolving with a lot of fresh thinking and opinions and so on." (**Answer 554:** Page 103)

Question 555: Characterised by greater regulation and more accountability?
Answer: "Well, greater regulation and more accountability but also some thought into the philosophy of the whole thing and how important it was."

Question 556: What do you mean?

Answer: "I mean the thinking of being responsible to public shareholders, you know, conducting affairs in a proper kind of kosher fashion. And sometimes when we invested in a private company. One of the things in going through our due diligence process would have been a recognition that in some of those companies they needed to have their own game upped and improved in terms of compliance like tax compliance you know. Proper interviews with auditors when the audited accounts were coming out, taking note of the management reports that might come from the audit about the way in which things were structured and conducted."

When asked if the Companies Act of 1990 was something which impinged upon him to any extent as a director he answered, "I don't remember other than there was a growing focus on directors' responsibilities and what they constituted or a growing awareness of that." (**Answer 557:** Page 105).

He knew for example that that is where the insider dealing provisions came in. He said that whilst there wasn't 'a formal class session' when the new Companies Act came in it was something that 'would have been discussed'. (**Answer 662:** Page 105).

When asked what type of culture was there within DCC during this time he answered, "the culture within DCC, and I have to say that the individual from whom the invocation of that culture came was Jim Flavin, was very fastidious. It was painstakingly detailed, fastidious, compliant. You know there was never a culture of saying 'I didn't know'. I mean one was expected to know what criteria had to be observed in every such issue that arose." (**Answer 564:** Page 106)

Question 565: That suggests a culture where corners aren't cut?
Answer: "No there were no corners cut. You know as was the case back in 1976 when we started, the culture out on the street was that corners were cut particularly on taxation matters. We might have been initially regarded as difficult people to live with by some of the people from whom we took investments because we were quite fastidious in not being

associated with anything where corners were cut…it was driven very much from the top, yes." (**Answer 566:** Page 107).

Mr. Crowe explained that he knew the Fyffes' people, having been involved in corporate finance activities in the 1980s and into the early 1990s. He agreed that the Fyffes' stake held by DCC was an anomaly however "it would have been wrong for the market to get the impression that this was a shareholding in which somebody was anxious to do a deal and therefore the shares would be overhanging the market. That would not have been the correct impression". (**Answer 572:** Page 108).

Nor would the correct impression have been they were an industrial holding group and were likely to take over Fyffes. It was more likely that they would sell than they would increase their stake. He said it was more accurate to describe DCC as a taker of an opportunity rather than a seller, if an opportunity arose. In such circumstances it was natural that DCC would wish to prepare for that eventuality and it would have been the responsibility of the Finance Director talking to the Chief Executive where those discussions would have taken place. (**Answer 586:** Page 111).

He also explained that the implications of a large Capital Gains Tax bill was "that what you are ultimately going to pay to the taxman…is the bit that is generating a return today." (**Answer 587:** Page 111).

Question 588: Explain that to me.
Answer: "Well you are getting a dividend on those shares today. You know, as soon as you effect the transaction and the CGT gets taken away you get a return only on what's left. I'm just saying that a consequence wasn't just paying the CGT it was saying goodbye to the earnings that would derive from the value of that CGT or from an equivalent value, let's put it that way."

"Realisation created a tax issue which if there was a way you could plan around it would be desirable to do that." (**Answer 590:** Page 112).

"You wouldn't have acted to the best of your ability in shareholders' interest if you hadn't sought to do something about that…provided it was done properly. And that it was lawful." (**Answers 591, 592** and **593:** Page 112).

Mr. Crowe said he became aware of the scheme whereby the beneficial interest in the shares was to be transferred to Lotus Green "not long before the thing came to the board". (**Answer 600:** Page 113). "I would have found out about it when it was a concrete proposition that had been checked out and was ready to bring forward." (**Answer 602:** Page 114).

Mr. Crowe says he didn't remember the issue arising between DCC, on the one hand and Fyffes on the other hand, as a 'particular sharp controversy'. (**Answer 626:** Page 118). In relation to the question as to whether there should or should not be notification Mr. Crowe said, "the driving force was what is the right thing to do. Speaking very personally, when I looked at this thing it might have been simplistic but I saw the shareholding moving from one DCC pocket into another DCC pocket and there was no question of any third party rights being disregarded in any way. So I didn't see it as a particularly consequential thing but I saw it as something on which satisfactory legal advice should be taken and we would act in accord with that." (**Answer 632:** Page 120).

Question 633: When you say no third party rights were being affected that's not quite the case, insofar as the Revenue Commissioners and the general body of taxpayers?
Answer: "I wouldn't accept that for the following reason: the Revenue do things in retrospect. They don't examine potential things that might happen and revert to you with a view as to whether that would be fine or wouldn't be fine. The Revenue act in retrospect in light of the tax legislation that exists at the time when they take the view. So it wouldn't be normal business practice in my experience to go along and say 'we might think about doing this, let's ask the Revenue and see what they think'. It doesn't work that way. It works that you take advice, very often from tax advisers who might have been tax Inspectors in their earlier career and you have regard to that advice and then you make your decision. In any event, I mean I would have been aware that the companies were

involved, plc, S&L, Lotus when it changed residence would be making tax returns. Whatever was to take place would be unfolded there in all its, you know, in the full clarity."

Question 634: Yes?
Answer: "So I didn't see, I mean to say that the rights of the Revenue could in some way be infringed…"

When asked if he had a view before the transaction went through, whether it was desirable that this transaction would be publicly known or not he answered, "no I would have had a perception that it could give rise to speculation that something was about to happen that wasn't about to happen". (**Answer 649:** Page 123).

Question 650: Yes?
Answer: "That is this positioning for some imminent transaction and will those shares then be overhanging in the market, kind of, you know, from the time."

Question 651: Yes? Was that spoken or unspoken?
Answer: "That was unspoken. That was unspoken."

Question 652: …Do you think that that was likely to be weighing to whatever extent on the minds of your fellow directors.
Answer: "I have no idea. I have no idea. That is the only answer I can give you."

"I stress however that the way the matter would have been approached at the time is 'is it necessary to notify? Yes or no.' If it is not necessary to notify well then why notify." (**Answer 655:** Page 124).

Question 656: If it is a hard call and there are consequences?
Answer: "If it is a hard call and there are consequences then it is necessary to notify."

Question 657: No, no, but if it is a hard call in the sense that there is no definitive view there is a view that it is, there is a view that it isn't, but the consequences of getting it wrong are fairly major what do you do then?
Answer: "If the consequences of getting it wrong are fairly major I think that would, and there was a material possibility of getting it wrong."

Question 658: Yes?
Answer: "I think on either of those, first of all I think I said that coming to the transaction in the first instance, was that it was going from one pocket to the other pocket. That DCC, the DCC Group was the shareholder before and after the transaction."

Question 659: Yes?
Answer: "They were the material considerations, and that was ultimately reflected in the advice which was given by Alvin Price."

Question 660: Did you know at any stage that getting it wrong exposed you personally to the possibility of criminal sanction?
Answer 661: "…I didn't see a material possibility of that being the case at the time."

Question 662: You mightn't have seen a material possibility, but did anybody bring to your attention "Morgan, if we get this wrong there is the embarrassment and the reputational risk to DCC plc., that the Directors could be prosecuted and a fine imposed".
Answer: "Well no, nobody."

Question 663: Directors sent to jail for this
Answer: "Nobody brought that to my attention."

Question 664: Yes?
Answer: "But it was a possibility of which I wouldn't have been unaware, but I would have seen it as a theoretical scenario rather than a practical scenario."

"The only real consideration, as I would have seen was whether it was in accordance with tax law or it wasn't and that would be determined in the fullness of time. If it was something on execution, if an ultimate disposal on execution was challenged by the Revenue and the Revenue were to prevail in a challenge, well so be it." (**Answer 667:** Page 126).

"But I never had a contemplation that this, you could be doing something materially wrong here." (**Answer 668:** Page 126).

Question 669: Now is that because you didn't consider it or weren't advised on it or?
Answer: "No because I found – that was because I found the advice – I mean I am aware that there can be technical infringements which make them, the fact that they are technical does not diminish the fact that they are infringements, and are therefore potentially illegal."

Question 670: Yes?
Answer: "I was convinced by the advice, I thought the advice made sense."

Question 671: Yes, but in terms of advice making sense is that because it accorded with what you wanted or because it made sense?
Answer: "Well, my view of that is because in absolute terms I thought it made sense."

Mr. Crowe was asked whether he took the view that third party shareholders in Fyffes were entitled to know if the 10% stake held by DCC was being readied for sale. He answered, "no. I believe that because it is the essence of a public company that its shares are saleable at any time by any shareholder." (**Answer 689:** Page 129).

Question 690: Yes?
Answer: "He doesn't. A public company shareholder. It is not like a private company where there might be pre-emption rights, when you…become a third party shareholder and you buy shares in Fyffes, you do so in the knowledge that every other share in Fyffes is

held by somebody who could sell it tomorrow. Nothing has changed. The fact that a shareholder might want to plan his tax affairs, so that a disposal would be more tax effective. I don't believe it is a cue that needs to be communicated to any shareholders."

"… It flies in the face of the logic of how public companies are entitled to, and public company shareholders are entitled to operate. You could sell, the fact that you, you know, it is almost like saying 'I have a sizeable stake in such and such a company. I wake up in the morning and I say that my circumstances are such that I would like to sell that. I better go out and tell people, announce to the market that I am thinking that way' that wouldn't be reasonable and that wouldn't follow." (**Answer 691:** Page 130).

He then went on to explain "I mean what I saw was, I saw legal advice, the bottom line of which, based upon, you know, the purposeful intent to this particular piece of legislation, and the facts of the matter, there is no need to notify. Fine. Move on, next piece of business, would have been the mindset at the time." (**Answer 698:** Page 132).

Question 699: Yes, what did you know about the purposeful construction or principle of purposeful construction?
Answer: "Well I knew what I was told in the letter."

Mr. Crowe was then referred to the papers which were sent out to the board in advance of the meeting of the 31st July 1995. He was asked if it was usual or unusual to have appended to your board papers legal advice. He answered, "if and as required. It didn't happen very often." (**Answer 712:** Page 134).

He was asked if he recalled ever having Solicitors advices appended to board papers before or since. "I can't remember a specific incidence." (**Answer 713 : P**age 134).

He agreed that the advice from CooperS&Lybrand and Tommy McCann wasn't circulated to the Directors.

Question 719: Yet the essence of what you were talking about is a tax scheme.
Answer: "The raison d'être for doing it…" (Interjection).

Question 720: Was tax?
Answer: "Was tax, yes."

Question 721: And yet you are not being asked to consider the tax scheme or the advice that was obtained in relation to that tax scheme.
Answer: "No that is right and it is stated here 'have been advised'. And that you know that that arrived at a conclusion. And in relation to the legal advice, I mean I don't know why that…" (Interjection).

Question 722: Yes, but there is no doubt.
Answer: "This could easily, and I can't give you the answer, it could alternatively have said 'and that we have received advice from Fry's that the matter doesn't require to be notified'. It could have said that."
Question 723: … No but, that is correct, it could have said that, but it didn't.
Answer: "I don't draw any…particular conclusion from it."

Question 725: You agree that there is a different treatment.
Answer: "There is absolutely."

Question 726: That one is appended, one is not, and on one Mr. Flavin wishes to have an agreed board position.
Answer: "Yes."

Question 727: Why do you think he wanted an agreed board position on the legal matters and not on the… (tax scheme) (Interjection).
Answer: "Yeah, maybe, maybe the tax stuff was perhaps a little bit more convoluted, a little bit more extensive. This was pretty concise, on one letter. I mean I wouldn't have given it any speculation."

Question 728: At the time?

Answer: "At the time. As to, you know, why it was, to draw any distinction between, yeah I wouldn't draw any distinction in searching for some intent or other…"

He said he didn't read anything into this distinction at the time or now.

When asked if he was ever asked to concur with legal advice before. He answered, "well concur? I mean if we want to be very, if we want to be rather than concurring, which implies, use those words implies that yes, we with equal status to the advisor agree at our own absolute, our own absolute wisdom rather than make…" (Interjection). (**Answer 734:** Page 137).

Question 735: Or peril?

Answer: "Or peril, but rather more correctly saying 'are you satisfied with the advice. Do you find the advice meets your requirements to be satisfied?' You could have if you wanted to parse the words and what they precisely mean."

When asked if the use of these words did not suggest that there was some worry about this. Mr. Crowe said, "absolutely not. Absolutely not. And one thing that characterised, one thing that characterised Jim Flavin's corporate governance was that he always had respect for his board, and you know would never have followed a practice or given credence to an interpretation of the board, 'this is just, look that is just, we will go through that and that will be all right.' I mean there was not even an approach either spoken or unspoken. The board was always treated with respect. I think this is reflective of that. This is the way I would have read it."

Question 742: At the time?

Answer: "At the time."

When asked if he knew why the words 'corporate restructuring purposes' were used in the Minutes he said, "I didn't, that it was non specific."

Question 747: Nor as accurate as it could have been?
Answer: "Its non specificity doesn't make it non accurate."

Question 748: Well, if I look at that sentence it doesn't tell me why it is being done?
Answer: "Exactly."

Question 749: Whereas if it had said 'for tax planning reasons it was proposed' then I would know exactly what it was about?
Answer: "Absolutely, I agree with that."

Question 750: Just why would there, if there was, why was there reluctance to so describe it?
Answer: "Well, I wouldn't conclude that there was a reluctance."

Question 751: Yes?
Answer: "I mean I think that is a further step."

Question 752: Yes?
Answer: "To claim that it was reluctant, I think, I think corporate restructuring purposes would be a generally used term."

Question 752: Euphemism? No?
Answer: "No it is definitely not euphemistic. It is non specific. It doesn't contain anything that is not true. It just doesn't, it is not explicit about the purpose as you say. I wouldn't draw anything from that. I mean, there was no, absolutely no element of being concerned about somehow hiding this or not revealing it. I mean, as I think I said earlier on, that this would be out in all its glory in tax returns by the various entities involved within a matter of months. I can't remember the time scale in which capital transactions had to be reported but …"

Question 754: I think the reporting from Lotus Green we have learned, was December 1996?
Answer: "Yes."

Question 755: So, within 16 months or so?
Answer: "Yes. I don't know when the others would have had to report. I mean I wasn't, that wasn't my, if you like, area of expertise."

Question 756: Yes?
Answer: "But I would have had knowledge that it would be put in black and white in front of the Revenue in due course. So I mean it wouldn't be, it wouldn't be, I wouldn't see any particular purpose in being served by creating some kind of concealment here. I have no belief or awareness that that might have been, such might have been the intention."

Question 757: But short of concealment you wouldn't necessarily want to put up in lights that this was being done for tax avoidance, albeit lawful tax avoidance purposes?
Answer: "You wouldn't want to put it up? I suppose you wouldn't want to put it up in lights."

Question 758: No?
Answer: "Sorry you wouldn't have an instinct that would make you desirous to put it up in lights, lets put it that way."

Question 763: Yes?
Answer: "But I mean I would have, I would have a frame of mind, or a kind of general perception and awareness that you have an obligation to tell the Revenue forthrightly and correctly what you have done."

Question 764: In your tax return?
Answer: "In your tax return, having done it."

Question 765: Yes?

Answer: "You set about doing what you are going to do and the best anticipation you can in terms of what, how the tax legislation will bear on you, and that is as much as you can do, and the Revenue at the end of the day will make up their own minds as to how they see it."

Mr. Crowe was asked how long the discussion at the DCC board meeting took around the proposed transfer to Lotus Green. "I can't say how long in terms of Minutes but it wouldn't have been drawn out. There would have been discussion about the makeup of the transferee Lotus Green in terms of its board or its intended board." (**Answer 816:** Page 150).

Question 817: For what purpose?

Answer: "Well for the purpose of these people would be charged with making any, would be given discretion and would make any decision that had to be made in relation to the future of that shareholding. Whether it was going to be disposed of or whether it wasn't going to be disposed of and under what terms and what price, sometime down the road. So, there was a desire of the board to be satisfied that the guys who would then be directors of Lotus Green were, you know, correctly qualified persons to be directors."

He then explained that they did in fact know the Dutch people who were proposed as directors. "There was a guy called Diepenhorst who was an IMD Secretarial kind of professional. There was a guy called Jansen Venneboer with whom I had some prior contact because he ran a small sort of a small M&A boutique and I had done some work with him hunting for acquisitions in Holland. There was a guy called Henry Roskam who was at that time a director of a bank called Crocker bank I think. They came to Dublin to meet people and you know become known. They were people of good standing in business." (**Answer 820:** Page 151).

Question 822: Can you remember whether you understood anything about the control of Lotus Green at that time?

Answer: "I knew that, I mean I hesitate to give a detailed answer, I knew that it had to be controlled in Holland. I think there was a degree of negative control with A and B directors but that the majority of directors were Dutch resident. That is it."

Question 823: The negative control was that no material decision could be made (Interjection).
Answer: "Could be made without the assent of."

Question 824: An A director and a B director?
Answer: "Yes."

Question 825: Which, and again this is I'm sure the intent, it prevented the B directors from doing anything that the A directors didn't want?
Answer: "Yes."

Question 826: It neutralised their numeric majority or gave a veto in circumstances (Interjection).
Answer: "It gave a veto. It gave a degree of protection, I suppose, that they couldn't take a flier and do something radical."

Mr. Crowe was then asked to look at the letter of advice from Mr. Price of the 21st of July. He explained in detail how he understood the letter and stated, "the decision to notify or not notify was based clearly on the understanding of obligation or non-obligation as the case may be. If there wasn't an obligation then there was no good reason to notify." (**Answer 862:** Page 159).

Mr. Crowe said he had confidence in Mr. Price, "I had done a number of transactions with him, corporate transactions with him. As I said earlier you work with certain people and you establish a level of trust and confidence and I would have read that on the basis that I had trust and confidence in the source and didn't really need to agonise, second guess." (**Answer 866** and **867:** Page 160).

When it was suggested to him that there was some lack of certainty in Mr. Price's advices he agreed that the sentence "while making notification is clearly the more cautious approach …" suggested some room of plausibility of another argument. (**Answer 870:** Page 161). "But he found the 'preceding sentence' (stating notification not to be required) to be conclusive." (**Answer 872:** Page 161).

Question 873: What was the downside in notification?
Answer: "You don't go on doing things that it is not necessary to do. There was no particular downside. No particular downside."

Question 874: It wasn't awkward, it wasn't inconvenient, it wasn't expensive, it had been done a lot?
Answer: "Just another chore that might raise speculation that something was going to happen that wasn't going to happen."

Question 875: Yes?
Answer: "That, I emphasise, is a personal comment, there was no question of the board saying: 'Oh we might raise hairs here and therefore if we can find a way to avoid it we avoid it' that was not the situation."

He said that they were not advised in specific terms of the civil or criminal consequences. "Nobody came and said: if you get this wrong, guys, you could be open to a criminal charge." (**Answer 876:** Page 162). Nor was he aware that there were civil consequences that neither DCC nor Lotus Green could take action to enforce their rights in relation to their interests. "No I wouldn't have been conscious of that. I never would have taken the view, out of ignorance I admit, that the shares are somehow contaminated or something, that they might get locked up." (**Answer 879:** Page 162).

"…That is not something that would have crossed my mind." (**Answer 880:** Page 162).

Question 881: No, I don't expect it to cross you mind, but had it been, had you been informed of it presumably you might have looked at the more cautions (approach)?
Answer: "It might have caused you to think about a more cautious approach, it might have." But he added "there are bigger risks in business so I wouldn't have rated such a thing as being a risk to be quite frank." (**Answer 884:** Page 163).

When asked if there was a discussion at the board of the concerns being expressed by Fyffes Mr. Crowe said, "I don't think there was." Nor was he aware of the fact that Fyffes didn't want DCC to notify to them even though he could understand why they might not have wanted it. But he doesn't remember it being discussed. Mr. Crowe said, that his recollection is that the board "perceived it was no big deal, that it was a bit of responsible tax planning. The material considerations were: was the tax advice sound, who were the guys in Lotus Green to whom we were handing discretion and as to whether this would be sold or not sold at some point in the future, are we satisfied with that, are there legal obligations arising which we need to do something to comply with? They were the kind of core questions. Once you answered those, we believe, largely for the work done by Fergal that the tax advice said yes, it is worth going here. We believed that it was, therefore, a sound thing to do in terms of tax planning whenever such a transaction would arise, and it didn't actually arise until almost five years later. Are there legal issues that need to be dealt with on which we should take advice and then digest that advice and act in accordance with it or get further advice if necessary? They were the material things on which members of the board would have had to form a view in approaching this. There were no other side issues about, if people know about this, is it going to have an adverse affect on Fyffes or are Fyffes going to get upset. Fyffes were told as a courtesy what was in contemplation. The shares were no more saleable the day after this transaction than they were the day before. There is freedom at any time in a public company if you are not tied up with some restrictive covenant that under the articles you can sell to whoever you want, whenever you want. No pre-emption provisions, none of that changed, it was an essential freedom of being a shareholder in a public company. They were the issues." (**Answer 906:** Page 166 and 167).

Mr. Crowe was asked if it was likely that the Dutch directors knew before the 25th of August that they were going to be appointed.

"They must have been, becoming a director involves taking on responsibilities and it is meaningless to appoint something completely in absentia if he has not agreed to become a director." (**Answer 912:** Page 169).

(f) David Gavigan

Mr. Gavigan explained that he had a B.Comm degree from University College Galway and is a Fellow of the Institute of Chartered Accountants. He qualified as an Accountant in Craig Gardiner & Co., which is now PWC in 1975. He joined Shell Chemicals in 1976 and stayed there until 1979 and on the 1st January 1980 he commenced with DCC. He left DCC in September 1995. When he joined, there was just Jim Flavin, Morgan Crowe and himself.

At the beginning it was a very small but very dynamic organisation. He was made an Associate Director in 1982. He became Company Secretary at the end of 1980 and he attended all the board meetings from that time onwards. He became a full director in 1984. There were about 10 or 12 shareholders in Development Capital Corporation at the time, all of them institutional except for Jim Flavin. Mr. Gavigan explained that he acquired some shares in 1984 along with Morgan Crowe and Tony Mullins who was there at that stage. He remained on the board for 11 years until he left in 1995.

He explained that the key function was to go out and get deals, venture capital deals. "We weren't a reactive organisation, we were a proactive organisation and we would try to analyse and develop relationships with different people so as to be the source of deals. In those days in Ireland there wasn't an awful lot of entrepreneurial activity, it was kind of scarce on the ground and if you weren't prepared to go out and actually get the deals you more than likely might be sitting back in your office doing nothing. At that stage DCC was absolutely a development and venture capital company. Later on as things emerged in the late 1980s we divided the company into two parts. There was the corporate finance

arm which Morgan Crowe was the Managing Director of, that was the title and I was Managing Director of the venture capital arm. My responsibility in the mid to late 1980s was to do deals and get deals and we very often actually would ring companies and say to companies "we believe you are developing a very interesting business there. We would like to go and meet you." (**Answer 189:** Page 43).

He explained that he was involved with Jim Flavin in November 1980 when DCC first became involved with Fyffes.

Question 194: When you say you did that deal, what does that mean?
Answer: "I was the boy, Jim was the man and I was the boy on the deal. I did all the analysis, all the interaction with the McCann Family on the ground and with Neil McCann, the father."

His recollection as to how it happened was that it was through Alex Spain the introduction was made. "FII was probably one of the most sought after companies by the Irish acquirers of companies…everybody wanted to buy or get into the McCanns. DCC took a 25% stake of which they took 10% themselves and placed the other with their institutional investors."

After the stake was acquired and after Fyffes was floated on the USM Mr. Gavigan's relationship with Fyffes 'kind of ceased at that moment because there was only one board seat available and the primary and absolute relationship was with Jim and the McCanns and the FII Board'. (**Answer 200:** Page 45).

Mr. Gavigan explained the evolution of DCC and its thinking in relation to Fyffes as follows, "around the late 1980s/early 1990s we used to have 'off sites' and we were wondering where was the road going to bring us to in terms of taking a 5 to 10 year medium view, where would DCC be. Obviously in a portfolio of 40 investments, or 40 plus I think it was, and I may be wrong about that, there were a number of investments which had the potential to be significant companies, i.e. they would be potentially

internationalised, i.e. grow outside of Ireland. So we sat down and we looked at the companies, we looked at the quality and depth of management in those companies and those we believed to be the strongest companies, who had the best chance of being an international type company which had, in other words, unlimited potential to grow. Because a lot of companies which we had been involved in really had a limit of where they could go. So we then came up with a plan, I think it was five divisions at the time, that these companies had the potential to be seriously large companies looking to the future. However we had only a minority stake in a lot of them. The question arose about Fyffes…there was no way we were going to take over Fyffes, though that was discussed. The view was Fyffes was a super company. The relationship with Fyffes was excellent with Jim, and it was a publicly quoted stock. Our ambition was at some stage to get a 'what would the interest be in terms of the shareholders or the institutions, if they wanted to be in Fyffes they could buy in Fyffes.' If we held a significant stake in Fyffes it didn't make any sense to them because if I wanted to be in a fruit company I would buy Fyffes …so to that extent it was slightly anomalous but I was a greater admirer of the Fyffes company so I wasn't quite signed on to (the anomalous view) as maybe some of the other people." (**Answer 205:** Page 46 and 47).

Mr. Gavigan was then asked when he first became aware of a proposed tax scheme in relation to the Fyffes' shares. He said, "I can't really answer that other than to say we were always very conscious that we had a structure in DCC, which was a pretty poor structure in terms of tax planning. CGT at that stage was 40%. We were also very well aware that the way we accounted in DCC for earnings of all our investments was associate accounting." (**Answer 217:** page 50)

Question 218: Which means?

Answer: "Your interest in the company is consolidated as your proportion of the earnings/profits before tax I should say. In other words, if you had 20% of an investment, when you come to do your annual accounts, you take 20% of that – these are accounting rules – into your PBT, profit before tax."

Answer 220: "But if we sold Fyffes the income from the capital, the interest of the income from the capital we would get from the sale would have to replace those earnings which were involved in the P&L Accounts. In other words, we constantly were looking at the situation where if we sold Fyffes tomorrow morning, our net proceeds would equal to "X". They say the carrying rate of cash at that moment might have been 10%. So 10% on that cash would not equate to what Fyffes were contributing to us in terms of profits before tax … so the hit of 40% was a huge issue, so if somebody came over the horizon on a white horse wanting to buy it, our calculation which came immediately into all our heads was 'hold on a second – X price less 40% equals a cash capital of X, take the percentage of interest – we are still under water.' So our earnings would have been affected so it was a crucial thought process. It may sound very financially driven, but we were conscious of the impact that might have on our earnings per share, even when we were a private company because we were keen to drive a line of profit upwards before the floatation."

Question 223: Just so I understand it…it doesn't mean that you would actually have the cash 10% of the Fyffes' profits – it is an accounting exercise… (Interjection).
Answer: "No, that's right. It is a pure accounting exercise. It wasn't a cash flow. You are right."

Question 224: You got dividends on your shares.
Answer: "You got dividends, but they would only have been a small proportion of the contribution that we were allowed to take into the P&L account of DCC on a consolidated basis."

Mr. Gavigan argued that "as a director of a company whether it be in the public arena or private arena, you have a responsibility to all the stakeholders in the company to protect their interests. One of the ways you protect their interests is by ensuring the company is properly managed…and driving the company forward is to, if you can, mitigate the tax implications for any avenue of that business. So at that moment in time it was an extremely punitive tax and it was not in the interest of the shareholders of DCC to exit the company and pay 40% and if there was a way to do it properly, legally and morally…you

should do it…in America if you didn't do it you would have a class action." (**Answer 229:** Page 53).

"…As part of corporate governance you are there to protect the interests of all the stakeholders and one of those interests are that you do your best in terms of running the business but also in terms of the planning of your disposal and sheltering as much income as you can. It was a perfectly legitimate activity." (**Answer 230:** Page 54).

Mr. Gavigan says that the question of the tax implications on an eventual disposal of the Fyffes' stake was "always on the back boiler. It had been there for a number of years." (**Answer 232:** Page 54).

Answer 234: "…We were always conscious of the difficulties of an exit and the impact it would have on any gain on exit we would have because of Capital Gains Tax. It was a constant argument. For instance, some of our shareholders over the years would be saying to us 'guys why don't you exit company X, and not just Fyffes, other companies that we have had for 4 or 5 years'."

The shareholders arguments were that in disposing of the stake it would avoid the necessity to have a rights issue to raise more funds for investment. "I vividly remember the argument…'if we do, we will create for you guys a 40% Capital Gains Tax within the DCC structure and if we distribute those, there will be another tax hit'. So if you were looking at the returns of DCC, we were automatically being hammered in terms of the returns to Standard Life, say, or Irish Life." (**Answer 236:** Page 55).

Mr. Gavigan confirmed that the tax scheme was not being put in place to take immediate advantage of it.

Question 260: It seems to be more of a "down the road" type preparation than an immediate one or what is your sense of that?

Answer: "No I would have thought, I mean, Jim was the guy who was always looking over the hill as to the likelihood of different events and what impact it would have on the business. At that stage there was no indication that the CGT rate might change down to 20%.… so we can put a structure in place that will allow us to make a commercial decision when the time is right and that we wont be scurrying around frantically trying to find a tax scheme."

Question 261: Yes.
Answer: "It was good corporate governance, in my opinion."

In terms of 'corporate governance' Mr. Gavigan was asked if that was something that Mr. Flavin as Chief Executive would have been driving or if the impetus for this was coming from somewhere else. Mr. Gavigan said, "I would say we were extremely conscious of our governance responsibilities as directors and our fiduciary responsibilities. I would have said that Jim was very conscious of that. He was constantly in communication with Fry's, I would say, I would say that there was a culture of doing it the right way you know." (**Answer 284:** Page 68).

He said that this culture was there right from the beginning 'of doing the right thing'. "I remember on more than one occasion where we would have had significant disagreements with some of our investee companies about incidents that maybe should not have happened. Nothing of any major consequences but issues that we would not like to be associated with." (**Answer 285:** Page 68).

Mr. Gavigan referred throughout his interview to 'a compliance culture' within DCC and was asked where that came from. He answered that it came from Jim Flavin. "(Jim) Flavin always wanted to do the right thing…Flavin liked people to look up to him, you know, as a man of substance, not so much money substance but a man of strong integrity. …business was his life or is his life and he would be very conscious of reading about what is going on in America: in corporate governance, at boards and so on…and also conscious of what was going on in the venture capital industry in America and nearer home maybe in

the UK. …It was always my view that we tried to do the very best in DCC in terms of corporate governance, in terms of doing the right thing and, you know, I would have said Jim was fairly tough on that. We had our differences of opinions on one or two occasions, nothing very major." (**Answer 288:** Page 69).

Turning specifically to the notification obligations of the 1990 Companies Act he said that "We were aware…that you had to notify under certain circumstances and we would have sought advice from Fry's on that." (**Answer 289:** Page 70).

Answer 290: "...You know, we were all, or most of us were Chartered Accountants, there were a few engineers. Anything that we weren't sure of or we had a notion that there might be something that required – we would consult with Fry's."

Mr. Gavigan was asked if he knew that failure to comply with the notification requirements of the 1990 Companies Act had civil and criminal penalties. He answered, "absolutely". (**Answer 297:** Page 72).

Question 298: When you say absolutely how can you say that?
Answer: "Well, we asked. My recollection is that we asked Alvin Price. Fry's and Alvin Price in particular to opine on the issue."

Question 299: Yes. We will have a look at the opinion but I certainly see nothing in writing which highlights or identifies either the civil or the criminal consequences of a failure to notify.
Answer: "Well, my recollection is that we were aware that there were issues, you know, if we didn't do it right and we asked Alvin. He would have been familiar with what we were planning at the time and we asked Alvin to opine do we need to make notification. Because as I understand it, it is done through the company, i.e. we would have had to tell Fyffes we had done X and then Fyffes notify the Stock Exchange."

Question 300: No.
Answer: "Is that not right?"

Question 301: Section 67 is an obligation to notify the company and then 91 appears to be an obligation to notify the Stock Exchange.
Answer: "But we would notify Fyffes."

Question 302: Well I think it is both.

Question 304: I have not seen any written advice where the consequences of a failure are spelt out?
Answer: "That could be correct. That could be correct. I cannot answer that."

Question 305: Therefore, if it wasn't spelt out in writing and if you answer as you did in saying "absolutely" to me, either you knew that at the time because somebody told you or you have since looked at it and you have seen that there are those consequences.
Answer: "Well, at the time you know, I can't remember exactly precisely at the time but we knew that if we didn't do – I suppose it goes back to the earlier comment about we knew that if we didn't do it properly that there were consequences for us as a board, because we were a board of a plc. I don't remember or can't recollect a discussion about the consequences if we didn't do it properly."

Mr. Gavigan thinks he would have been aware of the civil and criminal sanctions at the time but could not recall them and hadn't looked at it since because he hadn't had any dealings with the plc since 1995. He is certain however that he would definitely have read the board papers that were sent out for the meeting of the 31st July. (**Answer 315:** Page 75).

When asked would it have been usual or unusual for him to get Solicitor's advices with board papers he answered "not when it came to an issue like this". (**Answer 318:** Page 76).

Question 319: Had you ever had an issue like this before?
Answer: "Not in the situation of a notification to the Stock Exchange or to the company, no. There were other issues, though, where we would have been involved with issues which would have regarded the legal process."

He was then asked why Mr. Flavin would want an agreed board position on advice from Solicitors.

Answer 323: "Well, it was the style that where there was an issue as this, where there were tax issues and there was the letter from Alvin, that it was really a question of making sure that everybody was aware of the position and it was debated at the time. He would have pointed out the pros and cons and then after…" (Interjection).

Question 324: Who would have debated those?
Answer: "Jim, and us as a senior executive team would have discussed it. Then it would be, we always felt it right and proper to bring it to the attention of the non-executive directors so that they were aware and informed of the debates and the decision that was made and if anything how we dealt with that, i.e. the issue about notification."

Question 325: Yes, well can you recall any other time at which Solicitors' letters were sent when Mr. Flavin asked for an agreed board position?
Answer: "I can't but that doesn't say it didn't happen because there were different (issues) over the years."

When he was asked if there was something a little bit unusual about this, that normally in terms of the tax structure, you would want to get the best people involved and you would want to have the structure set up in such a way that there was a fair degree of certainty that this was going to work.

Question 334: Once you obtain that advice, if there is certainty in relation to that advice, then you either take it or you don't take the advice, isn't that right?

Answer: "Yes."

Question 335: Insofar as the tax scheme is concerned, there is no request for a view in relation to the CooperS&Lybrand view or Mr. McCann's opinion isn't that right?
Answer: "That is right, not in this section here, but I am surprised that it isn't in other meetings."

Question 336: Yes. Why would you be surprised? I mean, if Mr. McCann opined that, as far as he was concerned, this scheme would work and that he was prepared to put his professional indemnity insurance on the line in relation to the scheme you either accepted that or not?
Answer: "Yes."

Question 337: Isn't that correct? In other words, I mean, as knowledgeable as you might be, you wouldn't be in the business of second guessing either CooperS&Lybrand or Mr. McCann?
Answer: "My recollection is that we had a third person involved in that process."

Question 338: Yes you had Pat O' Brien of SKC, but that was for a second, if not a third opinion?
Answer: "Yes."

Question 339: That wasn't in any sense to doubt Mr. McCann or CooperS&Lybrand but it was a 'to be sure, to be sure' type of situation, isn't that right? I mean, if you had advice from Mr. McCann and you had advice from CooperS&Lybrand and you had advice from SKC, KPMG and down the line the Revenue challenged this, you would be going back and saying, 'here we have Tommy McCann's opinion…'. (Interjection).

Question 340: …What I am raising here with you, is because there is something a little bit different about the way…that consideration was given of the advice from William Fry on the notification of interest and insider dealing matter?

Question 341: If you get advice from professional advisers, be it accountants or lawyers, my expectation is that when they give that advice, if that advice is clear you take it or leave it.
Answer: "Yes."

Question 342: You don't say 'here' is Mr. Shipsey's or Mr. Cush's Opinion and I want an agreed position on this?
Answer: "Ok."

Question 343: Is that something that you would agree with? Am I right in relation to that or not?
Answer: "I think it all depends on the circumstances."

Question 344: What makes the circumstances here different?
Answer: "About Fry's letter?"

Question 345: Yes.
Answer: He explained that this was largely because of the high regard that they had for Alvin Price. "…Quite frankly, I personally have the highest regard for Alvin Price as a corporate lawyer. All the business I have been around all the last number of years in this industry, I would have the highest regard for him. One of the best there is, if not the best. If Alvin said X, I didn't really question it too much. I debated it with him but I took his view as the correct view. I also had the view that Alvin was a big enough guy that if he had a doubt in his mind (and I cannot answer this because I have never challenged him on it) that he would consult with one of his partners. He knew us intimately and he challenged us on a number of occasions and, you know, very aggressively at times. So quite frankly, I didn't see it as terribly surprising at all. I don't know whether that answers the question."

Question 348: Where you talk about DCC having the highest regard for Alvin and Alvin being very, very close to the company, if Alvin was giving you the unequivocal advice, my expectation would be, because of the high regard that you held him in, that you wouldn't be asking for an agreed position that you would take it?
Answer: "I cannot explain the words that were used in the Minutes. I just can't explain those."

He was then asked if he recalled reference to a slight difference of opinion with Fyffes in relation to the notification obligation to which he answered, "no". (**Answer 350:** Page 84).

Mr. Gavigan was asked whether the Revenue not knowing, or at least it not becoming public was weighing on his mind and on the minds of the board.

Question 371: So would I be right in understanding that it was better that the Revenue didn't know than they did know?
Answer: "I suppose the answer is yes."

Question 372: Yes. If you didn't go to the Revenue, one of the ways that they could have found out about it would be if there was a notification to the company and perhaps more likely to the Stock Exchange, the 10% stake in DCC had been transferred to another company to another wholly owned subsidiary?
Answer: "Yes."

Question 373: Again, the likelihood, and you may not have articulated at the time, but the likelihood of that making news was fairly high?
Answer: "Well, I don't recollect a discussion about that point."

Question 374: No, I appreciate… (Interjection).
Answer: "I have no recollection whatsoever that that actually was specifically discussed."

Question 375: Yes. Well, was there an understanding then, short of a discussion, that it is better that the Revenue don't know than they do know?

Answer 377 "I can safely say I don't recall a discussion about that at all, or an understanding. It may be Alex Spain had it in his head, Paddy Gallagher may have had it in his head, but I can't recall that."

Question 378: Yes. If it was the case that it was a call that had to be made on whether you notified the transfer to Fyffes or didn't notify and if that was a close call, there was no particular difficulty in the sense of logistical difficulty in notifying Fyffes or the Stock Exchange. It was a drafting of a document and sending it in the post, isn't that right? A notification under Section 67 or under Section 91 was a simple matter.

Answer: "Yes."

Question 379: It wasn't that you had to go off and spend an awful lot of money and incur expense, isn't that right?

Answer: "Yes."

Question 380: Therefore, where there is a close call in relation to it, as to whether you do or you don't, it is not because of any administrative difficulty or any expense that tips the balance one way or the other?

Answer: "You could say that, but, you know …"

Question 381: If you took a cautious view, lets say in any hard decision or close call you have got to make in life or in business where, whether you do or whether you don't is not going to cost you very much in terms of inconvenience or expense or administrative inconvenience, a decision to notify protects you from severe civil and criminal consequences if you get it wrong, whereas a decision not to do it and you get it wrong exposes you to those civil and criminal consequences?

Answer: "Yes."

Question 382: The prudent and rational thing to do in those circumstances, all things being equal, is to notify; isn't that right?
Answer: "But we had advice which said we didn't need to notify, you know. You get advice, you know."

Question 383: Well, we will come to the advice as to whether you got such advice but in my hypothetical example, is there anything you quibble with in my hypothesis?
Answer: "The principle, probably not."

Question 384: Therefore, in order to tip the balance against notifying where, all things being equal you would, you would expect there to be some counter veiling, either imperative or benefit isn't that correct? Because otherwise, the safe, prudent and cautious thing to do is to notify. There is no downside to notifying; you notify.
Answer: "True."

Question 385: Therefore, in my hypothetical situation, if the advice is equivocal as opposed to unequivocal and if you just assume for the moment, and we will come to Mr. Price's letter, but assume that a construction could be put on the letter that it is equivocal as opposed to unequivocal, it would suggest that there were other considerations at play that led an otherwise prudent, cautious board of directors to decide not to notify as opposed to notify?
Answer: "You could put that interpretation on it sure."

Question 386: Yes. Can you assist me as to what those considerations might be or might have been in 1995?
Answer: "But I don't recall a debate along the lines you are debating."

Question 387: Yes
Answer: "In that it was agreed that we would put the structure in place and we had advice from Fry's which we regarded as being competent advice and we had a tax structure in

place but I don't recall a line of thinking or that there was a debate around those issues, quite frankly, I mean I don't remember that type of…" (Interjection).

Question 388: No, I can understand there not being a debate at board level but you might have discussed it amongst the senior management beforehand or you might have, you know, informally discussed it with Mr. Flavin or as a result of reading advices from the accountants, KPMG, where there were concerns expressed about the Revenue challenge and finding out about this, that that could lead one to say, well, if there is a call to be made, and on one side we risk sanction for failure to notify and on the other we risk saving IR£7 million, that a board could take the view or a view that we will take the risk?
Answer: "And that is the view that was taken."

Question 389: Yes, but did you know that you were taking a risk?
Answer: "Well, we knew that there was a potential risk but I don't recall a detailed discussion at the board that these things, you know, were black and white."

Question 390: Yes, but all the more reason then for either the cautious approach or getting Counsel's Opinion in relation to it, because again insofar as Mr. Price is concerned he is a rightly respected commercial lawyer.
Answer: "Yes."

Question 391: This was a question of interpretation of a relatively new provision in the Companies Act which if ever it arose was going to be litigated?
Answer: "Well in hindsight maybe we should have got Senior Counsel's advice. I cannot argue that point at this stage nearly 13 years after the event. But the way you structure your questioning, yes, maybe we should have."

He was then asked why the cautious approach of notifying wasn't taken.

Answer 413: "Well, in the totality of what I read, the totality of the deal in terms of the structure that we were putting in place, my recollection is that it was deemed not an

unreasonable decision to make. Now I don't recall a specific discussion about the implications on tax notification. I don't recall any of that."

And in **Answer 418:** "Rightly or wrongly, we had a relationship and we sought legal advice from Fry's and we had that relationship for many, many years. We took that advice and we went ahead on that basis."

Mr. Gavigan confirmed that he had no insider dealing concerns in relation to this transaction. He accepted that the use of the term 'corporate restructuring' to describe the transaction was a euphemism for tax planning. When asked why he thought that euphemism would have been utilised and why tax planning would have been described as corporate restructuring he answered, "I don't know how to answer that question really, other than to say I actually never, to be honest with you, when I saw the Minutes, I actually didn't particularly focus on that, but I think the reason might be that it is the kind of wording we used an awful lot. I mean, if we were moving things around a bit. I can even see Jim's words being used in that quite frankly but I wouldn't have said that we would change these Minutes to reflect a tax planning exercise." (**Answer 443:** Page 106).

When it was suggested to him that there was nothing wrong in it saying for 'tax planning purposes' provided that the tax planning was legal, he agreed. He thought, "It may be Jim didn't particularly like the words 'tax planning' being written in the Minutes, I just don't know. I cannot recall any discussions whatsoever about that." (**Answer 445:** Page 106 and 107).

Question 446: Yes, but again does that suggest to you that there was a preference at least for there not to be documented in the Minutes of this public company the real reasons why this transaction was taking place?
Answer: "Well I suspect that the words 'tax planning' were not very nice words to use in certain quarters and maybe this was a nicer way to put it, really."

When then asked about the use of the word "concurred" in relation to Mr. Price's advices which was contrasted with the words used in the Minutes of S&L Investments which stated 'the directors considered letters from Mr. Alvin Price of William Fry in relation to the Companies Acts provisions on the notification of interest and insider dealing.'
Answer 458: "I cannot answer that question. I don't recollect that there was any thought you know in choosing the words very carefully, I don't recollect any debate about that at all and whether there is any super significance in those comments."

(g) Kevin Murray

Mr. Murray explained that he was now self employed as a consultant in investor companies. He was first employed by DCC sometime in 1988 as an Investment Executive where he worked making investments on DCC's behalf and also sitting on the board and working with those investments to try and grow and develop them over time. He became an Executive Director of DCC in February 2000. He had a board involvement with many other DCC companies, some Companies where DCC was an investee in the business and subsequently as DCC in general bought majority holdings or all of those businesses, those companies would have become subsidiaries or other companies would have become subsidiaries and he was appointed to some of these companies. So at various stages he would have been Managing Director of the energy business, the healthcare business, the environmental business and the fruit business and relevant subsidiaries within those divisions.

He explained that he qualified originally as an engineer and then subsequently as an accountant. He did his engineering degree in UCD and worked in London for a couple of years before coming back to do accounting with Arthur Anderson in Dublin. He then qualified as a Chartered Accountant. While working for Arthur Anderson and while working on a due diligence process where DCC were looking at investing in a business he was asked would he come and work for DCC.

When asked when he first became aware of a proposal whereby something would happen with the DCC stake in Fyffes he said, "to be honest I would struggle to come up with an

accurate answer on that. I can see from the Minutes that the events happened in August, 1995, clearly sometime in advance of that there was consideration of the matter." (**Answer 12:** Page 8).

His precise role within DCC in 1995 was Associate Director and he would have been an Investment Executive on various investments that DCC was involved in at the time. He explained that he would have attended the main board meeting for the purpose of reporting on the companies that he was involved with and then he would have left. Mr. Murray said that the Fyffes' stake held by DCC in 1995 was regarded as an 'anomaly'. He said that in 1995, if he recollects correctly, there were a number of anomalies in DCC. "DCC probably at that time owned 60% of Flogas which was a public company. DCC also owned a minority shareholding in a house building company (Heatons) so there have always been anomalies in DCC and I suppose shareholders enquire about them and they were told that they were anomalies and they were good anomalies rather than bad anomalies." (**Answer 45:** Page 13).

When asked if the market and DCC's institutional investors would have been greatly surprised that DCC had taken a decision to sell its stake in Fyffes, Mr. Murray said, "I suppose they would see it as an anomaly and as a result of that they probably wouldn't have been surprised".

Mr. Murray explained that DCC had never had any difficulty in raising funds. It had raised funds in 1989 and it raised a modest amount of funds in 1994. "I suspect it hasn't raised funds since." (**Answer 58:** Page 15).

"So it always had a lot of capital. So while there was a IR£38 million valuation on their shareholding and again I don't have the numbers in front of me but my guess would be that DCC either would have had little or no borrowings so it wasn't a requirement."

Question 59: To retire debt?
Answer: "No, I don't believe there was."

Mr. Murray thinks he first heard about the proposal to transfer the beneficial interest in the Fyffes shares from DCC plc and S&L Investments to Lotus Green sometime in early July. "I suspect it was sometime in July, I would suspect that the initial idea would be considered by, I suppose, a small group of people and as it became more relevant, the number of people who knew about it grew. I am guessing." (**Answer 60:** Page 15).

When asked was DCC a place where there was a fairly robust discipline in relation to information Mr. Murray said, "as opposed to a lot of Irish companies, DCC has an unusual history in that it started off as a venture capital company. So your business is looking at investment proposals and considering them, and if you are not confidential, people stop coming to you with investment proposals. I suppose the next thing was that there was a corporate finance function within DCC and it floated a number of smaller public companies, so again I think there was also an appreciation that particularly as regarding public companies, and DCC in 1994 itself was a public company, so I think there was an appreciation that as regard public companies the fewer people that knew something, the more chances there was that something would be kept confidential, and confidentiality was very important." (**Answer 64:** Page 16).

Mr. Murray explained that he had been director of "tens of companies" prior to 1995. He explained that he didn't have any formal training. His experience was a practical one and at various stages one might have come across situations where you think you needed some advice and you would take legal advice as appropriate. "So it was an on the job thing." (**Answer 71:** Page 17).

He said there was never any restriction on one looking for legal advice if legal advice was needed. (**Answer 74** and **75:** Page 18).

He also explained that although Michael Scholefield may not have been the secretary of each individual company within DCC 'he certainly would make sure that the individual company secretarial functions were performed correctly'. (**Answer 76:** Page 18).

He can't remember when he first heard of the existence of Lotus Green Limited. "I would imagine that at some point, and again it is hard to give an exact date, when I was going on the board of Marjove and subsequently Lotus Green, that somebody would have explained the roles of the various companies and their existence etc." (**Answer 80:** Page 19).

The Minutes record that he became a director of Lotus Green on 4th August 1995. He confirmed that he was at the meeting of Lotus Green on the 9th August which was the crucial meeting at which decisions were taken. He explained that the practice in relation to subsidiaries and board meetings of subsidiaries is that if you were attending a board meeting of a subsidiary company, you may well see a draft of a minute in advance and it would be explained to you why the meeting was taking place. The explanation would normally come from "Daphne Tease or Michael Scholefield or whoever it might happen to be". (**Answer 88:** Page 20).

"It depends if the matter was a banking matter, it might be somebody within DCC who had responsibility for banking would take you through it. Typically the purpose of the meeting was explained to you, you were shown the documentation and somebody took you through it and the meeting took place sequentially as the minute suggested." (**Answer 89:** Page 21).

Mr. Murray attended three meetings of Lotus Green at 4:05 p.m. and 5 p.m. on the 9th of August and on the following day the 10th of August. He resigned on the 24th of August.

Question 97: Do you know why you were asked to go on it and do you know why you were asked to leave it?
Answer: "I can surmise and it is surmising a little bit."

Answer 98: "I could be wrong and I have tried to rack my brains but I suspect that it might, and I am guessing, it is the first two weeks in August when Daphne and George were both on the board, it is conceivable that they were going on holidays."

At the first Lotus Green meeting which he attended on the 9th August there was himself and Mr. Breen as directors and in attendance Mr. O'Driscoll from CooperS&Lybrand and Mr. Alvin Price.

He was asked if the explanation then had to come from Mr. Price or Mr. O'Driscoll or both of them.

"I'm not sure if it necessarily had to take place at the meeting. I think somebody might sit down before the meeting and say 'listen this is what it is, you are going on the board, here is what is happening'." (**Answer 108:** Page 24).

Question 115: What do you recall about what was explained to you about Lotus Green?
Answer: "Again I am trying to go back 13 years. I would expect or I am pretty sure I understood the broad thrust of the transfer of the Fyffes shares into Lotus Green and that Lotus Green subsequently was going to go offshore and that Marjove was part of the process and would be liquidated as part of the process."

Question 116: What was the benefit of this transaction?
Answer: "I suppose the benefit of the transaction, there was a taxation benefit I presume if the share price of Fyffes increased from the point it was at and the shares were sold at sometime subsequently in the future."

When asked what he knew in August 1995 about notification obligations he answered, "…I would have been aware that there were advices sought in respect of notification obligations. Would I understand the detail of what the companies requirements were? I can't claim that I would, but I suppose, as I said earlier on, I think DCC because of its background and the fact that it had a corporate finance activity and the existence of Michael in that role, I think DCC probably uniquely for an industrial company had an understanding of what its notification obligations might be. So I would have taken it that it took appropriate advices." (**Answer 120:** Page 27).

Question 121: Were you shown any advices in 1995?
Answer: "Again, I have tried to recollect to the best of my ability and I can't say that I saw the advice."

Question 122: I don't know if you have seen the Minutes of S&L Investments or DCC plc., but in S&L Investments they certainly had the advices and they considered them.
Answer: "Yes."

Question 123: In DCC not only did they consider them but they expressed agreement with the advice, but that doesn't seem to have been the case for Lotus Green?
Answer: "Sure, that kind of accords with my recollection that I don't recollect seeing the advice."

Question 126: You knew that there were some notification obligations?
Answer: "Yes."

Question127: I am just trying to find out, did you do anything about enquiring about those notification obligations?
Answer: "No, I didn't. To be honest 13 years on it is very hard to know but I suppose in an overall sense I signed an SPA (Sale and Purchase Agreement) on the 9th of August that Fergal and Morgan Crowe had signed. I was aware that the issue was being considered by DCC for a period of time."

Answer 129: "… I am aware that it has been investigated or that it has been planned by people within DCC. The culture in DCC would be to do things correctly because there was this expertise within DCC that wouldn't have been in many companies at the time and Alvin and Terry O'Driscoll are sitting at the table, so I think it is a reasonable proposition for me as a director to think that things had been done properly."

Question 130: But nobody brought them to your attention that you can recall?
Answer: "I can't recollect."

Question 131: Nobody advised you that the failure to notify either to Fyffes or the Stock Exchange could expose the company to criminal and civil sanctions?
Answer: "I don't recollect that, but I am pretty sure I recollect the DCC group taking its advices and being aware that DCC Group was getting advice on the matter."

Mr. Murray did not have any recollection of a consciousness of the need to keep this transaction confidential more so than any other transaction.

He doesn't recall anyone telling him that there might be a personal sanction for him as a director of Lotus Green for failure to notify. "I think I would have done no more than say 'are people happy that they have taken the appropriate advices'. And the fact that Alvin was at the table, as I said, a broad number of people in DCC were involved, a good number of people in DCC were involved." (**Answer 136:** Page 29).

When asked if he recalled receiving any oral (legal) advice he said, "no, but my sense is that I was aware that advice was taken on the notification issue and I presume that it had been resolved satisfactorily". (**Answer 139:** Page 30).

Question 142: Therefore would it be fair to say that you trusted that if notification was required that somebody else would have looked after it or would have addressed their minds to whether it was required?
Answer: "Absolutely, and I don't think that was a hopeful trusting, I think it was a valid judgment to make in that a number of senior people within DCC were involved in the transaction. The culture in the company was one of compliance and knowledge of public companies and what was required and there were reputable advisers sitting at the table, so I think it was a fair judgment."

(h) George Young

Mr. Young obtained a Degree in Electronic Engineering in 1974. A PhD in Electronic Engineering in 1978 and an MBA in 1992. He started his working career with a company

called Electron Limited in 1997 and then took a position on the National Board for Science and Technology for about six months in the middle of 1979 and then rejoined Electron and stayed with them until February 1983 when he joined DCC.
He joined DCC and became an Associate Director with involvement in investment in high technology companies. He was on the Board of DCC from 1986 through to 1992. In 1992 when the company was being prepared for the initial public offering 'it is normal in that situation that a majority of the directors be non-executive, so I resigned in support of that objective'. (**Answer 9:** Page 8).

He resigned from DCC in 1998. He continued some consultancy assignments after that until early 2002 but he ceased employment in any formal activities in 1998. In 1995 he was a director of Lotus Green. When asked what training formal or otherwise he had in relation to his role as a director of a limited liability company he said he would have had some background associated with the MBA programme which would have covered it but in most cases when he joined the board of a company he would have teamed up with somebody more senior 'so there may have been some implicit mentoring aspect associated with that but in terms of formal training beyond what I would have acquired previously, I don't recall that being in place'. (**Answer 20:** Page 10).

"And it was always the situation too that if anything was controversial, there was a body of people there that one would refer to." (**Answer 21:** Page 10).

He stated that there was always the ability to seek financial or tax or legal advice if that was required. "I mean, it was very much an open door into Fry's from that point of view and I would have worked with Fry's on a number of transactions that we would have done through the 1980s indeed in the investment side. That certainly would have been there, absolutely." (**Answer 23:** Page 11).

He was then asked about the compliance culture within DCC and was asked if he understood what a compliance culture was.

Answer 24: "I do absolutely. I mean, DCC would always have seen itself as being in the forefront of best practice in that context. I guess before the formal Compliance Officer function was put in place, Ken Rue as Company Secretary would have held that position and Hugh Keelan would have followed in there. But certainly I would have had confidence in those gentlemen and in the seriousness with which they took their role."

He was then asked what the culture was within DCC in relation to potential conflicts where you had financial advantage on the one hand, but compliance obligations on the other. "The culture was always one of compliance and what was right in the longer term. There was never a desire to do something short term that might have resulted in short term gain…" (**Answer 28:** Page 12). (Interjection).

Question 29: Where did that come from?
Answer: "At the cost of damaging the business. It would have come from the top, in fairness. I mean, Jim was always one that would have espoused the best values in that context and it would also have come from Ken Rue, who would have had a very strong role in the corporate secretary area."

When asked whom he turned to keep him right in relation to compliance matters he said:
Answer 31: "One would have turned to the Compliance Officer who would have been Ken in that particular case or subsequently Hugh. And I think it was a matter of judgment that one would have had in terms of whether it was an appropriate topic for discussion with them, formally or informally. I mean, these would have been colleagues sitting around a table, so in many cases there would have been informal discussions that would have evolved."

When asked if there was ever a sense when he was on the DCC Board that DCC had become complacent or comfortable in relation to (compliance matters).
Answer 32: "Basically No."

Question 33: Do you understand?

Answer: "I understand. I think the words "group think" are used sometimes in that context and there was no evidence of group think. I think everybody was suitably independently minded if it came to anything that could be important."

He was then asked if there was freedom within the DCC plc., board to stand up to Mr. Flavin.

Answer 38: "Absolutely, there was."

Question 39: That's what I'm trying to get a sense of.

Answer: "Absolutely, there was. I mean it is one where certainly he would have been powerful and earned respect and such like, but in terms of having a direct line to others or whatever, that was not an issue."

When asked about the relationship between the executives and non-executives he answered, "it was basically a working relationship and everything was done on the basis of formal approval. Obviously an investment committee made most of the major decisions and that was theoretically composed of a grouping with the majority of the non-executive directors. But as to practical matters, once they had executive recommendation they went through relatively straightforwardly." (**Answer 44:** Page 15)

Question 45: On the nod?

Answer: "No, it would have been on the basis of formal preparations and formal board papers and such like. I guess one took comfort from the fact that everything in DCC was very well documented and appeared to be done to very high standards."

Mr. Young explained the evolution of DCC from venture capital company to industrial holding group as follows:-

"Basically during, I guess, 1990, the view was taken within DCC that the venture capital business was one which was limited in terms of growth potential. Operating

internationally was very much a local business and being able to go to the right coffee clubs or whatever where the real deals were done was probably a little bit difficult for an outsider. It made a lot of sense at that time that DCC would be reconfigured such that it would be an industrial holding company. That meant really taking majority stakes or building majority stakes and building to 100% interests where possible…I think it's fair to say that the Fyffes' holding was seen as anomalous within DCC and indeed by commentators on DCC at the time. And indeed after the initial public offering it would have been seen in that context, yes." (**Answer 52:** Page 18).

He said that the approach of moving towards a majority position in Fyffes was something that he didn't think anybody contemplated at that time. "Nobody would have been surprised if a decision was taken to sell the Fyffes' stake at anytime after 1990 but they would have been surprised if DCC had increased its stake." Dr. Young said that there wasn't focus on tax saving per se during the period when he was on the board of DCC plc, up until 1992.

He became a director of Lotus Green on the 25th May 1995 and remained so until the 4th August 1995. He then became a director again on the 24th August 1995 and remained a director until the 9th June 1997. He was asked when he first became aware of a proposal to implement a tax planning scheme for the shares in Fyffes that were held by DCC and S&L Investments. He said he was aware pretty generally that there was likely to be a transfer of Fyffes shares into an overseas vehicle. He couldn't put a precise date as to when he became aware of that but they would have had executive meetings and he would have been aware through those that that was contemplated. These executive meetings were apart from the formal meetings of the full board of DCC. The meetings that he was referring to were the Monday morning meetings of the executive directors and the associate directors. About 10 or 15 people in total. Those meetings were 'effectively a Tour de Table in terms of what was happening in various operating companies'. (**Answer 81:** Page 23).

The Chief Executive would chair the meetings and would go round and ask for various reports. Dr. Young explained that DCC was looking at a number of opportunities within continental Europe in terms of acquisitions and business development. He had a particular role in that context. Most of his contact was with Gerard Jansen Venneboer in the context of acquisition search and the like. The establishment of business operations in the Netherlands was part of a broader plan for DCC and the transfer of Fyffes shares into that may or may not have been part of tax planning. It wasn't automatically assumed to be part of tax planning. (**Answer 88:** Page 24).

Dr. Young was asked if he received any advice as a director of Lotus Green about the transaction that was going to be contemplated whereby Lotus Green would acquire the substantial Fyffes' stake. He said, "nothing specific, no". (**Answer 108:** Page 28).

When asked if at any stage he received copies of any legal advices from William Fry and specifically from Alvin Price in relation to the obligations and responsibilities or potential obligations and responsibilities of Lotus Green he answered, "I don't recall doing so, no." (**Answer 115:** Page 29).

Question 116: And do you recall at any stage giving consideration to whether Lotus Green did or did not have any notification obligations.
Answer: "I don't recall giving such consideration, no."

He described the Lotus Green meetings as being technical. They were for a technical purpose which was pre-ordained.

Question 120: Because you were getting together to fulfil a particular purpose which was part of a bigger picture?
Answer: "Sure."

Question 121: And you were aware of that?
Answer: "Sure."

When asked if he recalled any issue arising about the legal obligations to notify either the Chairman of Fyffes or Fyffes itself of the transfer of the beneficial interest in the shares to Lotus Green he said, "no I wasn't involved in the receipt of such advice". (**Answer 122:** page 30).

Question 123: Insofar as there may have been a loop, that was a loop which you were not inside?
Answer: "That's correct."

Dr. Young was on the board of Louts Green until the 4th August. When asked if he recalled why he stepped down on the 4th he said, "I can only surmise once again that I would have taken holidays during that period. That may have been the reason why I was not on the board during most of the month of August." (**Answer 125:** Page 30).

When asked if he could describe the circumstances in which he came back as a director on the 24th August and then how he came off the board in 1997 he answered, "I guess the purpose of my being in the Netherlands or my undertaking activities in the Netherlands was mainly acquisition search. Mr. Jansen Venneboer was the principal intermediary that we would have had in that context." (**Answer 135:** Page 32).

Question 136: Who was he?
Answer: "He was basically a retired executive from some trading company I believe in the Netherlands who operated as an independent consultant in a number of areas. Typically in this business one is looking at mergers and acquisition intermediaries to basically scout out investment opportunities. We had a look at a number of these investment intermediaries across the continent and he appeared to be one that was particularly well placed and being in the Netherlands was a particularly favourable location in terms of commonalty of language and business culture. I guess also it fitted in within these other transactions that were being contemplated. So he did end up in an advisory role to DCC in that period."

Question 137: And when had he started that advisory role?
Answer: "My understanding was sometime in early 1995…my principal interaction with him was really in an operating sense looking for acquisitions and such like."

When asked about his role as a director of Lotus Green from August of 1995 until he resigned in 1997 he said his involvement was "basically minimal. I don't recall that I had any involvement with Lotus Green during those years." (**Answer 150:** Page 35).

Question 151: When you say any involvement, did you attend board meetings?
Answer: "I am not aware of having done so."

Question 152: Did you receive board Minutes and board documents during that period?
Answer: "I'm not aware of having done so. It depends on what the record will show, but…" (Interjection).

Question 153: You don't recall?
Answer: "I don't recall."

Question 154: I mean if somebody had come up to you in February 1997 and asked you about what you were doing in Lotus Green, what would you have said?
Answer: "I would have said that from an operational point of view I had been looking for activities in continental Europe that were relevant in some sense or other to Lotus Green but that I didn't have any active involvement in the company."

Question 155: Was it your understanding that Lotus Green was to be used as a vehicle for those acquisitions?
Answer: "My understanding was that it could have been used as a vehicle for those acquisitions. I wasn't aware of any further aspects to that."

Question 156: And not aware of any tax consideration that would arise in relation to whether it should or should not have been involved?

Answer: "No, I wasn't aware as to that."

Question 157: And nobody discussed that with you?
Answer: "No."

Question 158: Did anyone discuss with you at any time after the transaction was implemented what the tax status of Lotus Green was or where it was fitting in the tax planning scheme of things?
Answer: "No."

Dr. Young confirmed that he was also on the board of Marjove.

Question 163: And what was Marjove?
Answer: "It was essentially a company that was in receipt of some assets. It was part of some overall planning arrangements. That is the limit of my understanding of the particular role."

Question 164: And what relationship did it have or connection to Lotus Green?
Answer: "I don't recall."

The records disclosed that he was appointed in May and sent apologies on the 2nd of August and resigned also on the 2nd August at a later meeting.

Question 170: Is it possible then that you never attended any board meeting of Marjove Limited unless there are further meetings that took place between the end of May and the beginning of August?
Answer: "I don't recall attending any meetings of Marjove."

Question 171: And you don't know why you were on the board of Marjove?
Answer: "I guess I don't particularly, no."

Question 172: When you were requested to join a board would that always have been at Mr. Flavin's request or could it have been Mr. O' Dwyer's request or Mr. Scholefield's?
Answer: "Normally it would have been Mr. Flavin's request."

He confirmed that he was at a meeting of Lotus Green on the 24th August when Mr. Scholefield and Ms. Tease resigned and was also present in Amsterdam on the 25th of August when a number of meetings took place.

Question 178: Is it likely therefore, subject to anything that comes up, that your involvement in Lotus Green is confined to the 24th and 25th of August so far as director participation is concerned?
Answer: "It is likely, yes."

(i) Tommy Breen

Mr. Tommy Breen is currently the Chief Executive Officer of DCC plc. Back in 1995 he was an executive within DCC for a number of years but was not then on the DCC board. Mr. Breen is a Chartered Accountant by qualification having worked with SKC, now KPMG, from 1980 to 1985 at which point he joined DCC. At that time, DCC was a venture capital company and he worked across a number of businesses and represented DCC in a number of companies that they were invested in and would have worked on making new investments in a number of companies. He worked with DCC in London between 1988 and 1990 in their venture capital business there. He then returned and between 1990 and 1995 he continued to work in Dublin and his title in 1995 was "Associate Director".

Mr. Breen became a director of Lotus Green Limited in August 1995 for a very short period of time approximately 3 weeks. He was a director of other DCC companies but not S&L Investments Limited. Either subsidiaries or companies that they had a minority stake in. When asked how it was that he became a director of any of those companies he answered, "well it would vary depending on the particular company. I mean if it was a

company that we were investing in, a new investment, and I had been working on that new investment, it would have automatically followed or it would have been expected I would have joined that but it would have been Jim Flavin in that scenario, that would have certainly signed off on it as he would have signed off on anybody becoming a director of any company within DCC." (**Answer 138:** Page 43).

Mr. Breen was then asked if there was any training provided to him or was he aware of any training for those executives within DCC who became directors of other DCC companies. "No there would have been no formal training. I suppose like myself and other colleagues, you know, we had come from a not irrelevant background having worked in accountancy firms and as part of your accountancy training you would have gained some board familiarity with what was involved in being a director of a company … it was on the grounds of practical experience rather than formal training." (**Answer 140:** Page 44)

When asked whether the enactment of the 1990 Act had any impact on DCC and whether there was any information provided or any discussion around its implications he answered, "Absolutely. We would have got, again it wouldn't have necessarily been formalised but you would get correspondence from solicitors, from accountants, there would be handbooks summarising that and people would generally have been aware of (it)." (**Answer 145:** Page 46).

When asked about the DCC culture in relation to compliance he said, "I mean I can only give you a personal perspective on it. My perspective on it would have been that there was a particularly strong culture of compliance. My knowledge would be that there were few enough 'plc's' back in mid 1990s that had Compliance Officers. Jim Flavin, particularly, was a stickler for compliance with tax legislation to the finest of detail. Again, I suppose the reality is that a lot of us had come from professional backgrounds and would have been trained, and it would have been ingrained in a lot of us where we came from. So I certainly would have characterised the culture in DCC at all stages as having a very high culture of compliance, and probably a little bit unusual in that. But my

experience is limited. You know, I have worked for DCC for 23 years." (**Answer 146:** Page 46).

Mr. Breen thinks it was about 4 to 6 weeks prior to joining the board of Marjove and Lotus Green that he learned about the proposed transaction. "I had no involvement in the tax planning or compliance advice sought in relation to that." (**Answer 149:** Page 47).

He was then asked what he would have been furnished with and who would have informed him about the transaction. "Again, just to say this is obviously a long time ago, I don't have a specific recollection of who would have informed me but if I was to guess I would say it must have been Fergal O' Dwyer or Daphne Tease or Michael Scholefield more likely Fergal O' Dwyer or Daphne Tease." (**Answer 150:** Page 48).

He confirmed that he 'was aware that there had been advice sought in relation to the compliance matter associated with the notification'. (**Answer 152:** Page 48). He does not recall seeing any written documentation in relation to the advice that was obtained.

Question 155: Did anyone ever advise you about the consequences of a failure to notify the transactions that were going to take place?
Answer: "No, not specifically. Nobody ever sat down and said to me, look, the specific implications of non notification of a transfer such as this. But, I mean, I would have been generally aware that a breach of the Companies Act is a fairly serious matter."

Answer 156: "So I would have been aware of that, but nobody needed to tell me that, or nobody did to the best of my recollection, sit me down and tell me that."

Question 159: So you wouldn't have been aware of the specifics of it other than that failure to notify where notification was required, be it across a range of regulatory matters, would have consequences and potentially serious consequences, reputational and civil and criminal?

Answer: "Absolutely, I would have been aware that there were very serious implications of a breach of the Companies Act but not specifically..."

Question 161: What is your best recollection of what you were told (about the transaction) and what you understood?
Answer: "Again, this is very difficult, it is a long time ago, but my recollection is that I would have been aware that advice had been sought obviously in relation to the whole tax issue from CooperS&Lybrand as they were then and Terry O'Driscoll was the main contact there."

Question 163: Did you know Mr. O'Driscoll?
Answer: "I would have known Mr. O'Driscoll yes, and that there had been advice sought on compliance issues and that that advice would have been sought from Mr. Price, Alvin Price. As to who told me that, as to whether it was Michael Scholefield or Fergal O' Dwyer, I just honestly can't remember."

Question 164: Do you recall being told the detail or the outcome of that request for advice?
Answer: "No. Well, sorry, the outcome, I would have known that the advice had been that there was no requirement to notify, that would have been my understanding of the advice, but I wouldn't have got the detail of it nor would I have asked for the detail."

When asked if he wouldn't have questioned it any further he said, "I mean, just the background is, I worked with Michael Scholefield and Fergal O' Dwyer for many, many years and would have known that that advice had been obtained from Alvin Price who I also had worked with as adviser to DCC and on various things for a number of years. So I wouldn't have felt there was any requirement to go any further with it." (**Answer 166:** Page 52).

He became a director of Lotus Green on the 4th of August and also Marjove on the 2nd of August. He said he was aware of the role of Marjove in the transaction and that it was

going to have to be liquidated sometime, subsequently and that there was going to be a return of capital to one of the shareholders and a distribution in specie of the assets of the company which were the shares in Lotus Green. He says he is sure that would all have been explained to him. He confirmed that as far as his directorship of Marjove or Lotus Green it could have been anyone else within DCC. He also knew that he was only going to be a director of Marjove and Lotus Green for a short period of time. He was a director of Lotus Green from 4th August until 24th August. He was a director along with Mr. Scholefield, Ms. Tease and Mr. Young and then he and Mr. Murray were appointed on the 4th August.

Question 183: Do you know why you became a director?
Answer: "Why specifically I became a director, I don't know. There was obviously a requirement for a director or directors at the time Kevin Murray and I were appointed. As to why that was, I don't remember as to whether, I mean, I could speculate that perhaps given the time of year it was maybe the previous directors were not going to be available, but I honestly don't know."

Question 186: Were you conscious at any time during your brief association with this transaction and your brief involvement with the two companies, Marjove and Lotus Green Limited, of secrecy surrounding this transaction?
Answer: "No, not while, I mean no greater secrecy than there would have been around any transaction. What was something that was I suppose engrained in DCC because of the nature of our background. I mean, you have the whole thing about confidentiality so I would have been aware that it was a confidential matter. But in the context of you know DCC, there would have been a number of people aware of it necessarily."

He said he was not aware that a view had been expressed that this was quite an aggressive tax scheme for a plc nor was he aware or did he hear about any discussion about any concern that information about this scheme, if it was publicly known, might not be desirable nor was he conscious at all about worries within DCC that public notification of this was going to have an adverse impact. He confirmed that he didn't have any contact

with the Dutch directors who took over from him when he resigned on the 24th August. That was all left to Mr. O' Dwyer.

9.1.3 Non Executive Directors

(j) Alex Spain

Mr Spain completed a B.Comm Degree in UCD in 1954. He was then articled to Forsythe & Co. which eventually merged with Kennedy Crowley, which in turn became Stokes Kennedy Crowley, which in turn eventually became part of KPMG, the international accountancy firm. He qualified as an Accountant in 1958, he worked through the 1960s and into the 1970s as an accountant doing general work, audit and tax. Subsequently he became the Managing Partner of Stokes Kennedy Crowley which became the biggest accountancy firm in the State. He was Managing Partner of Stokes Kennedy Crowley from 1977 to 1984. This took him away from professional work. He was no longer responsible for any clients. He was responsible then for the management of Stokes Kennedy Crowley.

He explained that he became involved with DCC at the invitation of Jim Flavin who had worked in Stokes Kennedy Crowley. He explained that Jim Flavin came to him for advice when he was forming DCC. He explained that DCC was set up as a venture capital company. It was to do in a sense privately what Mr. Flavin had been doing for the venture capital of AIB up to that point in time. He explained that he was advising Jim Flavin before it was formed and during its formation. Mr. Spain became Chairman from the start and was a director along with Mr. Flavin, Mr McGuane and Mr. Gallagher. He did not have any shares in the company at the outset. He subsequently acquired shares after DCC was floated in 1994. Mr. Flavin explained that he knew Neil McCann as he had worked for the Fruit Importers of Ireland in Forsythe & Co. Forsythe & Co., were not the auditors for Fruit Importers of Ireland but he prepared monthly accounts for some years in the 1960s. He explained that SKC subsequently became the auditors of Fruit Importers of Ireland after he left SKC. Carl McCann of Fyffes had been articled in SKC.

Mr. Spain referred to the preference in the 'Combined Code of Corporate Governance' for a separation between CEO and Chairman. Mr. Spain explained that he was Chairman of DCC from its formation in 1976 until he resigned on 30th June 2007. He explained that during that period he liaised very closely with the Chief Executive, Jim Flavin and to a lesser extent with the Company Secretary. This required the preparation of papers where the Board was concerned, he never really enquired into the inner workings of DCC. "But yes the papers for the Board meetings were very well produced" (**Answer 272:** Page 52).

Mr. Spain said that apart from being Managing Partner of SKC he had also been the Chairman of National Irish Bank. He explained that the relationship between the Chairman, Chief Executive and Company Secretary was different in every company. He explained that as Chairman he was responsible that the Board operated effectively but that he wasn't leading the discussion in any particular area. The executives would take proposals to the board and he would have to see that those proposals were properly dealt with. He insisted that everything was done in DCC 'in a very proper way'. (**Answer 288:** Page 55). He says he was always facilitated by timely preparation of papers and always facilitated with information if he needed it. He stated that DCC was 'a leader in corporate culture'. (**Answer 290:** Page 53).

Question 291: Really, just explain?
Answer: "Others followed really."

Question 292: Just explain that to me. Can you just explain why you say that?
Answer: "Well, if you take for example the corporate, the Combined Code of Corporate Governance, which DCC was always committed to implement."

Question 293: Yes.
Answer: "And comply with. If you take, if you like, the Chartered Accountants Accounting Awards, nobody other than CRH or DCC has ever won the award, the principal award."

Question 294: Yes. Is that awarded annually?
Answer: "Yes it is."

We then moved on to the early 1990s just before DCC went public. Mr. Spain confirmed that the stake in Fyffes which DCC owned at that stage was regarded on anomalous. "It was a hangover from the old venture capital days." (**Answer 309:** Page 57)

He said it was particularly anomalous because it was a minority stake in a quoted company. "DCC made no secret of the fact that the stake would be sold." (**Answer 313:** Page 58).

"At some suitable stage." (**Answer 314:** Page 58).

Mr. Spain knew that there was a potential large tax exposure for DCC if it sold its stake. When asked when he first recalled that active consideration was being given to putting in place a Capital Gains Tax scheme in respect of the Fyffes shares he said, "I can't recall that, but it wouldn't be a surprise to me that issues came to the board when they were ready for decision". (**Answer 337:** Page 61). He believes therefore that he first learned about the scheme when it came to the board meeting on the 31st July 1995. It was also no surprise to him, when it turned out to be a proposal involving a Dutch company 'because it was quite common for public companies to have Dutch subsidiaries for tax purposes'. (**Answer 345:** Page 62).

Mr. Spain does not recall the tax scheme being discussed at an earlier board meeting prior to the 31st July 1995. If it had been discussed informally with him by Jim Flavin he doesn't recall it, but he thinks it is unlikely and that it is more likely that the non executive directors would have found out about it for the first time when they got their papers in preparation for that July 31st board meeting. (**Question** and **Answer 358:** Page 64).

Insofar as his general awareness of the 1990 Companies Act was concerned Mr. Spain said he wasn't aware of the detail 'except insofar as it would be brought to his attention…I was confident that it would be brought to my attention'. (**Answer 368:** Page 66)

"Or to the attention of the board when it mattered." (**Answer 369:** Page 66).
Ms. Spain said that he believed that that would be the expectation of the other non executive directors as well 'but indeed some of them may have, from their work elsewhere, may have been more conscious of the 1990 Act than I was'. (**Answer 371:** Page 66).

Mr. Spain explained that the responsibilities of a director of a public company were more onerous than those of a private company. (**Answer 376:** Page 67). It was put to him that this was so for a number of reasons including the greater sensitivity in its share price. To which Mr. Spain answered, "yes and a good example of that, was we could never get much information from Mr. Flavin, in his role as a director of Fyffes, when we should have. We felt occasionally that he should be keeping us better informed, but his right hand wouldn't tell what his left hand was doing. He was very careful to maintain confidentiality in relation to Fyffes business." (**Answer 378:** Page 68). It was explained to Mr. Spain that I would be coming back to that issue in greater detail. He was asked if the board had ever had a presentation from legal advisers about the changes that came about as a result of the 1990 Companies Act, to which he said he didn't recall such a presentation. He said he would have been familiar with some parts of the Combined Code that were relevant to their business. When it was suggested to him that the Combined Code itself was quite a legalistic document Mr. Spain said, "no, I think it is quite understandable". (**Answer 385:** Page 69). Mr. Spain said he had a copy of the Combined Code of Corporate Governance which came out of the Higgs Report which in turn came after the Cadbury Report. He believes it was made available to all the directors in DCC. "I certainly had a copy of it." (**Answer 391:** Page 70).

In relation to the controversy between DCC on the one hand, and Fyffes on the other hand, as to whether Mr. Flavin as a director of Fyffes had to inform the Chairman of Fyffes of

the proposed transfer and then, when Fyffes' lawyers became involved, a suggestion that there was an obligation to notify Fyffes and also the Stock Exchange under the provisions of the Companies Acts. Mr. Spain was asked if he was aware of this to which he answered, "I wasn't really conscious of the conflict with Fyffes because my understanding was that Mr. Flavin was informing the McCanns of what was happening". (**Answer 393:** Page 70). Mr. Spain was asked if he understood that Mr. Flavin was informing Mr. Neil McCann on an informal basis he answered, "I didn't know that but informal is sometimes better than formal". (**Answer 394:** Page 70.

Question 395: Well? (Interjection).
Answer: "Because you get more information."

Question 396: Yes it can mean more information but if you were told, let's say informally and unofficially, it would mean that the person you impart the information to knows it, but they may not have to do anything with it and it may not become publicly known. Would you… (Interjection).
Answer: "Right."

Question 397: Accept or understand that distinction?
Answer: "Yes."

Question 398: Just for example, in an extreme case, if there was a proposal to transfer the shares into Lotus Green and DCC sent a notice to the Stock Exchange saying "we are going to sell our shares in DCC to an associate company Lotus Green?"
Answer: "Transfer them?"

Question 399: Transfer them to Lotus Green?
Answer: "To a wholly owned subsidiary."

Question 400: That would be a lot different than Mr. Flavin telling Mr. McCann at a Fyffes' lunch or a board meeting "we are thinking of doing this for …" (Interjection).
Answer: "Yes, I understand that."

Question 401: Because telling Mr. McCann, or telling the Chairman, wouldn't mean that anybody else would know about it.
Answer: "Yes."
Question 402: Telling the Chair could have, in a sense, the advantage for Mr. Flavin that he had imparted the information but that nobody outside the board of DCC or the board of Fyffes had to know about it?
Answer: "That is right. Well, media are very active in criticising tax avoidance schemes."

Question 403: Yes.
Answer: "It may have been he wished to avoid media comment."

Question 404: Yes.
Answer: "Adverse media comment."

He went on to say that adverse media comment can arise even if what was done was entirely legal. "The media will have a go." (**Answer 407:** Page 72). "No matter what, even if it is lawful." (**Answer 408:** Page 72).

Mr. Spain wasn't aware that there was a preference on the part of Fyffes for DCC not to publicly notify the transfer "I wasn't aware of that, but of course you could easily argue that it wouldn't be in their interest". (**Answer 409:** Page 73).

Question 410: Why would it not be in their interest?
Answer: "Because it was a signal that it was being prepared for sale at some future date."

Question 411: Yes. That certainly seems to have been the motivation, if there was a motivation for Fyffes' concern about the notification. Would that have been a concern to DCC?
Answer: "Well, it would have been a concern for DCC as well because the price would be affected."

Question 412: Can I just explore that a little with you, there are degrees of concern in relation to issues, if it was the case that DCC were for the first time in 1995 announcing to the Stock Market and to the world that the Fyffes' stake was for sale. In such circumstances you might expect the shock of that announcement and the fact that such a large stake was for sale to have an… (Interjection).
Answer: "It wasn't actually for sale at that time it was merely being prepared for possible sale in the future."

Question 413: Correct, you are right to draw that distinction, I suppose what I am asking you is, in 1995 it would have been no surprise to the market if DCC had sold its shares?
Answer: "No, I think that is fair comment because I think some analysts would have mentioned that the DCC stake was anomalous."

Question 414: Yes, that being so is it not the case that it was already known that the DCC shares or the shares it owns in Fyffes were for sale, maybe not initially but if the right person came along and was offering.
Answer: "At the right price."

Question 415: Some premium, nothing was not for sale in DCC?
Answer: "Yes."

Question 417: Therefore anyone learning that DCC were making it easier for them to sell the shares wouldn't have been surprised?
Answer: "No, that is a correct interpretation."

Question 418: In fact if you weren't doing it, where you had the possibility of saving 40%, your shareholders might likely come back to you and say… (Interjection).
Answer: "Why didn't you?"

Question 419: Why didn't you do what CRH and others did? One doesn't know how people are going to react?
Answer: "That could have happened."

When asked if it was the smarter thing to do, in terms of the DCC shareholders, to be trying to save IR£7 million, Mr. Spain answered, "there were very strong legal pronouncements favouring the tax payer not assisting the Revenue to wield their shovel into your gains". (**Answer 420:** Page 75).

Mr. Spain was then asked to look at the Minutes of the 31st July and in particular the minute which read "Mr. Flavin advised the board that for corporate restructuring purposes it was proposed that the company's beneficial interest in Fyffes plc., be transferred to a new subsidiary within the group". Mr. Spain explained that the board had been circulated with the papers for that meeting including the Chief Executive's Report which is at Tab 48. Quoting from the Chief Executive's Report: "changes in beneficial ownership within the DCC group of shares – We are planning to transfer the beneficial ownership of 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 the 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." (**Question 426:** Page 76).

Mr. Spain was asked if he ever recalled having to give consideration to legal advice to which he answered, "I think over the years we would have had to rely on Alvin Price's advice." (**Answer 429:** Page 77).

Question 430: Had you ever discussed his advice at board meetings before?
Answer: "I don't know. We had a high confidence in Alvin Price. We had developed high confidence in him as an advisor."

When asked what they would have done with the letters from Alvin Price, dated 21st July and 25th of July when they received them? He answered, "we would have read them carefully and concluded that he was advising that there was no requirement to notify Fyffes." (**Answer 432:** Page 78).

Question 433: …You would have read them carefully in advance of the board meeting.
Answer: "Yes."

Answer 434: "The position is that it was within the DCC group. It wouldn't have been surprising, Alvin Price's conclusions seemed sensible and well founded."

Question 436: …Did you ever concern yourself or look at the provisions of the particular sections?
Answer: "No, I would have looked at them if they were drawn to my attention."

Question 437: Yes, they weren't drawn to your attention in this letter isn't that right?
Answer: "Yes."

Question 438: You would not have been expected to go off and do your own homework in relation to this?
Answer: "No, because Mr. Price's letter seemed to be conclusive and sensible."

Question 439: Yes, well 'conclusive' and 'sensible' are two different things, isn't that right?
Answer: "Yes."

Question 440: What is sensible can sometimes accord with what you want as opposed to what is required?
Answer: "Well, it seemed to make sense."

Question 441: Acts, legislative obligations don't always make sense, in the sense, that you are often required to do that which you may not want to do, or you may not think is sensible to do.
Answer: "We were all very conscious of fully informing the market of the ownership of any asset that we had."

Question 442: Yes?
Answer: "We didn't see that we were changing the ownership here."

Question 443: For the purpose of the tax scheme you were most definitely changing the ownership, isn't that right?
Answer: "Yes."

Question 444: To that extent there was an inconsistency in the approach. If the Revenue Commissioners took the view that Lotus Green was part of the DCC group and therefore the Capital Gains Tax had to be paid, there was no advantage to transferring it to Lotus Green, isn't that right?
Answer: "That is so yes."

Mr. Spain was then asked to consider the letter from Mr. Price of the 21st July 1995.

Question 452: He is saying, the Act may require this but that cannot have been what the intention was when you were transferring an interest within the same group?
Answer: "He said in this case, 'I take the view that the true owner is the DCC group'."

Question 453: Yes.

Answer: "And the relevant plc., and public have already been very clearly notified of that fact in accordance with the requirements of the 1990 Act."

Question 454: Yes.
Answer: "That seemed to make sense to us."

Question 455: In terms of that advice, did that also accord with what, all things being equal, you would have wanted it to be?
Answer: "I suppose, yes is the answer because rather than be a hostage to the media it would be better if it was not notified."

Having set out, as it were, the two ways of construing the notification obligation while making notification, there is clearly a more cautious approach, Mr. Spain was asked why when there was a more cautious approach open it was not taken, he answered, "I mean we were aware that Alvin Price was a cautious individual and I think he wouldn't have expressed the view in the previous paragraph (of the letter) that he did, if he had a doubt about it." (**Answer 459:** Page 83).

Mr. Spain was then asked what the commercial considerations were that Mr. Price referred to in his letter, insofar as making notification or not making notification is concerned, he answered, "I don't know what he is referring to there." (**Answer 460:** Page 83).

Question 461: Did anybody ask?
Answer: "No, because it was clear from this letter to us that he was firmly of the view that notification was not necessary."

Question 462: Yes.
Answer: "And that suited us so we agreed with it."

When it was put to him that he expressed himself in much stronger terms in relation to the insider dealing provisions in the letter of the 25th July, Mr. Spain said that the letter of the

25th of July just strengthened his opinion, expressed in the previous letter. Mr. Spain said he was not aware of the severe civil and criminal consequences and when asked if somebody had said to him, there are two alternatives here, you can either notify or not notify – if you don't notify and you get it wrong there are severe civil and criminal consequences, would that have caused him to do something. He answered, "it probably would have." (**Answer 468:** Page 85). "Caused us to take a different view but he didn't say that." (**Answer 469:** Page 85)

Question 470: Yes but he mentioned it in connection with insider trading. He knew there were civil or criminal… (Interjection).
Answer: "Well insider trading is obviously a very evil thing."

Question 471: Yes and much more serious and viewed more seriously than… (Interjection).
Answer: "Than notification."

When asked if the recording in the Minutes of the 31st July 'The Directors concurred with the views expressed by Alvin Price of William Fry in his letter' was a little unusual that they were asked to concur or agree with legal advice, Mr. Spain answered, "I don't know why the minute was expressed in that language. I don't think that is what we decided at the board, we decided not to notify." (**Answer 475:** Page 86).

Question 478: Mr. Flavin in the board papers said "I want an agreed position on this." Do you know why Mr. Flavin was asking for an agreed position and why it was worded like that?
Answer: "I don't know why."

Question 479: Does it strike you now as being a little bit different than the norm?
Answer: "Well I suppose because of Fyffes requesting a notification."

Question 480: Yes, do you recall there being some discussion at the meeting about Fyffes taking a contrary view?
Answer: "No I don't recall that but clearly Mr. Price's last paragraph relates to that matter."

Question 481: Yes.
Answer: "I don't recall a discussion at the meeting. I think it would be minuted if there was a discussion."

Question 482: Yes I appreciate this is a difficult question. Do you recall if this was a very controversial discussion at board level or is this something that went through relatively easily? Was this an easy decision for you to make.
Answer: "I think so, yes, in the light of Alvin Price's letter."

Question 483: How much discussion would there have been at the board?
Answer: "Very little discussion I think."

Question 484: Yes.
Answer: "Very little discussion. I think it would have gone through fairly easily in that it all seemed to make sense and Mr. Price's Opinion seemed to make sense."

Mr. Spain was asked if after this meeting in July he had any cause to give consideration to Lotus Green until some time in the early part of 2000. He answered, "no. Although it is not minuted here I was concerned about surrendering control of a very valuable asset and I needed assurances that the directors of Lotus Green…"

Question 487: Wouldn't run off with them?
Answer: "Were sound people who would do sensible things."

Question 488: Yes.
Answer: "And I got that reassurance."

Question 489: How did that reassurance come?
Answer: "It came from Mr. Flavin and Mr. O' Dwyer."

Question 490: What assurance do you remember getting?
Answer: "I remember getting assurance that satisfied me that it was the right thing to do."

Question 491: And that there were sufficient controls in place to ensure… (Interjection).
Answer: "No I don't think there was an issue of controls, it was that these guys were sensible."

(k) Anthony Barry

Mr. Anthony Barry joined the board of DCC plc, as a non-executive director in January 1995 and has remained a director to this date. He explained that he was a Civil Engineer by background and worked at civil engineering and contracting around the world. He returned to Ireland in the middle of the 1960s and joined a subsidiary of a company that ultimately became a subsidiary of CRH and he became Chief Executive of CRH in 1988, having joined the board in 1978. At the time he joined DCC he had just retired as Chief Executive but was Chairman of the Board of CRH. He had 7 years as Chief Executive of CRH from 1988 to 1995.

In 1995, CRH was the largest of the non-financial public companies in Ireland and had quite significant international operations at that stage. From 1978 onwards he ran all of the operations of CRH on the island of Ireland except for the cement products company, the cement side of the business. From 1983 onwards he ran everything in Ireland and the UK and by the time he became Chief Executive around 1985 he was responsible for everything on the eastern side of the Atlantic. By the time he became a director of DCC in 1995 he had considerable experience of being a director. Apart from the main CRH board he was a director of 20 to 30 subsidiary companies. When asked to give some sense of the level of his understanding of the responsibilities of a company director of an Irish Company he said, "well I think the whole issue of compliance in the 1990s became much more clarified and deliberate, I would have thought. I would have known that from the

time I joined the board of CRH, while you were given a certain induction, compliance did not feature as highly then as it did 20 years later." (**Answer 25:** Page 10)

When asked where that came from, was it legislation or just a change in business culture or a bit of both he answered, "a bit of both. Some of it was from abroad where a lot of the compliance rules were worked out and they were transposed to Ireland because a lot of companies in Ireland were members of the UK Stock Exchange and the New York Stock Exchange." (**Answer 26:** Page 10)

Question 27: Right.
Answer: "So, the compliance came automatically with membership."

Question 28: Were CRH a member of the London Stock Exchange?
Answer: "Yes."

Question 29: in the 1970s and 80s?
Answer: "Yes."

Question 30: And also the New York Stock Exchange?
Answer: "New York happened during my time. We went for a listing on the full exchange."

Question 36: So, presumably as a member of the board and as a director your familiarity with compliance regimes was extensive?
Answer: "Reasonably good, but I would rely very much, of course, on secretarial and legal advice."

He explained that at the time he became a director of DCC, CRH did not have anyone with a title of Compliance Officer. It was the Secretary of the board who acted as Compliance Officer. (**Answers 37** and **38:** Page 12).

The Secretary of CRH was somebody recruited specifically for the role.

He described the compliance culture in CRH in the late 80s and early 90s as being "reasonable". "People were careful." (**Answer 45:** Page 13).

He explained that he was invited to become a non-executive director of DCC by Jim Flavin, although he did not know Mr. Flavin very well at that time. He would never have done any business with him. When asked what he recalled of the approach and why he was being asked he answered, "well I was approached because, I suspect because I was the Chairman and ex-Chief Executive of a significant public company. I was approached twice by Jim Flavin, and the first time I felt I had nothing to offer." (**Answer 56:** Page 14).

"That I was basically an operations person…I would have perceived DCC as being a financial holding company…but Jim assured me and came back a second time, that they would no longer be a holding company, investment holding company, but would in fact take responsibility for the operations of the company directly." (**Answer 57:** Page 14).

Question 58: Right?
Answer: "I felt I could contribute something to that."

He said that there was an induction process which took the form of sitting down with executives and with Jim Flavin and finding out what were the principal businesses in the company and where they operated. He explained that his involvement as a non-executive director involved attending seven meetings a year and taking part in a number of committees, audit, finance, remuneration and nominations which would have been shared out among the non-executive directors.

When asked how DCC compared with other companies insofar as the quality and timeliness of paperwork for board meetings was concerned, Mr. Barry said "I would have to say surprisingly excellently". (**Answer 71:** Page 16). He explained that he had been

involved with other companies but he always felt that the quality of the information they were getting wasn't as good as what he was used to "but I have to say in DCC it was rigorous and good". (**Answer 72:** Page 16).

Mr. Barry said that his strength on the board was on the operational side. He said when he was appointed, he knew Alex Spain because he and Alex were on a Government Board known as "The Audit Efficiency Group" which looked into the efficiency of various government departments.

When asked about his familiarity with the 1990 companies Act he answered, "aware, but only vaguely aware. I wouldn't have been that interested." (**Answer 91:** Page 19).

But if legal advice was needed, legal advice was taken. He said he was quite aware of the obligations of notification "being a personal shareholder and a director of companies". "That if I wanted to buy or sell shares I always did it with the knowledge of the Chairman." (**Answer 98:** Page 20)

He explained that CRH did not buy public companies and therefore he did not have familiarity with the notification issues insofar as company acquisitions or disposals were concerned "until the position was explained". (**Answer 102:** Page 20).

Mr. Barry said he was "well used to" schemes whereby Capital Gains Tax was minimised through "proper tax planning". (**Answers 109** and **110:** Page 21). He said CRH had frequently used non resident vehicles for that purpose. He said he found "nothing strange" about the 1995 scheme. (**Answer 115:** Page 22).

Answer 116: "This is the way we do the business."

Question 117: Yes, when you say 'this is the way we do the business' does that mean… (Interjection).

Answer: "I mean that is the way corporate quoted plcs, all planned their tax for Capital Gains Tax purposes as best as possible within the jurisdiction where the taxation was liable." (**Answers 117** and **118:** Page 22).

He explained that it would have been normal for Irish Public Companies to be engaged in tax planning to minimise not only their Capital Gains Tax but also their Corporation Tax "that if you so geared up a company where you could charge the interest off against the profits then you minimised the actual amount of corporate tax you paid in that jurisdiction". (**Answer 125:** Page 23). He said that that was, "something which every company in the world does". (**Answer 126:** Page 23)

When asked when he first became aware that DCC were contemplating doing something with their Fyffes' shares in 1995 he said, "it would have either been at the meeting immediately preceding or the actual meeting. He hadn't a clear memory of precisely when but 'he wasn't one bit surprised'." (**Answer 131:** Page 24).

He said that he found out about it through the board and when he received the board papers for the meeting of the 31st July. Mr. Barry said he would have been surprised and disappointed if there wasn't tax planning going on and that he was hoping that they were planning to sell the Fyffes' shares. (**Answers 143** and **145:** Page 26).

He said he would not have been consciously aware of the fact that the scheme was in the making for a number of months nor would it have surprised him. "I mean management do an awful lot of things in planning terms." (**Answer 157:** Page 28).

"Prior to actually going to board with them and getting approval." (**Answer 158:** Page 28).

He was not aware of the tax advice that was taken in relation to the scheme "other than that it was generally proper and above board, I wouldn't have been aware of any more detail other than that". (**Answer 161:** Page 29).

He was aware that taxation advice had been taken but beyond that he wouldn't have gone into the documentation of what the advice was. (**Answers 163** and **164:** Page 29).

He was not surprised not to get the advice in relation to the tax scheme based upon his experience in CRH, "other than getting undertakings from the management, be it financial or secretarial, the proper advice was taken and the proper records, that that advice was being followed and this is okay. There is no way in which you would have read the total documentation." (**Answer 166:** Page 30).

He agreed that as far as the Revenue Commissioners were concerned the bigger the amount of the tax saving and the more "aggressive" that they perceived it, the more likely it was that they would challenge it. (**Answer 174:** Page 31).

When asked again if it was unusual in the context of this substantial tax saving scheme in terms of DCC was it not surprising that he didn't seek the tax advice, he answered, "it would be perfectly normal to take the assurance of the executives". (**Answer 180:** Page 32).

Question 181: Yes.
Answer: "That the proper tax advice was obtained and it would all come out in the wash anyway."

Question 182: When you say it would all come out in the wash, what does that mean?
Answer: "I mean if the Revenue had decided, you know, that they were going to attack this as being over aggressive."

Question 183: Yes.
Answer: "Well then I was perfectly accustomed to the tax, the Revenue, taking on companies over tax issues."

He also said that there was nothing in his prior experience which said that schemes like this didn't work. (**Answer 186:** Page 33).

He was not conscious of the need for excessive confidentiality in relation to this transaction in July 1995. "All I could say about it really was that I wouldn't have regarded that particular bit of tax planning as being so novel that I would go out and discuss it with other directors 'why don't you do the same as DCC have done. Very clever. It wasn't very clever. When I say it wasn't very clever, of course it was good tax planning'." (**Answer 205:** Page 35).

When asked if there was any sense in his mind, that he can recall, of not wanting this to be known. He answered "no". (**Answer 207:** Page 36).

Question 208: Was there any sensitivity or any understanding in your mind that for it to be publicly known there might be an effect or an impact upon the Fyffes' share price, for example?
Answer: "No. In fact the only, I think the only aspect of it that would ever have struck in my mind, was that you were putting a for sale sign on it."

Question 209: Yes. I can see looking… (Interjection).
Answer: "But that, by the way, I knew enough about Stock Exchange dealings at the time."

Question 210: Yes.
Answer: "That if somebody had wanted to buy Fyffes' shares they knew exactly where to go to buy them."

Question 211: Yes.
Answer: "So I'm not sure the 'for sale sign' was such a big deal anyway."

Question 212: Or that there was any reality in it?

Answer: "Yes."

When asked if he was surprised that lawyers' advices were being sent out in the board package, he answered "no". (**Answer 214:** Page 37).

When asked if it struck him as being unusual, that the legal advice, in respect of the compliance and insider dealing issues were being circulated but not the tax or legal advice in relation to the tax scheme he similarly answered "no". When asked what he did when he got the letters from Alvin Price he said that he read them and sort of said "well, okay". (**Answer 259:** Page 43).

When asked if he recalled much of a discussion about the letters and the issues that were being raised at the board meeting he said "not excessive, no".

Question 261: What is excessive?
Answer: "Well, excessive means a kind of a barney, where you would remember it because there were so many views expressed or there were differences. There was nothing like that."

When asked if he was aware that Fyffes had a contrary view he said he was aware that Fyffes' Solicitors expressed a contrary view, "but I would have said well, they would have, wouldn't they". (**Answer 263:** Page 44).

Question 264: Well, why would they have?
Answer: "Because it always seems to me that when you get Solicitors on, if you like, different sides."

Question 265: Yes.
Answer: "That they take a view which is in the interest of their client."

Question 266: Yes, so it was in… (Interjection).

Answer: "I mean I would never be surprised if somebody I was acting for, my Solicitor who was acting for me, and somebody else's Solicitor who was acting for someone else, then my Solicitor would be giving me advice which is the right advice for me, and the other person who is employed by the other firm will be giving the advice to them, which they felt was in their best interest."

When it was suggested that this was a cynical view he says, "it is somewhat cynical, I accept that yes." (**Answer 267:** Page 44).

Question 268: …I mean one interpretation of that is you tell your client what they want to hear?
Answer: "It certainly is, and I wouldn't mean it in that sense."

Question 269: No I'm sure you wouldn't. How would it be in Fyffes' interests? Or how would it have been in Fyffes' interest to notify or to have been notified?
Answer: "I wouldn't have thought that it mattered much to Fyffes at all."

Question 270: Yes, did you know that they had some concern about the effect it might have on their share price?
Answer: "Not really, and I couldn't see why it should have any effect on their share price."

He said that if he had been in the McCanns' seat and DCC were transferring the shares for tax reasons within the group of DCC companies, he wouldn't have been in the slightest concerned. (**Answer 272:** Page 45).

Mr. Barry knew that the consequences of a breach of the Acts "would be serious". (**Answer 280:** Page 47).

The view that Mr. Barry took was a "common sense" view. "There is no beneficial change of ownership, effectively, still within the DCC group. We had advice which said 'you can go this road'." (**Answer 286:** Page 48).

He accepted that having got the advice from Alvin Price he didn't enquire too much into what the consequences were. He also confirmed that he had no concern about insider dealing in relation to the 1995 transaction and insisted that Jim Flavin was "adamant in saying that he could not give any information to the board which was not in the public domain". He said that insofar as insider dealing was concerned that in terms of that particular transaction the suggestion never crossed his mind. (**Answer 295:** Page 49).

"I would be absolutely adamant as a non-executive director of DCC and as far as I know the other non-executive directors of DCC there was never any question of insider information with regard to Fyffes." (**Answer 300:** Page 50).

When asked how he satisfied himself about that he said, "I would never have suspected that there was any reason (for the 1995 transfer) other than the reasons (that were given)." (**Answer 301:** Page 50).

(l) Patrick Gallagher

Mr. Patrick Gallagher explained that he was called to the Bar in Trinity Term 1966. He has a Diploma in Public Administration since 1959 and he has been working in business since 1957. He explained that he had worked for about 13½ years with Aer Lingus and the rest of the period of time up until 2000, with Guinness. He finished up in Guinness in Ireland as head of Legal & Pensions. He would have specialised in the pensions area and was also responsible for Legal Company Secretarial. He said he joined Guinness in 1970 as Assistant Company Secretary, he moved into personnel in 1972 and back in as Company Secretary in 1976, back out again in 1980 to head up the distribution function

where he was for about 5 or 6 years and then back into Head Office again on secretarial/legal. He then finished his career in that role.

He explained that before the formation of DCC in 1976 Jim Flavin arrived in his office one day and said he had a proposition and told him what he was planning to do and he was looking for support from large pension institutions and insurance companies. Mr. Gallagher said he was impressed with what he had to say. He had never met Mr. Flavin before. He didn't even know his name. He didn't know who he was. In fact he thinks he arrived unannounced. At that time the government were very anxious to have pension schemes, bigger schemes in particular, to put some of their money into venture capital, into investment in Ireland and what Jim Flavin was proposing would have fitted with that. Traditionally, up to that point in time, Guinness Pensions would have been invested all around. He explained that he met him and then brought the matter to the Trustees of the Guinness Pension fund who agreed to invest £100,000.00 at that time into DCC which was a fairly significant stake. At that time it was suggested that there should be a nominee to the board representing the interests of the pension schemes. Mr. Gallagher was suggested and when his employer was happy, he agreed to do so. He became a director from the very beginning in April 1976.

In 1976 he had experience of being a director of lots of subsidiary companies in Guinness but he would have had no experience of plc's but he would have understood through his company secretarial role, the roles and responsibilities of directors "so it would not have been novel". (**Answer 359:** Page 65).

Apart from his training at the Bar he was asked about his knowledge of company law. "It would have been acquired as part of you know, being involved. I was involved in the Company Secretary department of Aer Lingus so I would have had a lot of experience of what I call the 'general company secretarial' side of that. Company secretarial returns, of the need for the requirement drill. I would have kept myself up to speed on that." (**Answer 360:** Page 66).

Question 361: Yes?
Answer: "It would have been an evolving process. You know, I would have said that I was pretty well up to speed in terms of Company Secretarial issues and, you know, in terms of directors, directors' responsibilities by the time, by 1976 certainly."

Mr. Gallagher was asked if he was in a position to compare the corporate or compliance structure in DCC with that in Aer Lingus or Guinness.

"Well, I would have said, I was very taken, I have always been very impressed with the attitude towards compliance and corporate governance within DCC. I mean Jim Flavin himself and Alex Spain also as Chairman had a very well, strong and well-developed view of compliance." (**Answer 371:** Page 67). "…The issue of having a Compliance Officer was in place for a couple of years before (1994). And we, as a board, would have been getting twice yearly reports, detailed reports from the Compliance Officer on the whole area of corporate governance, there was quite a range of headings. That would have been taken very seriously. Certainly Jim Flavin, in my view, was admirable in that regard and I think it was better structured, it was more structured, than say it would have been in either Aer Lingus or Guinness now." (**Answer 373:** Page 68).

"No, I think that DCC could and did, and I think still would stand up, in my opinion, very highly indeed in the whole area of compliance. It wasn't lip service. It wasn't just ticking boxes. I mean, there was, I mean warts and all were disclosed and the board had an opportunity twice a year, you know, to pick over and to say, and to test, and to ask, you know certain questions around about those areas…" (Interjection) (**Answer 373:** Page 68).

Question 374: Did they?
Answer: "Yes of course they did."

Question 375: I mean would they have any opportunity… (Interjection).
Answer: "No, no, of course they did. This wasn't just read and filed, it was, no it was, there was a considerable debate on every one of those reports, on aspects of them, so that

we could understand what was and also to make sure that insofar as there were any problems that they didn't recur."

He was then asked how he coped with the dual role of being an executive of Guinness and a non-executive of DCC.

Question 380: … What informs you in relation to when one hat comes off and one hat goes on?

Answer: "I think the critical thing is integrity. I think that you have a requirement to carry integrity into whatever role you are doing… instinctively when you are at, say a DCC board meeting…you don't carry any of your Guinness information. You carry knowledge, you carry training…but you commit yourself to do what is right for and what is correct for and what is appropriate for DCC. I think that in the context of Fyffes and DCC, in the context of Jim, I think Jim would have carried that role into Fyffes. He would have done that role without fear or favour. He would have done it absolutely as a director of Fyffes. He would have had another vision which, as you would say, I am minding my significant investment on behalf of the shareholders of DCC…he would have had a total commitment to Fyffes. I mean he would have been quite tenacious in making sure that what he did and what he acted on Fyffes for, was done in the best interest of Fyffes."

When asked what familiarity he had with the changes that were brought about in the 1990 Companies Act he says he was aware that in 1990 there was quite a significant update of company law. He needed to advise his own boards of the changes that affected them, "not all the changes did, but you know, obviously there was the issues of directors dealing, of directors' loans, all of that sort of stuff. There was obviously the question of insider trading and they would have had to, to some extent, not usually so, but there were shareholders in the plc., and they were bound by the code, their code of behaviour…so I …remember doing a short paper for them, of the key points of the Act, at the time so that they would be aware of the implications of the 1990 Act…They weren't going to read it themselves. So yes I would have been reasonably up to speed, I wouldn't say as quite as up to speed as this moment but nevertheless, of course I had to." When it was put to him

that legislative change brought about by the Oireachtas in 1990 was both a reflection on what was perceived to be a need for greater compliance in relation to certain things that weren't perhaps working well enough up to that point in time, he agreed that some of it was driven by perceived need, "I think that all legislation which is new and which updates is driven by something. I mean some of the legislation is driven from Europe and is part of our belonging to and being part of the European Union. That doesn't make it wrong, but I mean it is a matter of fact that it is driven and some of it is driven by perceived need." (**Answer 386:** Page 72).

It was put to him that his experience and involvement as Company Secretary in Guinness gave him a deeper understanding of the type of interests that were of concern under Part IV of the Companies Act 1990. He agreed. He knew that one "menace" that the 1990 Act was trying to cure, in terms of notification obligations, was that a company, be it Guinness or DCC or Fyffes, knew who the true owners of their shares were. "The reality of the ownership was intended to be known." (**Answer 392:** Page 74).

In relation to the Fyffes' shareholding he said "a decision was taken in the early 90s by the board that Fyffes was not a long term hold and that the Fyffes' shares were going to be and would be disposed of, in due course, if and when a suitable opportunity came up. There was no big rush in that decision. It was made as a decision. Then that decision was affirmed once a year at times of strategy. So it was a shareholding which was not, did not fit, in our judgment in the board's judgment with a DCC long term strategy." (**Answer 397:** Page 75).

He says that that decision was taken before 1995 and it was discussed before the company went public in 1994 but he couldn't remember precisely when.

Mr. Gallagher explained that the year of the floatation in 1994 was an extremely busy time. But for the board there was only marginally more involvement and certainly there would have been more time at board meetings. For everyone and not just for him. He accepted however that he took a greater interest in the technical aspects of floatation at the

board meetings. "Absolutely, yes as you would necessarily, you bring your own particular strengths to bear and probably bring your own line of questioning to bear on it. And, yes, I mean I would have had a business background. As I say I was involved in distribution and personnel so I would have had other areas of interests but I had no particular role." (**Answer 413:** Page 78). He explained that the ideas person in relation to the floatation was Jim Flavin and that he was a very powerful person at board level. When asked for a sense of what it was like to serve on a board that wasn't chaired by Jim Flavin but of which he was the Chief Executive he answered, "well, as you say, he was a formidable individual. He was always very well briefed. He would feel he was failing if he was asked a question that he didn't have the answer for or hadn't thought about. From time to time questions were asked that he didn't have the answer for and which he had to go back on. That wouldn't necessarily have pleased him I would imagine, but if it displeased him he hid it well. I must say I found him extremely open. I do believe in my role as non-executive I did ask the odd awkward question when it seemed to me that that was appropriate. That was never resented, that I am aware of. I must say I have always had a good practical business relationship with him and I found him open to question and open and amenable to change." (**Answer 419:** Page 78 and 79).

Question 420: Yes, was there any sense, or did you have any sense of the non-executive directors being in awe of or being afraid of Jim Flavin?
Answer: "Speaking for myself, no, to be honest with you, no, why would you? And I dealt with fairly powerful chief executives and senior executives in Guinness and believe me, you know, they don't come much different. They are successful people in business. They don't get there because they are nice people and easy people to deal with. They are there because they are strong personalities and they are quite – but all of them, in my opinion and certainly with me I have found I have always been able to question and I always felt it was my duty to question."

Mr. Gallagher was aware of the new provision in the 1990 Act in relation to the appointment of a secretary of a public limited company.

Question 426: How did that inform the decision to appoint Michael Scholefield in January of 1995?

Answer: "Well, he was a very highly qualified accountant, you know, which would have been one of the requirements. He was not just highly qualified, you know, he was an exceptionally bright fellow. He had been working in the business. So he would have, from my point of view, I mean there was no reason at all why he wouldn't be an outstandingly good Company Secretary and indeed he so proved."

Question 427: And when he was nominated was there a discussion in relation to his appointment?

Answer 428: "Oh yes, I mean Jim would have said…that he was proposing a change in Company Secretary and he didn't bring forward three (names) he brought forward one name. He then went through his CV in detail with us."

Question 430: How would the discussion have gone?

Answer: "People would have asked, they would have asked the obvious questions and if the Chairman was bringing forward somebody whom he was strongly recommending to be Company Secretary who, from the point of view of the directors seemed to have more than adequate training for the job and certainly a lot of experience and a lot of intelligence, that he would be – and proved to be a good secretary."

When asked about the job description for Compliance Officer he said it "covered anything from litigation, employment law, competition law, health and safety and a whole range of issues, you know, compliance with the directors dealings with the Stock Exchange notifications, all of that". (**Answer 432:** Page 81).

"There was already a well established reporting requirement into the board on the areas. I would have seen the role of the Compliance Officer to keep up to date with issues of compliance and to give advice to the board and the management of compliance requirements for the group and to monitor those and make sure that the group stayed in compliance with all the various, quite significant amount of legislation that was required

…and it seemed to me…Michael Scholefield would be well capable of doing that as well as his role of Company Secretary." (**Answer 432:** Page 82).

When asked if he remembered when he first learned of an actual proposal to transfer the beneficial interest in the Fyffes' shares held by DCC and S&L to Lotus Green Limited, he said, "I knew that the driving force on this was taxation. I mean the idea would be that if and when the shares in Fyffes were sold that the company would try to mitigate its obligations and liability for Capital Gains Tax." (**Answer 434:** page 82).

He said he was already aware of the use of Dutch companies because Guinness plc., used, for tax planning reasons a Dutch company as well "so that didn't phase me, that seemed to be perfectly logical". (**Answer 435:** Page 83).

He explained that in the Guinness example it was used for Corporate Tax. "I was aware of the requirements to make it legitimate." (**Answer 437:** Page 83).

Mr. Gallagher believes that the papers which were circulated in advance of the board meeting of DCC plc., on the 31st July 1995 was the first formal notification that he had as a non-executive director of the proposal. He said he expected that a lot of work had been done before the matter came to the board. Not only would he not have been surprised that tax advice had been taken if it hadn't they would have said, "'hold on'. You know we'd have to stop." (**Answer 455:** Page 86).

He said they were made aware at the board meeting of the fact that advice had been obtained "because for obvious reasons the biggest issue was to test and to be confident that the tax scheme was robust". (**Answer 456:** page 86).

He said he was not surprised that the legal advice in relation to notification and insider dealing was sent out but not the advice in relation to the taxation scheme. The compliance and insider dealing matter was "a much more discreet issue…much easier to have recorded in one or two short Memos". (**Answer 459:** Page 87).

He agreed that if you read the Minutes of the board meeting of the 31st July 1995 you would get no sense that it was tax related. When asked if this was deliberate he said, "I don't know is the answer – I mean I can't remember now why the Minutes were structured in this way – but certainly the reason for the whole process was tax driven. We were quite clearly made aware of that and we discussed that at the meeting. I cannot answer as to why the Minutes were written in this way." (**Answer 462** and **463:** Page 88).

Question 465: Am I correct in saying that the preferred view is that you record decisions rather that discussions?
Answer: "I would favour that. I must say it is not always done. Where I can influence it I try and say 'for God's sake leave out the waffle and put in the decisions'. But sometimes it's a requirement to understand the decision to give some idea of the background. But generally speaking short Minutes make sense."

Mr. Gallagher was not aware that there was a concern at the time that DCC could have been charged with tax, based upon the transfer in August 1995 and being liable for that tax, even though the sale didn't take place until much later. "I wasn't aware of that detail. That's the first time I have heard of it." (**Answer 473:** Page 90).

He said it didn't surprise him that there was explicit reference to the legal advice in relation to the Companies Act provisions in the Minutes but not to the tax advice.

"Not particularly. I mean because my recollection at the meeting was that the strength of the tax advice was very – the advice was very strong, that in fact the possibility of the scheme being struck down was remote and that in fact it was a perfectly workable, solid, piece of tax planning which was strongly recommended to the board as a whole by the Finance Director and the Chairman and that they had said that they had taken and you know, they quoted the resource of people that they had discussed with and that they were satisfied on the advice of all of those people that the scheme was good." (**Answer 479:** Page 91).

He said his practice in relation to board papers was to read them beforehand and to be up to speed and they got the papers normally seven days beforehand so there was no excuse not to have read them. The Chairman, Mr. Spain would have expected you to read them and indeed if the papers didn't get out a week beforehand he would mention it at the meeting. (**Answer 485:** Page 92).

When asked about his recollection of the import of the advice from Alvin Price he said "Well, it's very hard to say where it blends, I mean obviously I read it more recently again. I mean if I could go back to that meeting, the biggest part of that meeting and the biggest concern that I would have and I think the other non-executive directors coming to it for the first time would have been, around about the robustness of the tax planning and to make sure that that was going to work. I think we were also told at that time that we would no longer as a board be concerned if this scheme was put into place…concerned with any decision to sell the shares in Fyffes, but this would be a decision that would be made in Holland, you know to preserve the integrity of the tax scheme. So in other words we were, if you like, kissing farewell in a sense to our involvement as a board with the Fyffes' shareholding. So we were setting up a scheme which was complicated, which required new companies being formed, which required a whole new arrangement existing in Holland and that was in fact, that that company then was going to make decisions which we weren't contributing to…the third issue was the issue of the advice from Fry's, but the overwhelming decisions were those to say that this very significant investment which was no longer mainstream but was nevertheless very valuable was going to move offshore, for lack of a better term, and as part of tax planning situation, so in fact on the inevitable sale that the liability to Capital Gains Tax would be zero. Then the other issue which was in a way a tidy up situation was, does or does not this particular inter company (transfer) within DCC group, does it require to be notified? So they would have been the sequence for me as far as I would be concerned and, indeed, it would be my hierarchy then and it would I think still be my hierarchy." (**Answer 486:** Page 94).

Mr. Gallagher was then asked in relation to the point about transferring the beneficial ownership of the Fyffes' stake to an entity that was not controlled by the DCC board

whether he really thought he was doing that or that he was only doing that for tax purposes. "Oh no I thought I was doing it, I was sure I was doing it." (**Answer 490:** Page 94)

He said from that time on, "Jim Flavin would not have reported on Fyffes at every meeting, that was gone, it was now a share that was not under our management and control as it were, it was in our ownership but it was in a basket for sale". (**Answer 494:** Page 95).

Question 495: So up until that point in time Fyffes' shares would have been discussed at every meeting?

Answer: "Prior to the floatation of DCC. A sea change took place at that point in time because otherwise we were going to be insiders or we would be made insiders into the issues of Fyffes, or we could have been made insiders. Jim was very careful to make sure that we were never insiders."

Question 501: If you were transferring 15% in DCC and it was going out of your control what assurance did you have or what control or what consideration did you get for this?

Answer: "I think it was that the Finance Director would be a director of the Dutch company."

Question 502: Yes.

Answer: "And by definition was going to represent, if I can put it that way, the DCC ownership of the shares, so we had confidence in the Finance Director."

Question 503: But he is but one director?

Answer: "Correct."

Question 504: How did that give you assurance for the situation where you as a DCC board controlled it entirely to a situation where the Finance Director… (Interjection).

Answer: "As I said, we spent a good bit of time at the meeting trying to get that uneasiness out of our system, that was dealt with at the meeting, by definition the

company was still a company within the DCC group, it would have had by definition, under its own corporate governance, to act reasonably in the best interest of DCC and in the interest of its shareholders. We were fairly confident of the outcome. We were confident, because obviously we wouldn't have done it if we weren't…"

Question 505: Did you know anything about the internal or the proposed internal controls and constitution within Lotus Green?
Answer: "We would have been made aware that there was a standard Articles of Association. We would have been aware of the people, who in fact made up the board, we were aware of their background."

Question 506: Were you aware of any veto rights?
Answer: "Sorry?"

Question 507: Were you aware of any veto rights?
Answer: "Not that I can remember. We were satisfied at that meeting because I think otherwise myself and other people would have said if there is an enormous risk of someone running away with the proceeds or if there was enormous risk for DCC in relation to a sale we would have had to have been made aware of that and I think the answer is that it wouldn't have gone through."

Mr. Gallagher was then referred to the handwritten note of Mr. Scholefield dated 31st July which referred to "slight difference from Fyffes on this. Insider dealing agreed by boar".

He was asked if he recalled the discussion around the notification issue to which he answered, "yes, obviously with the papers my recollection is that there was a letter or letters from Alvin Price and it was for decision by the board whether or not that advice would be accepted, in other words had we accepted that advice." (**Answer 517:** Page 99).

Question 518: Had you ever been asked, you perhaps more than anyone there had at least the qualifications to express a legal view, did you think it was unusual that a board of directors were being asked whether they concurred with legal advice?
Answer: "No, we have concurred with legal advice fairly regularly with our various schema, including stock option, things like that. Alvin would have in the past and Jim would have brought forward documentation drafted and recommended by Alvin to the board which would have by definition legal connotation and the board would adopt them. It would not have been by any means the first time that Alvin Price would have advised the board and would have either come to the board himself or have given written advice to the board. There would have been nothing new about that. We knew Alvin quite well because he had been involved from early on with the company."

He was then asked if he ever had cause as the Company Secretary of Guinness to look for Counsel's Opinion on a matter to which he answered "only if its Solicitors suggested it. I don't remember ever second guessing them on that." (**Answer 519:** Page 99).

When asked in what circumstances he would look for Counsel's Opinion "I might have said, do you think this is something we will need Counsel's Opinion on? They would say 'we don't think it is necessary' and they would give reasons or they would say 'you are probably right we probably do need it' and they would suggest who should do it. It would be an informal chat and it might be done formally in writing, but quite often it would be done by telephone." (**Answer 520:** Page 100).

When pressed as to what would have prompted him to look for Counsel's advice, he said "if it was highly complicated, if it was very complicated and if McCanns (Guinness' Solicitors) were hesitant in any way on the advice, they would say 'this is tricky, this is a bit difficult' whatever and I would say maybe, 'look, in those circumstances should we get Counsel's Opinion'. More often than not they would be the person who would suggest it rather that me, that is what they were paid to do." (**Answer 521:** Page 100).

Referring to the advice from Alvin Price in relation to the particular transaction he said "his logic and the way he set out the logic for his decision for his advice rather, appealed to me, I thought it made sense and I didn't think I should second guess it." (**Answer 524:** Page 101).

Question 525: Why did it appeal to you?

Answer: "Did I think that at that time? I had very significant regard for Alvin's commerciality and for his judgment. It seemed sound, I would have looked at it, I followed his reasoning down in my own way. I think any of the other directors, whether they be accountants or engineers, would have done the same. His decision, in my opinion then and now, was sound. I didn't feel then or now the need to second guess it by asking for another opinion."

Question 526: Did you ever see the provisions that he was advising on?

Answer: "He quoted the provisions. Did I look up the Act at the time? I don't remember."

Question 527: He may have paraphrased the provisions but he didn't set out the provisions?

Answer: "No."

Question 528: Would you have known from your legal days that when you are looking at a piece of legislation you give it its ordinary meaning in terms of how you construe it?

Answer: "Yes."

Question 529: That would not have been a surprise to you?

Answer: "No, absolutely no."

Question 530: It would be in circumstances where the meaning was perhaps not so clear that you would have to look at the context in which the provision occurred?

Answer: "That is logical."

Mr. Gallagher was then asked to look at the advice and he confirmed that he understood that it was an issue not only of notifying Fyffes but also the Stock Exchange. When asked if he knew that Fyffes had been informally notified about this he said he thought that came through at the meeting.

When asked if he thought that it was a little bit odd that they were debating, whether they had a legal obligation to formally notify Fyffes and yet Fyffes knew and they were debating whether they would be telling them formally. He said he didn't know whether the board of Fyffes were told. It would not have been a big part of the DCC board meeting considering this. The big part was concerning the tax structure and the issue of whether or not there was notification required and the fact that there might have been a different view coming through from Fyffes that wouldn't have surprised him. (**Answer 539:** Page 104.)

When asked what was unusual about only the beneficial ownership moving in the context of this transaction, Mr. Gallagher said, "I wouldn't have believed that it was my role to, if you like, to second guess that. All I say is that the letter at the time I read it seemed to be well structured and seemed to be sensible." (**Answer 540:** Page 105)

Question 541: I'm just wondering, is that because it provided the answer that you wanted as opposed to what your head told you?
Answer: "This didn't seem to me, then or now, to be an enormous issue. It seemed to me at the time that it either needed to be notified or it didn't."

Question 542: Yes.
Answer: "There didn't seem to me to be any downside if the advice was to notify. There didn't seem to be any downside about that. I don't believe if Alvin said, 'this has to be notified' we would have asked for Counsel's Opinion. We would have said 'notify'. In the context of the advice that was given if it had been given the other way I don't believe anybody on the board would have said 'this is awful, this gis oing to ruin the whole thing, we are in real trouble'. There was no sense of it hiding anything. It was a simple

straightforward logical follow on as an item that needed to be dealt with because of the big decision."

He was then asked if he was aware that there were somewhat diverging recollections of different people as to what concerns they had He said he was not aware nor was he aware that Alvin Price had a sense in which he believed or understood or felt that DCC did not want to notify.

"I certainly didn't have that and I am not aware of that, no it was certainly not discussed and I got no sense of that, absolutely not, no." (**Answer 544:** Page 106).

Question 545: Did you have any sense at the time that all things being equal it is better not to notify?
Answer: "No. No. The only sense I had of this was that a decision had to be made to notify or not to notify. The advice which came before me was, in my opinion, clearly saying that it is not a requirement. In that situation 'if it aint broke you don't fix it' or if it was not advised to do something why bother doing it. I am trying to think back and had he given an alternative I would have said 'notify, move on, next business,'."

It was then put to Mr. Gallagher that there were 3 reasons why the board might not have wanted to formally notify the transfer. One was that it was going to set the hare running in circumstances where it was going to mislead the market about the imminence of the sale of the Fyffes' stake by DCC. Secondly a concern that to do so was putting a formal or a more formal "For Sale" sign on the shares. The third possibility is that it was a tax driven scheme which was going to be implemented over a period of time starting in August 1995 but not culminating until Lotus Green sold the shares and that it was unwise to alert the Revenue Commissioners to this scheme before they had to be alerted.

Mr. Gallagher took the last point first.

"I think once you have a Dutch company, DCC would have to disclose in its annual report all of its subsidiaries and once you have a Dutch company and they are de novo you wouldn't have to spell that out for the Revenue, that is public knowledge. You don't have a Dutch company set up without the Revenue knowing why it is there because any company, particularly a company that wasn't trading in Holland, we didn't have a subsidiary company, so once you would form a company that was in and registered in Holland for sure you were telling the Revenue that you had a tax scheme in place. There would be no question of hiding it from the Revenue, that never was discussed, that never came up and I don't think that would have been an issue at all." (**Answer 551:** Page 108).

Question 552: There is a difference you will appreciate between the Revenue finding out in August 1995 or December 1996?
Answer: "I don't believe there is. There was no question of hiding from the Revenue because if the scheme was robust it was robust and it was only going to be tested when the shares were sold, so that was the issue."

Question 553: Yes, insofar as it being tested was concerned, if there was a possibility that DCC would have been taxed on the transfer to Lotus Green that could have been tested before the sale.
Answer: "It wasn't a consideration that I am aware of."

Question 554: Yes?
Answer: "It may have been a consideration for somebody but it wasn't a consideration for the board at the meeting I was at."

Question 555: You didn't seek the tax advice?
Answer: "I didn't."

Question 556: That was obtained?
Answer: "I would have seen it since yeah, I would have had a lot of regard for somebody like Tommy McCann, who I would have seen and known to be an expert."

When asked if he knew the consequence for getting it wrong on failure to notify the company or the Stock Exchange he said, "you were in breach of the Companies Act 1990." (**Answer 559:** Page 109).

Question 560: Particularly what?
Answer: "We certainly didn't go into it at the board meeting, the detail, if this is wrong are we going to end up in prison, or are we going to be fined or disqualified. The answer is it was certainly not mentioned at the board meeting."

Question 561: Did you know of the civil consequences for the seller or the acquirer in relation to enforcing their rights over shares being put in jeopardy?
Answer: "No."

Question 563: I take it had you been made aware of the potential for an impediment to exist over the title to the shares or the ability to transfer the shares, your view as to the desirability or absence of a desirability in notifying might have changed or would be likely to change or how would you describe it?
Answer: "The short answer is it is difficult to give an honest answer to that now, I don't know. I would like to think that in terms of the totality of the advice that we would still have looked at it and measured the situation. As I say my instinct would have been then and now that the issue of notification was not going to go to the root of the tax advice and the tax scheme. If advice on the notification was going to any way cut across or destroy or damage that then I think the board would have taken that on board."

Question 564: I'm not suggesting in terms of damaging the tax advice but I'm really thinking in terms of the ability of either DCC or Lotus Green to enforce rights in relation to the shares by action or proceeding, forgetting about the tax consequences. It is somewhat hypothetical but you say you weren't advised in relation to it?
Answer: "Not directly, no."

Question 565: What I'm trying to find out is would it have made a difference to you if as a consequence of not notifying there was a difficulty for Lotus Green in doing anything in relation to the shares by action?
Answer: "The answer is that you would have had to take serious notice of it."

He agreed that there was no technical difficulty with notifying and when he was asked if he wasn't worried about the share price and wasn't worried about the Revenue Commissioners the more prudent course might have been to say 'notify'. He answered, "it is easy to say that now." (**Answer 567:** Page 111).

Answer 568: "Hindsight has perfect vision."

Answer 571: "You seriously don't anticipate an enormous amount of hardship over what looked like proper, well structured tax planning advice, which looked like proper, well structured advice in relation to a notification. You really don't get into significant second guessing every single item. What you do is you look at it, you are required to look at it sensibly and coherently. Do you trust the people who are bringing it forward? Do you believe that the people are competent to give you good advice? Then you say, fine, from time to time, all advice is wrong but you are pretty bloody good if you get it right all of the time."

When asked if he agreed that it was important to know the consequences, he said, "of course it is". (**Answer 572:** Page 112).

Question 573: Because that informs your decision?
Answer: "I would like to believe that that was what informed me at all times, did I at all times get it right? Possibly not."

Question 574: Yes.

Answer: "Possibly not. I think the level of detail when you forensically examine a minute part of one transaction of the hundreds and hundreds that were made from the time I joined the board it is difficult. I wouldn't say any more than that."

Mr. Gallagher was then taken through the detail of Mr. Price's advices. He was asked if it struck him that the true owner of the particular substantial block of shares after the sale was in fact Lotus Green and that is what needed to be notified, he said he looked at the "totality of the opinion which goes on to say that there was no need for notification because there was no disposal of shares outside of the existing ownership". (**Answer 593:** Page 116).

He was asked did he ever think about the other shareholders in Fyffes, if they were entitled to know what DCC's intentions were in relation to the sale "that certainly wasn't a consideration that I took into account and I don't remember it being discussed, I don't think it was discussed in fact". (**Answer 607:** Page 119).

He was then asked what the 'commercial considerations' were referred to in Mr. Price's opinion. He answered, "I don't know, you can guess. I presume that he was saying that you have put in place, you are putting in place, you are proposing to put in place a scheme which on the disposal of the Fyffes' shares is going to be beneficial to DCC. I assume that is the commercial consideration that he is talking about. He was not party to that scheme that I am aware of, he was not involved in it." (**Answer 611:** Page 120).

Mr. Gallagher was then asked what structure existed within the DCC board to ensure that inside information which the Chairman of DCC undoubtedly had by virtue of his membership of the board of Fyffes to ensure that that did not find its way into a decision, a decision being taken at the DCC board level.

Mr. Gallagher said that they would have relied heavily on Jim Flavin and on Michael Scholefield as Compliance Officer.

Question 623: Tell me more. What does 'replying on Jim' mean?
Answer: "Well, what I've said to you before, I've always, and I think that any board member would have always found him explicit I mean in telling when he was constrained from dealing with matters of Fyffes… he would have said 'I'm sorry' you know, he always prefaced his position and he would stop. He would always – he was meticulous in not bringing to board anything that was price sensitive or if he did, and he may have done it once, he would have said 'I'm making you all insiders for the purpose of Fyffes so that I can impart information which is important from DCC' and we would have been all made insiders at that point and accepted that we should be and were insiders."

Question 624: The consequence of that was, when you were made insiders, then what?
Answer: "That we couldn't trade in Fyffes."

Question 625: Either personally or corporately?
Answer: "Well I would have understood it personally. I think he probably just did it once but if he did it more than once it was twice. But, you know, I was quite comfortable and quite happy to accept that in the context of the DCC board that I was now an insider and that I couldn't deal in Fyffes' shares."

He was then asked what role the Compliance Officer plays in relation to insider dealing matters. He said, "I would have expected the Compliance Officer to report to the board, probably having reported to the Chairman already if he had a concern". (**Answer 627:** Page 124).

Question 628: Yes…how would the Compliance Officer know that there was price sensitive information?
Answer: "All right, well, I am just saying I mean if he didn't know, if he couldn't do anything about it."

Question 629: If he is to do his job, if he is something of a policeman in relation to it… (Interjection).

Answer: "Well, I would have expected him in the context of that to talk to the Finance Director and the Chairman. And since only the Chairman could possibly have known, you know, it would be reasonable that he would have had discussion with Jim on it."

Question 630: Yes.
Answer: "I don't know. I can't tell you whether he did or not."

9.1.4 The Dutch Directors

(m) Gerrard Venneboer

Mr. Venneboer obtained a Degree in Economics from the University of Colorado. After returning to Holland he started his career in commodity, trading mainly in cocoa. After that he joined a cocoa manufacturing plant in 1972 and became the Chief Executive in a biscuit and cooking industry and trading company. The company that he was running was sold to a listed company in the Netherlands in 1984. He remained on with that company as an executive board member. In 1989 he voluntarily left the company and started his own 'boutique' mergers and acquisition company and started consulting and helping larger corporations to find acquisition targets in the Netherlands and in the whole of Europe. He was doing that business from 1989 until about two years ago.

He explained he first came in contact with DCC in or around 1992 and 1993 through the intermediary of Henry Roskam and Peter van der Hoeven. At that time he was introduced to Morgan Crowe who explained the business of DCC, what they were looking for, that they were really looking for acquisition targets in the Netherlands and asked if he could help him by finding a similar company in the core business of DCC.

After that Morgan Crowe introduced him to George Young, who was the person responsible for corporate development and he had various meetings with George Young and they went to see potential targets in the Netherlands, acquisition targets in the Netherlands in 1993 and 1994. He then explained that he and Mr. Roskam were not in

business together, that they came to know each other through their respective wives but that from about 1989 he and Mr. Roskam shared an office building in Amsterdam. Mr. Roskam was still a Banker's representative at that time. "So we got to know each other very well because we were in the same building and we often ate lunch together." (**Answer 18:** Page 13).

Question 19: But not in a partnership or association?
Answer: "No."

He explained that Mr. Roskam was a representative for Crocker Bank in Africa, the Middle East and Europe.

Mr. Venneboer explained that he became a director of DCC Holdings BV some time in the early 1990s.

Question 29: And were you at that stage director of many other Dutch Companies? Is that something that you did routinely in your business?
Answer: "No I had a couple – we call it a supervisory board in Holland. I had a couple of supervisory board roles. We have in Holland a two tier system. In the Anglo systems you have a one tier board, we have a two tier board. So you had the supervisory board and the executive board. The executive board reports to the supervisory board."

Question 30: And the supervisory board would be the upper tier?
Answer: "Exactly, yes."

Question 33: And typically would the Executive Board members also be on the supervisory board?
Answer: "No, never, never. Strict separation."

Question 35: … Did DCC Holdings BV have an executive board or a supervisory board.
Answer: "No, it was a one tier board."

Question 36: And was that unusual in the Dutch structure?
Answer: "No, it happens."

He says he became a director of DCC Holdings BV in 1985.

Question 38: And what did becoming a director of that company involve for you?
Answer: "Because well first of all I liked the people. It was a first class company because I was working with them already, for two years, I got to know the company and the culture of the company. They were a first class company. At the same time I was working for some other Irish companies like Avonmore and Kerry. So before accepting the board membership of DCC Holdings, I checked for the good name and fame of DCC which I always did, also before working with a company. So I got all of the very positive…"

Question 39: When you say it was a first class company, and you liked the culture, what does that mean to a Dutch person?
Answer: "It is style. It has a style – and I think the most important thing in that, is that your style may even cost you some money, in other words, I am not for sale, I am not – I look for is it a straightforward, even if it costs me money, why not take the direct line."

Question 40: Right.
Answer: "I don't like to talk with people when I don't understand what they have in mind. If they have a double agenda as we say in Holland, when they were just clear, no was no and that I like."

Question 41: Right. And that was apparent to you from your dealings with Dr. Young and Morgan Crowe?
Answer: "Absolutely."

Question 47: And in what circumstances did you become director of Lotus Green?

Answer: "I was a director of DCC Holdings and they asked me to join Lotus Green and I accepted that, knowing that Lotus Green was holding Fyffes' shares. That was all. Apart from that I wasn't familiar with the history before that."

Question 48: So you didn't know how Lotus Green came to acquire the Fyffes' shares.
Answer: "Absolutely not."

Question 49: Or anything of the purposes behind why a Dutch subsidiary of another Dutch company, which was held by an Irish company, would wish to hold a large stake in an Irish public company.
Answer: "Well the tax driven motive was known to me."

Question 50: Yes, which is?
Answer: "Which is very common in the Netherlands."

Question 51: Yes, this is the exemption from Capital Gains Tax.
Answer: "Exactly."

Question 52: For Groups or companies within a group?
Answer: "Yes."

He explained that he was already on the board of a Canadian company with the same purpose so nobody had to explain it to him.

When asked if anyone sent him any documentation prior to him becoming a director of Lotus Green, explaining or setting out the steps that were to be taken he answered "no".

He knew Lotus Green was an Irish company and that it was an Irish company that either was or had moved its residence to Holland. He knew that the purpose of Lotus Green was to hold the Fyffes' shares and that it was not a trading company. When asked if he made any enquiries about his obligations in becoming a director of an Irish company he

answered, “no, I don’t feel, my responsibilities - I saw it as being, it was a Dutch resident company, and I feel obliged to know what that meant as a director. As far as the Irish part is concerned I relied completely on the DCC people.” (**Answer 67:** Page 20)

Question 68: And when you say you relied upon them, what does that mean?
Answer: “Well, that they fulfilled the legal obligations as far as Irish law is concerned. I am not familiar with Irish law.”

Question 72: Yes, but you didn’t make any enquiries as to what your duties were?
Answer: “No because I am, I had been a director and I was still a director of other companies and I knew what my duties in the Netherlands were.”

Question 73: But in terms of discharging your duties, your ongoing duties as a director of an Irish company, did you make any enquiries as to what they were, or did you just take it on trust that the, that what you described as the DCC people would look after it and therefore look after you?
Answer: “Yes.”

Mr. Venneboer did not remember anything in particular about the meetings of Lotus Green that he first attended in August 1995.

When asked if he knew what the difference was between A directors and B directors he explained that the A directors were the Irish directors and B directors were the Dutch directors.

Question 85 Why was there a distinction between them?
Answer: “Because of the tax scheme you had to have a majority of Dutch directors.”

Question 86: A majority in number?
Answer: “Yes but also in the final say.”

Question 87: So when you say also in the final say what does that mean?
Answer: "Well there has to be – the Dutch directors should always be final, they should have the final word in the decisions being taken."

Question 88: But again if I understand it correctly no decision could be taken without an A director?
Answer: "That's correct."

Question 89: And how did the Dutch then have the final say, if in effect the Irish directors had a veto over any decision?
Answer: - Yes okay, then that is correct, yes."

Question 90: And I think it was, in a sense, a mutual veto in that there had to be an A director and a B director voting?
Answer: "Yes."

Question 91: Did you understand that at the time?
Answer: "Yes."

He explained that he was paid a fee for his directorship but there was nothing in writing that set out what his responsibilities were. When asked if he knew anything about the obligations of an Irish company to notify either disposals or acquisitions of shares in Irish public companies above a certain threshold both to the company and to the Stock Exchange, he answered "no".

His position was that if there were such obligations of any kind in Irish law that the DCC people in Ireland would keep him right and if legal advice was necessary or if legal advice was to be obtained, that would be done by them for their benefit, but also for the benefit of the Dutch directors. He did not see any legal advice in relation to the setting up of the structure or any of the tax advice that was obtained.

(n) Godfried Diepenhorst

Mr. Diepenhorst explained that he obtained a Law Degree from Utrecht University. Thereafter he worked in a small private bank in Amsterdam from 1962 to 1972. From 1972 to 1979 he moved to the Netherlands Antilles for that bank and in 1983 he came back to the Netherlands for ING Trust up until 2005 in Amsterdam. He explained that ING Trust was a Dutch BV wholly owned by ING Bank and was at time providing administrative and management services to clients from the Netherlands. 90% of the clients were international groups who operated outside their own jurisdiction for various reasons, tax reasons, and who needed in those foreign jurisdictions an address, a management service for accounting, administration. That service was provided by ING Trust.

Mr. Diepenhorst explained that he first came in contact with DCC in the beginning of the 1990s. His first point of contact was Fergal O' Dwyer and he also met Michael Scholefield. The first entity that they had an involvement with, where they were asked to provide management services was for DCC International Holdings BV, the subsidiary of the group. He said that they always had a standard written form agreement tailored for the specific service or the specific agreement. Mr. Diepenhorst identified the two agreements which were entered into with Lotus Green and explained that these were fairly standard forms of agreement with international clients.

He explained that there was some checking or due diligence conducted by ING Trust in relation to the clients, where one establishes the identity of the client, the identity of the transaction with the client and they never as a policy accepted clients without a proper Dutch Tax Adviser who was introducing the clients to them. The Dutch Tax Adviser who provided that introduction to Lotus Green came through CooperS&Lybrand through Peter Van der Hoeven. Mr. Diepenhorst explained that ING Trust itself would be a director without the individuals being directors. This was something that the Dutch Civil law system permitted that a company can be a director of another company. "It seems to be more logical to have a company in the Dutch system as a manger rather than a private

person…and the main reason is the continuity doesn't die." (**Answers 165** and **166:** Page 42).

When asked why one would have a private individual as a director as opposed to a corporate director he explained that certain foreign tax jurisdictions prefer (real persons) as directors in order to prove that the company is a Dutch based company.

He says that he first learned of Lotus Green Limited at one of the regular board meetings of DCC International Holdings BV. He explained that the meetings of DCC Holdings BV were held either at ING Trust's offices or at Mr. Venneboer's office or Mr. Roskam's office. They were in the same building in Amsterdam. He explained that Mr. Venneboer and Mr. Roskam were not connected with ING Bank or ING Trust. He said Mr. Roskam was well known to him. Mr. Roskam was involved with DCC Holdings BV but not Mr. Venneboer. Mr. Roskam was one of the Dutch directors of DCC Holdings BV. He then explained what Fergal O' Dwyer had explained to him in relation to Lotus Green "I think Fergal O' Dwyer mentioned that there was an Irish company moving its residency to the Netherlands and that the company had substantial shareholding and shares in Fyffes, and explained that the reason of this moving of this residency was to avail of the Dutch participation exemption at the time there was a sale of this interest." (**Answer 191:** Page 45).

Question 192: How familiar were you with the Dutch participation exemption at that time?
Answer: "Well, we were not allowed to give tax advice, but a large part of our clients established Dutch companies for participation exemption reasons so the mechanics were known to us."

Question 194: And was it well known that Holland was a jurisdiction in which you could avail of participation exemption?
Answer: "It was in the professional world of tax advisers and trust companies, and I think widely marketed as a possibility."

He explained that it was copied by other jurisdictions, by the UK and others afterwards.

When asked what information and what documentation he obtained from anyone in DCC about the steps that needed to be taken to move this Irish company to Holland, he explained that, that wasn't a concern of theirs since they were not on the board of the company, they were ready to step in once it was in the Netherlands. He did not concern himself with the legalities of what was being done from an Irish perspective.

"Seeing the parties involved and the role we played as Dutch directors in the future, I didn't see that as our concern, no." (**Answer 203:** Page 48).

He did not see any legal advice or any tax advice that had been provided to DCC or S&L Investments Limited or Lotus Green. When asked what familiarisation he had or what he did to familiarise himself with the obligations as a director of an Irish company under Irish law he answered, "the definition of our role was discussed with the client, and we saw it as our duty to take care of the Dutch obligations of the company…we relied for the Irish part on the outside counsel or the counsel within DCC's house." (**Answer 219:** Page 51).

Question 220: Yes does that mean, insofar as Irish company law was concerned, that you didn't concern yourself with it?
Answer: "No."

Question 221: Or didn't familiarise yourself?
Answer: "No."

Question 222: And insofar as any returns were required either of you as a director or annual returns that were required who looked after that?
Answer: "That was done by, I think at that time it was done by the tax people in DCC."

Mr. Diepenhorst was then referred to the Minutes of the meetings of Lotus Green of the 25th August 1995. Mr. Diepenhorst was not present for that meeting "if my memory serves it was a holiday, I was on holiday". (**Answer 226:** Page 53).

Mr. Diepenhorst said the requirements under the Irish Companies Act for notifying Fyffes about the transfer or the acquisition of shares "was not an issue for us". (**Answer 241:** Page 54).

"I did not know at what time the shares were acquired. And presumed – my thoughts were it was an existing situation for quite some time." (**Answer 242:** Page 54).

He was not aware if the Minutes of the previous meetings were with ING Trust or if they were in Ireland. When asked would ING Trust just start with the Minutes as they became Secretary or would they require the minute book for the company and take custody of it. "I cannot be sure what would be normal." (**Answer 248:** Page 55).

Question 249: You don't? There was no standard procedure for ING Trust in terms of what they did in terms of Minutes?
Answer: "Well, of course, the situation where a company might not enter the Netherlands was not standard. It did not happen. It happened on a few occasions. But normally the client set up a Dutch BV right from the start."

Question 250: So there was no
Answer: "This was an extraordinary situation."

He can only remember 5 to 10 cases of companies moving their residence from Ireland or from some other jurisdiction to Holland. He did not know anything about the obligation of Irish companies where they were transferring shares in another Irish public company to notify the Irish Stock Exchange, although he was aware that there were equivalent provisions where you had to report to the Dutch Stock Exchange. (**Answer 257:** Page 57).

Question 258: So you knew that in Holland there were reporting requirements.
Answer: "Yes."

He said he wouldn't have been surprised if there were similar requirements in Ireland but he didn't do anything about that presumption or ask any questions about the matter.

When asked if he knew what the point was of having an A director and a B director he said, "I think there were two perspectives, one was the tax perspective, always the Dutch, the Dutch director should be involved in decisions as a director for the Irish tax Inspector." (**Answer 275:** Page 59).

Question 276: Yes.
Answer: "And we, as ING from our side, we don't, we want always to be on top of the situations, and know what is going on so there will be no decisions in Ireland without the cooperation of the Dutch directors."

Question 277: And was there any other purpose that you understood from having A and B directors.
Answer: "No."

When asked if he had anything to do with the preparation of the Minutes of these meetings he said, "in general the Minutes were prepared in a draft format by the Account Managers within ING Trust who were responsible for the specific client and discussed with…DCC…that changed over time for practical reasons. The Minutes were drafted in Ireland so I don't know at what time there was a change." (**Answer 283:** Page 60).

Question 284: Is it probable that Minutes for the 25th August 1995 were all drafted in Ireland?
Answer: "Well certainly the specifics. The specifics about company law and regulation were provided. They were provided by Ireland that is for sure."

(o) Paul Schuler

Mr. Schuler explained that he joined ING or as it was called FNB in January 1988 and was continuing to work for ING until the management buy out in 2007. He still does the same job. He is the Compliance Officer for Orangefield Trust which was formerly ING Trust. ING sold the business to the Investor in 2007. The business is continuing under the name of Orangefield Trust who now acts as the Company Secretary to Lotus Green and to DCC Holdings BV.

Mr. Schuler explained that he wasn't involved in 1985 and 'was not even in Holland at that time'.

9.1.5 The Advisers

(p) Alvin Price

Mr. Alvin Price explained that he was a Solicitor and a partner in William Fry. He qualified from UCD with a Bachelor of Law (Honours) in 1973 and as a Solicitor in 1974 and he joined William Fry about 2 years after qualification and has been there ever since.

He became a partner in William Fry in 1979. He specialises in business law, company law and general commercial transactions. He has always specialised in that area.

He says that he first met Jim Flavin, very shortly after he joined William Fry. He explained that his wife had worked in Allied Irish Investment Bank and Jim Flavin also worked in Allied Irish Investment Bank. He believes Jim Flavin came to William Fry as a client when he was leaving that Bank and he believes he probably came to Houghton Fry as a partner at the time. He explained that he got to know Jim Flavin through doing work for DCC very soon after DCC was formed in 1976.

Question 15: How did the relationship…personal and business develop after that?

Answer: "Well it was always a business relationship, there really wasn't a personal relationship as such. Development Capital Corporation as it then was started in a fairly small way with offices in Merrion Square and grew quite dramatically over the years. Because we were acting for them in making their investments it became probably quite valuable to them, in the sense, that we knew all about the businesses that they were investing in, and indeed it was valuable to us…in that we got to act for some of the investee companies so it was a mutual benefit."

He said that DCC over the years became one of their bigger clients. Fry's were paid on a transactional basis but then progressively they came for general corporate advice to DCC as an entity as distinct from the advice on the particular transaction. During the 1980s he said that Morgan Crowe and David Gavigan would have been the main points of contact for him.

Question 21: Did Mr. Flavin become less of a point of contact?
Answer: "He would have been a less frequent point of contact, although he would have been constant in the background."

Question 22: …What was your experience of him. What type of a Chief Executive was he? Was he a hands on person or was he a person that delegated to his people and let them get on with it?
Answer: "I would describe him as very hands on. He was one of those rare breeds that he had the broad vision but he was also the person that wanted to keep his finger on the detail all of the time so he was unusual I suppose in that respect. He was very good I thought."

Leading up to the floatation of DCC in 1994 Mr. Price dealt with Ken Rue who originally was the Company Secretary and then Hugh Keelan took over from him in the run up to the floatation. Fry's were heavily involved in advising around the floatation. There were a lot of transactions in buying in interests in companies and expanding the interests in companies, in order to ready the Development Capital Corporation for a floatation and then there was the actual floatation work itself.

Apart from Fry's, the other professional firms assisting in the floatation were Davy's and Price Waterhouse Coopers or CooperS&Lybrand as they then were. Davy's would have prepared the first draft of the prospectus but Fry's would have been responsible for feeding in the accurate information to go into it. "They would have put the skeleton together and we would fill in the details of the employment agreements and what the material contracts were and all that." (**Answer 30:** Page 11).

Mr. Price was then asked about the Companies Act of 1990 and whether he had any involvement in the lead up to that Act. "I was on the Business Law Committee of the Law Society and we would have put in submissions and that kind of thing in relation to what we thought should be in the Bill as it was going through so, yes, I would have been involved." (**Answer 24:** Page 11). He says it was not an extensive involvement, that there were about 10 people on that committee and that different parts of the Act would be parcelled up and given around to different people to do. He did not deal with either notifications or insider dealing. He agreed that the 1990 Act effected a comprehensive overhaul of companies' legislation and was the biggest chance since 1963 with quite extensive implications for private and public companies. Within William Fry he explained that there would have been in house seminars "not quite as structured as they are nowadays, but certainly we would have had a series of those in the office". (**Answer 44:** Page 12).

He explained that at that time William Fry produced a guide or a booklet to the Act. He also said that he familiarised himself with the 1990 Act "I knew the broad concepts and all the parts of the Act. It was not possible to drill down into every part of it." (**Answer 48:** Page 13). "So, familiarise myself might be exaggerating but I certainly understood what the changes in the law were and where the law was if I needed to go and look for it." (**Answer 49:** Page 13).

He explained that the provisions in relation to notification came into effect around the beginning of August 1991. He explained that he had more familiarity with Chapter 1 of Part IV dealing with the issue of directors notification issues because they tended to

happen more often. "It became an immediate thing that had to be done all of the time so it became a standard form for director's notification of interest in the company." (**Answer 55:** Page 14).

He agreed that Part IV, Chapters 1 and 2 were really designed for situations where the legal title wouldn't necessarily disclose who the beneficial owner was.

Mr. Price explained that the provisions of Chapter 2 of Part IV were in broad terms directed towards an obligation to notify a company under Section 67 and the Stock Exchange under Section 91 of the acquisition or disposal of certain interests in shares in the company above a certain threshold. 5% in the case of Section 67 and 10% in the case of Section 91. He explained that Chapter 2 of Part IV was both "complex and extensive". (**Answer 74:** Page 17). It was quite technical and from a lay persons perspective not all that "user friendly". He agreed that whilst you could read the sections in order to understand all the exceptions and the interests that it applied to it took a bit of work. He doesn't precisely remember when he first had to consider the provisions of Chapter 2 of Part IV but he obviously did have to consider it at the time when it came into force in August 1991 because DCC were exclusively his client and notified their interest to Fyffes at that particular time. He also believes that S&L Investments Limited notified its acquisition of 3% when it acquired those shares from the McCann Family in 1992. When asked why S&L Investments Limited with only 3% would have notified he answered, "I can only assume that it was looked at on an aggregate basis of the group notifying all because they were already over the 5% that any accretion on that was notified as well". (**Answer 83:** Page 19).

Mr. Price thinks it was probably by virtue of Section 72(2) that the S&L Investments shares were notified.

Mr. Price explained that when the relevant provisions of the Act came into force in August 1991 all holdings above 5% (or 10%) had to be notified to the relevant company (and the Stock Exchange). He explained that holdings of over 5% in a public company wouldn't

be all that common but certainly everybody was alive to it and it was being done extensively. He explained that it would be mainly Banks and Insurance Companies that would hold holdings typically of more than 5% in a public company. Mr. Price believes that the draft notifications would have been prepared by William Fry rather than by someone in DCC. He explained that the notification in 1991 and the notification in 1992 were quite different in that the 1992 one was "more fulsome".

Mr. Price was then asked if he recalled being contacted in August 1994 about a proposal to transfer a 30% stake in Flogas from one DCC company to another DCC company. "The honest answer is I don't recall it at all. I became aware just in the last few weeks that I was involved in it and that arose by virtue of DCC sending me a copy of a note recording that I had given certain advice in relation to it but as I sit here I really have no recall." (**Answer 104:** Page 23)

"One of the disadvantages of it being so long ago is that the file which related to that transaction has long since been destroyed." (**Answer 105:** Page 23).

Question 106: Destroyed. How long would you keep files?
Answer: "About 7 years."

He did recall however that there was a large amount of research done in relation to the matter of notifications of inter group transactions and up until recently he assumed that that had been done in relation to the Fyffes' transaction. He explained that he now thinks that probably all that research was done in the Flogas context and that there certainly were extensive internal memorandums and things but whether it ever turned itself into an external letter out to DCC he really didn't know the answer to that.

Question 110: Is the probability that it didn't because DCC don't have a record of it and yet they have a note of the conversation?
Answer: "Well, that doesn't appear to be right either because I asked that specific question when the piece of paper emerged and they had also destroyed their file and this

piece of paper was preserved because somebody had put it on the Fyffes' file. So that is the sole record of that Flogas transaction that seems to have survived."

Mr. Price was then asked for his best recollection as to what would have happened in 1994 when Ms. Tease asked him for advice in relation to the Flogas transaction.

Question 115: Would you have answered her then or would you have gone and researched it?
Answer: "No, I would have gone and researched it. I remember that there was quite an amount of research done."

Question 116: Who would have done that?
Answer: "I would have done some of it but under my watch, as it were, an assistant would have done it."

Question 117: Who was that at the time?
Answer: "I think it was a chap called Dara McDonald who has since and indeed shortly thereafter moved on and is a Solicitor in London now."

Question 118: Right you would have asked him to research that point for you?
Answer: "That's right."

Question 119: And presumably produce a Memo for you …?
Answer: "Absolutely. It would have come back in the form of a written Memo. I have discovered this or these are the relevant provisions etc."

Once he discovered that it wasn't done in relation to Fyffes but was done in relation to Flogas he said he had "quite a good recall of what the research was". (**Answer 121:** Page 26).

"The more we dug into the question of an inter group notification or notification of an inter group transaction the more perplexing the particular provisions of the Act appeared to become. It appeared that by operation of Section 72(2) that companies in a chain, which are in a group in a chain, that if the bottom company had the interest in the relevant plc then each company above that in the chain was deemed by virtue of the Section to have exactly the same interest until it got up to the top of the group. That was kind of odd in that you might end up with eight companies all notifying that they all had the same interest. There were other kinds of odd things in it, in that we seemed to identify that there was a couple of drafting deficiencies in the Act in that the definition of an interest only related to the interest in the relevant plc., in the share capital of the relevant plc., and the consequence of that was that the purpose of all of the provisions seemed to be quite easily avoidable…by virtue of the fact that one could bring for example another shareholder into a superior company and effectively leave out an interest of the wholly owned group without it being noted." (**Answer 121:** Page 27).

Mr. Price then gave an example such as the Fyffes case. "You would have S&L Investments holding shares in Fyffes and you wanted to transfer an interest in the Fyffes shares to a totally outside party, you could, it would appear on the face of it have that outside party subscribe for shares in S&L Investments Limited which would given them, say, the rights to all the income and capital profits of that company, you obviously wouldn't mention Fyffes, but in fact all that was ever flowing through that company would have been coming from Fyffes. That didn't appear on a literal interpretation of the Act to be caught or required a third party to notify or even didn't require the group from whom it was existing to make any notification because it was still holding the chain straight down to thirty three and a third per cent interest plus subsidiaries all the way down, so the interest was never changing, looked at from that side. The other party wasn't taking shares that had any voting rights attached to them in S&L. There seemed to be a fundamental kind of drafting error in the Act in that the definition of an interest should really, I would have thought, or thought at the time, this is all many years ago, thought at the time that the definition of an interest in relevant share capital should have said an

interest in relevant share capital or in any company which holds or has any interest in the relevant share capital or whatever." (**Answer 122:** Page 28).

He then explained that when they drilled down into it a little more they identified that that part of the Act derived from a directive and "what the legislature was trying to achieve by reference to the Directive seemed to make a lot of sense that what in fact you should be doing in interpreting that is actually looking at it from the top down, looking down from, in this case, say DCC plc., and seeing is there any interest leaving the group rather than looking at it from down at the bottom rung of the ladder, if you follow me." (**Answer 123:** Page 29).

"What the research seemed to identify was that an intragroup transfer didn't require to be notified by the acquirer if the acquirer was further up the chain because that acquirer by virtue of Section 72(2) already had the interest and had already by definition notified it, whereas going down the chain the new subsidiary or whatever it might be wouldn't be caught by 72(2) and it would appear to be notifable on that basis." (**Answer 124:** Page 29). He further explained that there were provisions in the Directive to the effect that where you have a group of companies which produce consolidated accounts, subsidiaries of that group that acquire notifable interests in plc's are exempt from notification if the notification is made by the ultimate parent. (**Answer 125:** Page 29). "That seemed to make the thing work and if you read that back into the Irish Statute rightly or wrongly we came to say can we have a look at the Directive and then we came back to the law…it was held that in interpreting either EU Directives or Irish legislation based on EU Directives the purposeful approach of interpretation should be adopted. That made an awful lot of sense in the context of 1994 when I was looking at that because purposeful interpretation was the big issue, it was a hot topic really among lawyers at that particular time and it seemed to be the way that statutes were going to be interpreted into the future." (**Answer 131:** Page 29).

Mr. Price went on to explain that by the time the Fyffes transaction' came on "rightly or wrongly we advised at that particular time that an intragroup transfer, which I had long

since forgotten what it was, which I now know to have been the Flogas transaction, didn't require notification because the notification had already been made by the ultimate parent in the group". (**Answer 132:** Page 31).

When asked how certain he was that the research was done in August 1994 as opposed to when you were asked for more specific chapter and verse in July 1995 he answered "I am certain it wasn't in July 1995 because they had the file in relation to the Fyffes' transaction which got saved by virtue of the fact that the proceedings got issued". Mr. Price was asked if there was anything else from July of 1995. He said there was nothing further and that, "it was annoying and upsetting to him that he couldn't find where the research was and he now realised that that's because it was on the Flogas file rather than on the Fyffes file". (**Answer 134:** Page 32).

He said he was completely satisfied that the Flogas file was no longer there and that he personally had gone and physically looked in the storage. "It's recorded as having been destroyed." (**Answer 137:** Page 32).

Mr. Price was then asked how familiar he would have been with the concept of "purposive construction of statutes". "I had certainly heard about it. I knew there were cases and I probably sent my assistant off to find them and identify them." (**Answer 139:** Page 33).

Question 140: Yes.
Answer: "So beyond that I can't claim to have any particular expertise other than I knew that they existed."

Question 141: Were you familiar with the provisions of the Interpretation Act insofar as the construction of Irish Statutes was concerned?
Answer: "I was, yes."

Question 142: What was your understanding of the way in which the legislation was to be construed?

Answer: "By virtue of the time that I qualified I would be very much from the literal school of interpretation of statutes."

Question 143: Yes.

Answer: "It took quite a lot to persuade me to go across to that form of interpretation but it did seem to be almost required in that particular case. It seemed to me at the particular time and in those particular circumstances it was virtually required to make sense of why it should be relieved going upwards and not relieved going downwards."

When it was put to Mr. Price that Section 67 on its face would have required the selling company to notify Flogas it had disposed of an interest and that Section 67 would have required the acquiring company to notify Flogas that it had acquired an interest. He answered, "that's right. No I accept that. The only difficulty would be if they were actually moving in the wrong direction, the disposing company would immediately be deemed to acquire an interest." (**Answer 147:** Page 34).

Question 148: I appreciate the legislation doesn't always make provision for every eventuality. In the circumstances of the particular Flogas transaction I am just wondering, and I appreciate that whoever researched it may have said that this would result in anomalies or an absurdity in different circumstances, but it didn't on the face of it in this particular transaction?

Answer: "As I say I don't have a recall of the particular transaction, and you may well be right, but equally it might have done had the seller been higher up in the chair than the acquirer."

Question 149: Right.

Answer: "Because the seller would immediately be deemed to have the interest again."

Question 150: Do you know whether that was the case in the Flogas one, and I think I know who the companies were, one was DCC plc., and DCC Corporate Partners was the acquirer, but it was acquiring from DCC plc.

Answer: "Then it wouldn't have applied."

Mr. Price was then asked why with this new piece of legislation which had not yet been tested in the Courts he didn't get Counsel's Opinion. He explained that it was very rare for him to seek Counsel's Opinion. "I don't think its anything unique to me but I think commercial and corporate lawyers in the larger firms, the five or six larger firms would rarely enough go and get Counsel's Opinion on a construction issue." (**Answer 155:** Page 36)

Question 156: Why is that?
Answer: "Why is that, well I don't know. I suppose it's because we would be dealing with the matters on a much more regular basis ourselves than Counsel and would therefore expect to have developed a little bit more expertise in it…or not dealing with it."

He also said that one of the significant factors is when you are in a business solicitors' commercial practice the pace of things moves pretty fast and you are under pressure to give bottom line answers and if you were known to be saying to your clients on a regular basis "I don't know the answer to this but I will send it off to Counsel…you would be out of business quickly. I am not being pejorative or anything." (**Answer 162:** Page 38).

He explained that when he was asked about the notification issue again in 1995 he didn't revisit it because it "would have been very fresh in the memory at that particular time". (**Answer 164:** Page 38).

Mr. Price was then asked to look at the core booklet and to his letter sent to Daphne Tease in April of 1995. This letter didn't set out chapter and verse in relation to Section 67 or 91 or didn't even refer to whether it's to the company or to the Stock Exchange. He was asked would that have been his style to which he answered, "no not particularly. I just didn't know the circumstances in which this came to be sent…I might get four or five phone calls a day from that particular source on various matters and you would deal with them fairly tersely. You would get the phone call then you would think about it and you would remember that you had done the research on it and then you would just send the email back or the fax back." (**Answer 170:** Page 40).

Question 171: … Do you think that's what happened here?
Answer: "I do, yes."

Question 175: Do you think that the results of the research that was done in 1994 had led you to conclude that no transfer of any interest intragroup gave rise to a notifable interest to the company or the Stock Exchange?
Answer: "That's correct, yes."

Question 176: That applied whether you were the disposer or the acquirer of the shares?
Answer: "That's right."

Question 177: Did that only apply to 100% owned companies or partially owned companies?
Answer: "…I think it is 75% actually."

Question 178: Right, so provided the disposer or acquirer was in a 75% relationship with the disposer or acquirer or with anyone within the same group?
Answer: "I think what we concluded was that you went up to the top of the chain and then you looked at what was its consolidated group and if no interest was leaking outside of that sealed box it wasn't a notifable interest."

When he first got the call from Daphne Tease in April 1995 he wasn't aware of the proposed Capital Gains Tax saving scheme. And wasn't 'in the loop' in relation to CooperS&Lybrand or Tommy McCann's Opinion at this stage. "I knew nothing about it." (**Answer 183:** Page 43).

"I think it was the beginning of May, either late April or the beginning of May that I became aware of it." (**Answers 184 and 185:** Page 43).

He thinks he probably put the two together. He wasn't being asked to stand over the tax structure or whether it was going to work from a tax perspective.

He became aware that an issue was made of the notification issue by Fyffes in June 1995. He also knew of the deterioration in the relationship between Jim Flavin and Fyffes. "I wouldn't have known it on a personality basis. I just knew that relationships with Fyffes appeared to be not what they once were." (**Answer 19:** Page 45). He was not at all surprised that DCC were making provision for the sale of the stake in Fyffes since, "it's unusual for one listed company to have such a significant shareholding in another listed company". (**Answer 200:** Page 45).

He says that he never heard the "anomalous" phrase but he would have heard Jim Flavin being interviewed by people and commenting in newspapers and things like that and you could tell that he was dancing around saying it's a wonderful company and we are very pleased to be investing in it and then the next question he would be asked is "are you going to buy it all and he would say 'no', we have enough holding at the moment and so on." (**Answer 201** and **202:** Page 45 and 46).

Mr. Price believes that even if Fyffes had not raised the issue in June of 1995 that the question of notification would have been revisited. He believes that Daphne Tease's telephone call to him in April 1995 was "just the first sign of the point rising on the horizon. But that and the insider dealing point, I think, which were the two legal issues, came percolating up and I think they would have both been dealt with in more detail, yes, I don't think they would have been forgotten." (**Answer 203:** Page 46).

He did not believe that his short letter in April 1995 put the notification issue to bed. "It had no context it was a hypothetical question. I have no doubt I would have been interrogated further when the flesh had been put on the bones of the scheme." (**Answer 204:** Page 46)

He went on to explain "I think the culture in DCC was, you know, Jim Flavin's personality was such that everything was drilled down into. There was genuinely a culture of corporate compliance and rules and regulations were tested as to whether you were complying with them or not. He had a curiosity which he imparted to all from Ken Rue, to Hugh Keelan to Daphne Tease and then on to Michael Scholefield about wanting to know and wanting to understand. You know he was never the type of person that accepted that the car would start when you would turn the key. He wanted to know why." (**Answer 206:** Page 47).

"And you would have to explain the inner workings. That was my experience of him. So we were always expecting the next call, you know, drill down further, you know, give me chapter and verse." (**Answer 207:** Page 47).

He was then asked about the evidence he gave in the High Court where he expressed the view that he perceived a preference on the part of DCC not to notify and if he remembered how he formed that view.

Answer 210: "I can only assume that somebody said to me and probably Daphne, we would prefer if there wasn't a requirement to, well she wouldn't have put it as strongly as that but she would have said it would be great if we don't have to notify it because that possibly will just draw the attention of the…again to this shareholding is there, and they will be asking more questions about what we intend to do with it and not do with it. I had seen it before in the past after AGM's and things like that you know and at informal gatherings it was a difficult series of questions and it was a difficult line to take you know that this was a very good company and we had a great stream of income and all the rest of it, but we are now this other type of company where we want to be able to control and manage our destiny and people say oh, you are going to take over Fyffes then. So I certainly got, between what she said to me and what Michael Meghen subsequently said to me, I got a sense that notification wasn't really wanted by anybody because it just made everybody's life a little bit more uncomfortable. But, having said that, I really don't feel I was put under any pressure whatever to give that advice."

Question 211: I was going to ask you that.
Answer: "I do, I quite honestly believe that if I had said at any point in time, listen my interpretation of these sections is that you should notify I believe they would have been notified. I think the problem would have moved on to how do we minimise any fall out from that. We might have thought of changing the name of Lotus Green to DCC Investment Holdings or some name like that and just made sure that nobody was getting the wrong impression because it would have been a wrong impression to think that the shares were more for sale after this had happened than they were before it happened."
Question 212: Yes.
Answer: "I think to the extent that they were for sale. They were equally for sale over a five year period."

Question 214: And to that extent and knowing that there was no intention to dispose of the shares in the short term, I don't quite understand why there would have been share price sensitivity apprehension?
Answer: "I wouldn't have sensed so on the DCC side that there was really any such apprehension that it would affect the share price."

Mr. Price didn't recall DCC having a concern about the effect of the transaction on the Fyffes share price.

Question 220: Did it ever occur to you that from a Revenue perspective, it would be better that the Revenue did not find out about this before they had to find out about it?
Answer: "It never occurred to me, no."

Question 221: Did you know that from the perspective of some of the tax advisers this was regarded as a somewhat aggressive piece of tax planning?
Answer: "I don't think anybody told me that at the time, that it was particularly aggressive."

Question 222: That there was a likelihood that the Revenue Commissioners would, at the very least, ask questions about the transaction, if not challenge it, did you have… (Interjection)
Answer: "I would have had had a sense of that, certainly."

When asked if he had a view as to whether DCC not wanting to notify was related to the desire for tax secrecy he said "no, I'm certain none of that occurred to me at all, I have to say. Nobody ever mentioned tax in the context of notification at all." (**Answer 242:** Page 54).
Question 243: But would they have had to mention it to you. I mean… (Interjection).
Answer: "Quite frankly, I suppose, maybe I was a bit naive or innocent or whatever. I thought probably that one needed to quite quickly establish that management and control had moved to Holland. I would have thought that that's something that you would want to establish with the Dutch Revenue pretty quickly and establish with the Irish Revenue pretty quickly in order that you would then have the freedom to go and sell the shares on that basis."

Question 244: Yes?
Answer: "But I wouldn't have drilled down any more into it than that. I would have thought that you would be wanting to put in your return and show that it was now Dutch and try and get the Irish Revenue to accept that as quickly as possible. But that is not within my competence really."

Mr. Price said he was not being sent all the advice from CooperS&Lybrand or KPMG on the tax scheme. "The only document I was given was a document which was a set of steps that described and assigned to me particular steps. Also, I was given an extract from Tommy McCann's Opinion and that was the first time I became aware that there was Counsel's Opinion." (**Answer 246:** Page 55).

Question 248: Were you surprised that Counsel's Opinion had been sought on the tax scheme?

Answer: "When it was Tommy McCann, probably not no. I wasn't surprised. But I was just interested to find out that the firms of accountants had gone directly to Counsel."

Mr. Price then went on to say, "you see I think I should say that as far as notification of interests in relevant plc's or the relevant share capital of plc's is concerned I honestly believe that the DCC Group was, you know, entirely compliant. It always did what was required to be done and it did that when the Act was enacted and when S&L acquired shares. In other words, it acted entirely consistently throughout. Then when it exited from Fyffes in 2000 the notifications were made again. I think it was purely in this narrow area of moving it as they saw and indeed to some extent I saw it as moving the interest from your right pocket to your left pocket as to whether that was something that the legislation required you to notify again to Fyffes that DCC and its 100% owned group still own the shares that we told you we owned before. It was purely on that." (**Answer 255:** Page 57).

Question 257: You understood that for the purpose of the tax benefit it would be, it would have been fatal to the tax efficacy for the Revenue to take the view that, in fact there had been no effective transfer that this is all still owned by the DCC group of companies.
Answer: "Oh yes, I understood that. That is from the point of view of tax law."

Question 258: Did you not see that there was something of an inconsistency that you were, not you but DCC for one purpose was insisting that something substantial had taken place and that there had been a transfer of the entire beneficial interest and, yet, for the purpose of notification as to who the beneficial owner was, it wasn't prepared or it was making a different case.
Answer: "I don't think they were making a different case. I think they were just interpreting the law that governed the two different situations…" (Interjection).

Question 259: For their own benefit?
Answer: "Well I think that's an argument you could make but…" (Interjection).

Question 260: Yes.

Answer: "But it was not particularly for their own benefit. On the notification point, I don't believe they were taking any view for their own benefit. They were taking a view that notification would be a nuisance if it has to be done but does it have to be done? On the other side they were doing it for the purpose of tax law which I think is probably quintessentially technical because I think the basic rule is that you are entitled to your income and your profits unless the legislature has enacted specific rules to deprive you of part of that."

Question 261: Just to tease this out a little bit, these provisions were very technical?
Answer: "Yes."

Question 262: Insofar as there was an overall intent, could you not say that the intent was to ensure that not only the legal owner but the beneficial owner of shares was known at any given time?
Answer: "I suppose, you could make that argument but I would have thought that and I think it was kind of intuitive that you would expect the law to have provided that it was concerned with who were the ultimate owners of this and that there was no secret deals going on with any third party, but that when it was within the group that it made the notification and that all the public and Fyffes itself knew precisely who had all the interest in these shares and that there was no leaking of any particular interest or subset of interests outside that group, I would have thought that the purpose intuitively had been served."

Question 263: But what if I am a shareholder in Fyffes and am trying to make up my mind whether I sell or I might be interested in buying Fyffes' shares knowing that the beneficial interest had moved to an Irish Company …?

Question 264: You know that a transfer has taken place?
Answer: "Yes."

Question 265: And you know that there is a good chance of at least or arguably a good chance that questions would be asked about it?

Answer: "There is a possibility, I think that if you follow the Section 72(2) point, the notification, and if you adopt the literal interpretation I think the only notification I haven't really analysed it from that point of view but DCC would retain its interest because it is at the top of the chain, S&L would be still the registered shareholder so it would still have an interest. I think on the literal thing, the only notification would be that Lotus Green has acquired an interest."

Question 266: But DCC plc., and S&L have transferred their beneficial interest?
Answer: "I don't think the notification would tell you that. It would simply tell you that Lotus Green…" (Interjection)

Question 267: Why wouldn't it, because it talked about any interest?
Answer: "I think if you look at the particulars of what needs to be – I stand to be corrected now, not having the Companies Act near me, but I am not sure that you have to go into precisely what it is that needs to be notified. I would have thought what I was saying was that I think what the notification would have ended up as is something like the Lotus Green Limited has acquired – Lotus Green, a wholly owned subsidiary of DCC plc., has acquired an interest in blog shares which are registered in the name of DCC plc., and S&L Investments Limited."

Question 268: Did it not require you to say what the nature of the interest was?
Answer: "I would need to look at the Act to give you an answer to that. I recall that you certainly had to identify the number of shares and the registered holder of them is…" (Interjection).

Question 269: Yes.
Answer: "But whether you had to split down what the precise nature you have of interest in it, I just don't recall that as I sit here now."

Mr. Price went on to say that the Section 67 notification would not have told you anything about the tax status of the new owner of the beneficial interest and gave as an example

"S&L Investments could have always been tax resident in Holland for all anybody knew." Mr. Price was then asked if his advice would have been different if the legal interest had been transferred. He said, "I don't think the advice would have changed. Logically, it shouldn't have changed. There wouldn't be much point in, if the registered owner was changing it would have been self evident." **(Answer 274:** Page 61).

Question 275: Yes.
Answer: "But logically the interest…" (Interjection).

Question 276: The advice should stay the same.
Answer: "The advice was right, it's right in both situations or wrong in both situations."

Question 277: But would you agree with me that if the legal interest was being transferred as well, the probability is that you would notify or you would certainly want the legal interest registered in the company?
Answer: "Well I think they are two different questions? I think you would certainly want it registered in the books of Fyffes plc."

Question 278: Yes?
Answer: "If I was to be consistent in my advice I would still have to advise that it's still within the sealed wholly owned DCC box. There is no notification requirement."

Question 279: That's – I'm just wondering it may not have ever twigged with you that there is an inconsistency here and that, really, what these provisions are dealing with or what they are trying to ensure is that, actually, the beneficial ownership of shares is what matters, who the true owner of the shares are?
Answer: "I wouldn't have thought so. You know I think interest is much wider than lawyers understanding of legal interest and beneficial interest."

Question 280: But if you have the legal title and if the legal title is transferred then you would ordinarily want to have that reflected in the share register of Fyffes.

Answer: "Oh, absolutely yes."

Question 281: Therefore whether you notified under Section 67 or not Fyffes are notified because they need to know that to reflect it in their share register?
Answer: "Yes but what we are talking about here is the formal notification under Section 67. As a matter of fact, Fyffes were fully aware, you know, it had been discussed with them so there wasn't any attempt to disguise or not notify in the broader sense."

Question 282: So far as that is concerned, did that make, in a sense, the advice easier not to notify it because you could legitimately say people know anyway, what's the point in notifying them of what the Chief Executive has already informally notified them?
Answer: "I don't think so, no. I think you are dealing with a specific section that requires notification in a particular form within a number of days."

Question 283: Or not?
Answer: "Or not as the case may be. So I think an informal chit chat doesn't achieve that."

Question 284: Sure. You don't think it weighed on anybody's mind or weighed in the balance of… (Interjection).
Answer: "I don't, no".

Question 285: You don't?
Answer: "It certainly didn't weigh in mine, no."

Mr. Price was then referred to the jotter notes of Mr. Scholefield at Tab 19. When asked if those notes which read "no exemption for inter group transaction – there is a dealing – don't think we will be prosecuted technically unlawful – not too concerned if there was – nothing immediately contemplated – no price sensitive info. Not participation on equal. One sells on market – tell brokers/brokers need to tell prospective purchaser (if possible)

looked familiar to him". He answered, "I've seen it before but I really don't know. It just seems to be random thoughts to be quite honest." (**Answer 287:** Page 64).

Question 288: I suppose what I'm trying to find out from you is whether those random thoughts were jotted down following a conversation with you or during a conversation with you or as a result of a conversation with you?
Answer: "I really don't know. The 'no exemption for inter group transaction' that was something that was certainly raised with me in a telephone conversation and I would have used the words 'there is no express exemption for intragroup transactions' per se in this. Is the intragroup transfer, is it a dealing within the meaning of the Act? Yes I think, 'Don't think we will be prosecuted'. I don't know how that would have worked its way into a conversation. I wouldn't have been talking about prosecuting. He might have asked me if you were wrong in your advice could we be prosecuted. Maybe that's it and I would have said "well quite frankly I certainly would have thought it was a very long shot indeed".

Question 289: Was this talking about the insider dealing or was this talking about the obligation to notify under Section 67 or 91?
Answer: "I couldn't tell from that. It is nearly equally applicable to either."

Question 290: You, presumably, knew what the civil and criminal consequences of a failure to notify where you were required to notify?
Answer: "Yes."

Question 291: In one sense the civil consequences were more serious?
Answer: "They were more unusual, let's put it like that because all the other provisions of the Act would involve offences and possible prosecutions and things like that but it would be only a few sections that would have a civil consequence attached to them as well."

Question 292: Did you know what the civil consequence was?
Answer: "I did yes."

Question 293: What was your understanding at the time?
Answer: "My understanding at the time was if the non notified plc., wished to take an issue with it that it could sort of freeze your rights as a shareholder if you hadn't notified your interest and that you would be unable to enforce those rights in Court."

Question 294: Did your understanding extend to understanding that that applied to the transferor and the transferee?
Answer: "Well, in the normal course of events, it would be the transferee who would now be the one who had acquired the shares and had the problem."

Question 296: We will just look at the section. It doesn't seem to make that distinction because the two parties to the transaction had the notification obligation if a notification obligation arose?
Answer: "Yes."

Question 296: So if you were meant to notify the disposal of an interest and you didn't and you were meant to notify the acquisition of an interest and you didn't, you were caught, were you not by the civil consequence?
Answer: "You were caught – well again I suppose…" (Interjection).

Question 297: In the sense that you were unable to… (Interjection).
Answer: "If we leave aside an intragroup situation. If it's two parties, independent third parties dealing with another that is absolutely right, yes."

Question 298: But even intragroup. Let's say you are wrong on your advice on the intragroup and let's say there was an obligation to notify, the civil consequence, in those circumstances would apply to both the transferor and the transferee?
Answer: "That would be right unless of course the transferee was higher up in the chain and was deemed to have continued to have the interest that it always had."

Question 299: But whether it was higher up or not it was the acquirer of an interest in the shares and it was caught by the civil consequence.
Answer: "I'm not quarrelling with you. The only point I was making is that in certain cases the acquirer wouldn't be required to give any notification because it had already given the notification that it had an interest in the shares."

Question 300: You will have to take me through that when we come to your letter in July. Undoubtedly there were civil consequences?
Answer: "Oh yes, absolutely."

Question 301: In a sense, the civil consequences were more severe than the IR£1,000 or whatever it was fine at the time.
Answer: "Potentially they could be more severe."

Question 302: I take it you were aware that there was also a consequence that if this failure to notify was done in a wilful sense, there was an impediment to getting a court to relieve you of your disability.
Answer: "I was aware of that."

Question 303: That could be, I mean, again, maybe one didn't contemplate such a doomsday situation but let us say that applied to both transferor and transferee which was trying to sell or dispose of its interest and Fyffes wasn't permitting this you could have found yourself… (Interjection).
Answer: "Absolutely."

Question 304: Could have found yourself in a terrible situation that neither of the DCC companies could get out of the problem that had been created?
Answer: "Yes."

Question 305: I'm just wondering did you worry about that at the time?

Answer 306: "Certainly if one was wrong and that was the consequence that would be a serious consequence no doubt about that. I think it might have been a little fanciful in this particular case that Fyffes would have stopped paying the dividends or whatever you know."

Question 307: Yes.
Answer: "You know that you would ever want to or need to have a requirement to seek to enforce your rights…" (Interjection).

Question 308: But let's say you were selling it to somebody that Fyffes didn't want you to sell it to?
Answer: "Yes."

Question 309: They might make things difficult for you then?
Answer: "I'm agreeing that it had serious consequences. I think effectively the scenario that you are outlining is the one that actually transpired in Eircom where an application had to be made to court because the Minister hadn't notified and neither had ESOP."

Mr. Price was then referred to Tab 20 which was Michael Scholefield's memorandum reporting back to Jim Flavin about a conversation he had with Mr. Price.

Question 317: You were looking at the insider dealing implications. Would that have required research or is that something you would have been dealing with so often… (Interjection).
Answer: "I wouldn't have thought that that needed research. The first paragraph just states the basic rule."

Question 318: Right. It says "on reflection" that "on reflection" suggests that you had a different view and then you changed it?
Answer: "I doubt that. I think there is a weakness in the language there, he refers to 'construed as insider dealing'. I think the quote 'on reflection' point, well frankly, I don't

understand it is the honest answer, I am struggling because I don't think there was any prior conversation or anything like that."

Question 319: Unless you expressed a view on the phone, if he had said what about this Alvin and then you reflected
Answer: "That possibly could be an explanation or I might have said on the call 'well thinking about it now' or something like that. I don't think there was any prior occasion when I had expressed any different view than the one we were talking about here."

He was then referred to the end of Mr. Scholefield's memorandum at Tab 20 "AP also mentioned that if the transaction was being entered into for a specific purpose and that purpose might be construed to be price sensitive so far as the shares involved were concerned, then that also might be a problem." Mr. Price was asked if he remembered saying that.

Answer 329: "Oh I certainly don't remember saying it but I think I know what it is getting at."

Question 330: What do you think it is getting at?
Answer: "I think the first question I was asked was a general structure of insider dealing and I made the point that you would have to have price sensitive information in your capacity as a director or connected with Fyffes."

Question 331: Yes
Answer: "Then I think Michael went on to say 'if you leave that aside' and that would be very much Michael Scholefield's style to ask you the next question on, he probably asked me 'well if you leave that aside and I tell you that there is no price sensitive information relative to Fyffes what about this transaction in its own right?' I think I would have said 'no' a transaction in its own right couldn't be price sensitive information. Then I think I probably thought would that always be right? Maybe if you were doing this for the

purpose of getting ready to make a takeover bid for Fyffes or something like that maybe that transaction itself was a step in the transaction that was price sensitive to Fyffes."

Question 332: Yes
Answer: "I think it was just musings, really…"

Question 333: How could you create your own price sensitive information?
Answer: "It was a telephone conversation, I don't think it was terribly well thought through either on his part because once you got the answer to the first question the second question doesn't arise at all."

Question 334: What I read into it, maybe I'm too literal, or reading too much into it, it could have meant: if the transaction was being entered into for a specific purpose then that purpose might be construed to be price sensitive as far as the shares involved were concerned then that might also be a problem. If you just say if the transaction was being entered into for a specific purpose, let us say the specific purpose was the saving of tax, and that purpose might be construed to be price sensitive so far as the shares were concerned. So if there was knowledge about DCC's intention to dispose of the shares and put this tax scheme into place that could be construed, however fanciful, as being price sensitive and then that might also be a problem?
Answer: "I don't believe that anything like that was in my mind. Section 204 of the 1963 Act had provision which allows you to compulsorily buy out, if you acquire over 80% you can buy out the minority. There was a bit of a trick there that you can do there where if you have shares to start with yourself and you want to include them in the 80% to make it easier to get to the 80% that you would put your shares in the plc., into a subsidiary and then you get another subsidiary to make the offer and your first mentioned subsidiary will accept that offer and thereby become part of that 80%. I think what I was thinking of here was if this intragroup transaction was the start of a bid for Fyffes."

Question 335: Yes.
Answer: "Maybe that might make it price sensitive relative to Fyffes."

Question 336: That would be inconsistent with advice that said that it had to be Fyffes' price sensitive information.
Answer: "I think we were struggling in that conversation to try and find a way that it could be Fyffes related information. That is my best shot at explaining it."

Mr. Price was then asked what advice he had given or what advice had been sought from him in relation to keeping DCC and Jim Flavin right in relation to insider dealing.

Answer 338: "I think it probably consisted just of the conversations that we had had at that point in time."
He was then asked if things are done differently now than they were done in 1995 in relation to insider dealing.

Answer 339: "I don't believe they have changed. I would have changed, but I think if you are asking me about the general practice I don't think so."

Question 340: In what way have you changed?
Answer: "I think I probably ask a lot more questions."

Question 341: Yes.
Answer: "I had no interaction with Jim Flavin here but the facts as presented to me for legal advice was, there existed no price sensitive information in relation to Fyffes, can we transfer these shares intragroup and the answer to that always has to be 'yes' and that was the advice that was given. I suppose in light of my more recent experiences I would be saying…" (Interjection).

Question 342: You would drill down a bit?
Answer: "I would drill down and say 'have you, Michael sat Jim down and gone through possible transactions and how far are they advanced' and all that kind of thing. It is a difficult enough situation because the director himself is bound by obligations of

confidentiality and he is not going to tell you 'we thought about taking over X – that is gone away for a while and maybe it might come back next year'."

Question 343: Is there also a sort of difficulty, and I'm not sure how you can legislate for this, Jim Flavin is a CEO within DCC and a subordinate Compliance Officer is interrogating him or required to interrogate him. That is a difficult position for the Compliance Officer.
Answer: "It is yes, there is no doubt about that."

Question 344: If Jim Flavin says "I don't have any information that is price sensitive".
Answer: "Yes."

Question 345: And you interrogate him on that pretty soon you are sounding as if you don't believe your Chief Executive?
Answer: "I think there is a difficulty there."

Question 346: How can you get over that or what mechanism is there… (Interjection).
Answer: "All I think you can do is go through all of the range of things and ask on each specific one from trading to possible transaction."

Question 347: Mr. Price is there a check list that you provide to clients …?
Answer: "I don't think there is."

Question 348: There is no guidance provided by the Stock Exchange or regulatory bodies that say listen this is what you need to do in terms of… (Interjection).
Answer: "No I don't think there is any such guidance at all. Ultimately you are entirely dependant on the individual."

Question 349: It is an honour system isn't it?
Answer: "It is an honour system but you are also dependant upon the individual director (a) being able to identify whatever information he has and (b)…" (Interjection).

Question 350: What role did you have or did you see yourself having in terms of ensuring that the director knew what he had to examine his conscience about and the Compliance Officer knew what he had to ask about?

Answer: "I would certainly have always asked in these kinds of conversations, I would say that there were loads of memos filed in DCC about 'spoke to Alvin' about this kind of thing. I would have gone through with Michael a range of possibilities and reminded him about transactions and takeover and dividends – all the various things – big borrowings."

Question 351: Yes.

Answer: "And, of course, trading and just ask 'have you considered every one of those?' In Jim Flavin's particulars case Jim would he be particularly alive, the irony of this is Jim would be particularly alive to those kinds of issues."

Question 352: Yes.

Answer: "Being from a plc culture himself and being rather meticulous in terms of observance of the Yellow Book in particular. From an outside adviser's point of view DCC were a very good client. From that point of view we were pushing at an open door, you weren't getting any resistance and people weren't saying to you 'you've asked me that question and I have told you'."

Question 353: Brushed off?

Answer: "That was not happening. There is a dilemma there."

Mr. Price was then asked if he ever had a concern that his closeness to the company was ever a matter of concern for him or for them.

Answer 354: "No, I don't honestly think so. It just didn't work like that. In fact you know of all the clients of William Fry I think they were the ones who were probably the most difficult in that sense."

Question 355: What do you mean by 'most difficult'.

Answer: "I think we had an example there a couple of pages back where I was required to draft a letter to say 'this is a draft agreement under which the beneficial ownership definitely passes'. I think other clients would ask you to draft the agreement, you would send it out to them and they would accept it. There was a culture in there to get the risk passed back…" (Interjection).

Question 356: To the advisers?

Answer: "To the advisers yes. That is not necessarily a bad thing but we always as a result, Brendan Henehan and myself and Barbara Kenny in later times always felt you were being put on your mettle."

Mr. Price was then referred to the memorandum of the 27th June 2005 from Carl McCann to Neil McCann and Denis Bergin and asked if the effect of disclosure on tax effectiveness (referred to in that memorandum) ever crossed his mind.

Answer 364: "It never did. I had a naive assumption that you would want to get this into the tax people as quickly as possible."

Mr. Price was then shown the letter from Mike Meghen to Carl McCann and the letter from Carl McCann to Jim Flavin and was asked what his reaction was when he got the letter from Mike Meghen to Carl McCann.

Answer 369: "I suppose I can't say that I had any particular reaction other than thinking it is a bit stilted. This is kind of a set up."

Question 370: Cox's were being difficult on behalf of their client?

Answer: "Yes."

Question 371: Why would they be difficult?

Answer: "Well you know I was generally aware of the tense atmosphere that had developed between DCC and Fyffes and I was also aware that going along in the background there had been an apparent desire, I couldn't put it any higher than that, an apparent desire on the part of Fyffes to get DCC to give them some form of commitment in relation to what they might do with their shareholding… It has never really been articulated to me what exactly it was they were looking for but there seemed to be that thought going on in the background."

Question 373: Yes. The three sections that he mentioned, 67, 77(2) and 91(2). He synopsises the three sections and if you didn't look at any other sections you might say as a lawyer, *prima facie* there is an obligation to notify both the company and the Stock Exchange?
Answer: "Yes. It didn't come as any surprise to us. It wasn't as if we were saying we haven't looked at these sections, we had been all over them and, you know, frankly got a pain in the head studying them."

Question 374: Right.
Answer: "When the letter came in saying effectively 'have you thought of these?' it was simply 'yes we have'."

Question 375: You wouldn't get a pain in the head looking at 67 and 91 – it is really the other provisions that might give you something of a pain?
Answer: "Yes, absolutely."

Question 376: Would you agree that they are pretty straightforward?
Answer: "Yes. I would need to look at them again but I would accept that I think they are relatively straightforward but they are probably not capable of being read in isolation from all of the other sections around them."

Question 377: Why not?

Answer: "I think other sections would describe what the interest is that is probably in section 67 and deals with agreements between shareholders and all of that and other sections dealing with exemptions and things like that."

Question 378: As far as exemptions are concerned, there is no exemption for intragroup?
Answer: "Absolutely not."

Question 379: Insofar as there were exemptions they were pretty specific exemptions dealing with unit trusts and the like, so insofar as the legislature seemed to have given consideration to exemptions they hadn't seen fit to expressly deal with intragroup transfers, isn't that right?
Answer: "Absolutely. In express terms that is correct. The difficulty with that is there is a very express exception in the directive and unless you made some attempt to import that into the legislation it would appear that the statute wasn't effectively transposing the directive. You are absolutely right, I at all times, I said there is no express exception in clear terms which says…" (Interjection).

Question 380: Just in relation to the directive and Mr. Price I readily accept that what we are doing here is debating fine points of law and ultimately, I think you have said fairly that if you had advised DCC to notify you believe they would have notified?
Answer: "Yes."

Question 381: Would you go to your grave believing that?
Answer: "Absolutely I would yes …"

Question 382: …But if a court were to take the view that there was a notification obligation on DCC would your view be that DCC acted on your advice?
Answer: "Oh it would, definitely yes."

Question 383: In other words, without putting too fine a tooth in it you would take, to some extent, the rap for them acting in the way that they did?

Answer: "I couldn't say that – yes is the short answer."

Mr. Price was then asked if the Fyffes intervention fortified his view or did it make him think that he was less sure. "No it didn't detract me from the view or side track me from the view that I had already adopted. This letter comes in a form of not expressing any view really. It just says 'these things could be applicable and have you thought about them?'." (**Answer 387:** Page 85)

Question 388: Yes.
Answer: "As a result I suppose I was just put on guard that you know that this had already been looked at internally and we had found it difficult to analyse the particular sections in it and their application to a purely intragroup situation. Michael Meghen of Cox's hadn't looked at it all from that perspective but he was saying no more than we already knew, that there is this body of law which deals with transfers of large blocks of shares in public companies. I suppose all that changed was the fact that I knew there was a light being shone on this particular area which mightn't have been shone on it otherwise but no more than that I think."

Question 389: In terms of your reaction did it make you defensive or did it not have any impact upon you?
Answer: "It is very difficult, I don't think it made me particularly defensive. You see if it did I always had the opportunity of changing my mind and in many ways it would have been an easier life just to say 'I have revisited this matter and I think now on balance' and I think the notification would have been made perhaps with a little bit of as I suggested changing the name of Lotus Green so that the public would clearly see this as a wholly owned DCC subsidiary involved in this. It is really not a big deal. I don't think it made me defensive or anything like that, to be honest I was more curious as to what was going on at the political level that generated this letter coming out of it."

Question 390: Because of the battle that was going on at the political level did that make you more assertive in your view than if this had come up in a different way?

Answer: "No. You see, we had adopted this view as a sort of a house view and it had applied, I now realise, in the Flogas transaction and we had expressed the view here on several occasions and I just think the question of changing the view didn't really arise and it didn't make me more combative or less combative about it. I suppose my reaction was that this letter is not what Fyffes went to Arthur Cox for, they wanted something which would require DCC to get permission from the Chairman or from Fyffes to do what they were proposing to do."

Mr. Price was then referred to the long memorandum from Neil McCann in which there was reference to Mr. Flavin getting Alvin Price to contact Mike Meghen so that they could liaise to prepare an acceptable letter of comfort.

Mr. Price was asked if that accorded with what Jim Flavin asked him to do to which he answered "no". (**Answer 395:** Page 88).

Question 396: It doesn't?
Answer: "No, not all."

Question 397: In what respect?
Answer: "I never heard anything about a letter of comfort. I know nothing about that. To the best of my recollection nobody ever asked me to generate a letter of comfort. "

Mr. Price thinks that this is borne out by the second last paragraph of the Neil McCann memorandum. When asked if he would have prepared a 'letter of comfort'. He said "well I don't know whether I would have or not." (**Answer 399:** Page 88).

Question 400: Fyffes weren't your client?
Answer: "No. It was mission impossible because what Neil McCann was wanting was not anything that I could draft."

Question 401: Why?

Answer: "Because I don't think Neil McCann was interested in Section 67 notification because we would turn around at any moment in time and say 'fine here it is' and that wouldn't have got him anywhere."

Question 402: Yes, so you are saying that he didn't want the notification or he just wanted somebody to take responsibility for not notifying?
Answer: "I'm saying that my guess is that he had no interest in the notification one way or another other than perhaps Carl's concern with it affecting the share price which I don't know whether he really thought that or not, but my understanding throughout the period and it went right up until the year 2000 that Fyffes were continually seeking commitments from DCC as to: Will you notify us in advance? How much in advance? Will you give us first options over the shares? Can we place them? You know various approaches were made from time to time and I think in 1998 Jim Flavin ultimately did give such a letter to Neil McCann which only said 'all things being equal we will use our best endeavours to contact you in advance of any sale to notify you'."

Question 403: Right.
Answer: "I wasn't aware of any of this Memo but that was certainly my sense of where they were coming from."

Mr. Price thinks he had only one conversation with Mike Meghen. When asked if he remembers telling Mike Meghen that technically you thought his opinion was correct. "I certainly never said that, no." (**Answer 406:** Page 90).

Question 407: Commercially DCC would probably go ahead?
Answer: "I probably said commercially the transaction is likely to go ahead, yes, but the conversation that I had with Mike Meghen was again a bit stilted. 'Mike I saw your letter and I saw you were drawing attention to section …Thank you very much'. He said 'yes what I know of what you are doing might require to be notified'. I said 'yes, we looked into that point. It is not an easy point and we are taking the view that we should take a purposeful interpretation of this and it is only if an interest is moving outside the group of

companies' he said 'well I haven't looked at that point but I have drawn your attention to the other sections'. We went on our way I think at that point. He did make some comment that made me believe – he said something to the effect 'I have drawn these provisions to your attention and it is not up to me to persuade you to make notification and indeed I'm not sure my clients would welcome that' or words to that effect. He made some comment that gave me to understand that it wasn't a thing that Fyffes really wanted."

Question 409: You didn't take a note of this conversation?
Answer: "Probably again on a jotter and then I would have relayed that back to DCC."

Question 410: I would have them, I assume, if they were discovered.
Answer: "They weren't discovered, no."

Question 411: The next paragraph "spoke to Alvin Price during week commencing 3rd July". I take it that that is not Neil McCann speaking to you?
Answer: "I have only seen this Memo in recent days and it is not inconceivable that this is a conversation that he had with me."

Question 412: Who, Neil McCann?
Answer: "Neil McCann."

Question 413: Had you spoken with him before?
Answer 415: "I had, yes…I have no recollection of it (speaking with him) but what is said here sounds quite plausible."

Question 417: Would it not be unusual for Neil McCann to ring the adviser to DCC about this issue?
Answer: "It would."

Question 418: And his style or did you know his style?

Answer: "I knew his style. He was a very charming, engaging type of character. You would quite enjoy having a chat with him. If you heard he was on the end of the phone you would say 'I will take that one'."

However on balance Mr. Price believes that he did not speak with Mr. McCann because he would imagine he would have recall today of it.

Mr. Price was then referred to the next memorandum from Michael Scholefield to Jim Flavin :-

"According to Alvin he had a good telephone conversation with Michael whose attitude he felt was positive. While Michael pointed out that the legislation if applied to the letter could be interpreted to provide that any transfer of interest was notifable, it was my understanding that he accepted that the intent of the legislation was not such and he did not disagree with Alvin's argument that the proposed transfer was not necessarily notifable."

Mr. Price was asked if that accorded with his recollection of the conversation. He said,
"I think that is slightly overstating it. The conversation I had with Mike Meghen was that it would be best described that we both heard each other out. To say that he embraced my interpretation or that I embraced his is just not right." (**Answer 422:** Page 93**)**

Question 423: The truth being… (Interjection).
Answer: "I have always said if you take a literal interpretation of this…" (Interjection).

Question 424: He is right?
Answer: "He is right."

Question 425: You had to take a purposeful one to conclude that it wasn't?
Answer: "That's right yes."

Question 426: Why would Michael Scholefield have endeavoured to contact Mike Meghen to confirm this interpretation?
Answer: "It is a bit odd but because of the business advisory role that they had they would have had a relationship directly into Mike Meghen which I personally wouldn't have had any such role."

Question 427: There are a number of possibilities always, but it is either that Michael Scholefield is very fussy or he is not quite sure of your view or what? What does the middle paragraph say about Michael Scholefield?
Answer: "That he was checking up."

Question 428: Yes.
Answer: "I wouldn't read anything in that other than he was just following through to make sure that that box had been ticked and that there wasn't another salvo going to come in from Cox's and that that matter had been concluded. I think in fairness to Michael he would have been happy if Michael Meghen had said to him 'we will agree to differ'. He wanted it done."

Mr. Price was then asked if he had seen the letter which Michael Scholefield had sent to Mike Meghen on the 11th July at Tab 37 and whether he was consulted about that letter to which he replied he was not.

Question 435: Was that unusual that Michael Scholefield would take it upon himself – this seems to be the closest we have to the letter of comfort that it wasn't coming from you?
Answer: "That's right."

Question 436: Nobody had asked you for a letter of comfort?
Answer: "No."

Question 437: And nobody had discussed this with you?

Answer: "No."

Question 438: Does that surprise you?
Answer: "I suppose it does actually, yes, in fairness."

Question 439: Because if one of the memorandums is right and you were being offered up as the comforter and they don't speak with you but the Compliance Officer writes the letter, can you help as to why that is?
Answer: "I can't really. I am saying that a letter of comfort was never mentioned to me, I believe that to be the case now. I certainly was never asked to draft one or anything like that or never did draft one. I really can't speculate. What went on between DCC and Fyffes in terms of trying to find a way to live with one another and appease one another and that kind of thing was sometimes quite mysterious."

He was then asked about the letter from Daphne Tease to him of the 14th of July and whether he was surprised to get this letter "no, no, I would have expected that to come." (**Answer 440:** Page 96).

Question 441: Had you ever been asked for a similar letter before?
Answer: "Yes regularly."

Question 442: In the context of a transaction?
Answer: "Yes, yes as I said earlier the way DCC operated was that they would consider all these points as a transaction was being negotiated. It wouldn't be necessarily something like this, it could be an acquisition or something like that, and you would be asked to give advice on one off points as the transaction went along. As it came to closing or completion we would be frequently asked to write a letter of advice covering all of the points so it wouldn't have been unusual at all."

When asked again if he thought that any DCC concern about notification was tax related he answered, "I just don't believe that, no. It seems to me that notification was entirely

neutral to the tax scheme. What DCC were attempting to do was to get Lotus Green Limited up and running with the Dutch tax residency as soon as possible so that if a bid came around the corner, there was none expected, but if it did, then you would have Lotus Green in a position to dispose of those shares with the (Dutch) tax residency." (**Answer 450:** Page 99).

When asked if he had ever advised Lotus Green he said he did while it was still an Irish managed company.

When asked if he was ever asked by the directors of Lotus Green to advise them of their obligations he answered, "I wasn't asked, but I did advise them because I attended at a board meeting and I gave them advice on it". (**Answer 453:** Page 99).

Question 454: Is that recorded?
Answer: "No only in my mind is it recorded. I remember it specifically because I remember being floored by a question that was asked. The question was what is meant by enforced by action or by legal proceedings, what did 'action' mean and I remember not being able to answer that."

Question 455: Who asked you this?
Answer: "I think it was either Tommy or Kevin, Tommy Breen or Kevin Murray. We were going through the sections about the civil thing and the phrase that you wouldn't be entitled to enforce your rights by action or legal proceedings and sort of out of the left field came the question 'what is meant by action as distinct from legal proceedings?'."

Question 456: Right.
Answer: "I suppose thinking about it years on now it probably meant that you wouldn't be allowed to vote your shares or that kind of an action but at the time I was really stumped to come up with an answer. I remember that. That is all I can tell you on it."

Question 457: When do you remember that taking place?
Answer: "It took place at one of those board meetings that I attended when I was going through the transaction between the buying and selling companies."

Question 458: That suggests going through the provisions of the Act in considerable detail.
Answer: "I don't think we went through it. I think I was saying that this is the view that we have taken. If we require a notification obligation and a breach of it is an offence and, indeed, there is a civil thing which means that you can't enforce your rights by…" (Interjection).

Question 459: Were Mr. Breen and Mr. Murray the only people to raise this with you?
Answer: "Yes, that is the only bit I remember yes. I think it was Kevin Murray myself but I just seem to remember sitting around a round table and Kevin asking the question."

Mr. Price was then asked if his letter of the 21st of July at Tab 44 was written in his style to which he replied that it was.

Question 465: What was asked for, I don't know if the words chapter and verse but the rather more detailed letter dealing with the Companies Act, Yellow Book, Blue Book, that is what Daphne Tease had asked you?
Answer: "Yes that letter. There is a disconnect between that request and this letter."

Question 466: Why is there that disconnect?
Answer: "I don't know. There may have been some intervening telephone call or whatever because it doesn't address the Yellow Books and Blue Books."

Question 467: She had gone away on holidays as of the next day so unlikely from her perspective. Would you agree with me that in relation to this letter it doesn't set out the provisions. When you read this you obviously are in receipt of your advice but it is opaque insofar as the provisions of the Companies Act are concerned. In other words, you

can't read it and say "well there are the provisions of Section 67 and 91 and whatever and here is the view being expressed on it".
Answer: "No, I accept that. The point that was being made in the letter was more in relation to the purposeful interpretation method of the legislation."

Question 468: The first page doesn't really say very much other than:-

> "A somewhat unusual feature of what is proposed here is that only the beneficial ownership (i.e. not the legal ownership) is to move and the relevant shares will at all relevant times remain registered in the names of the two DCC group companies which are the existing holders."

That wasn't really unusual, from the perspective that the stamp duty saving it had to be like that?
Answer: "Yes, but in those days that was quite an uncommon way to leave matters. Subsequently it became popular in property transactions with sub-sales and things like that. In terms of dealings in shares it would have been quite an unusual feature I think."

Question 469: Again, in terms of the notification obligations if the legal title was transferring Lotus Green would have been registered as a shareholder.
Answer: "Yes, but again Fyffes were fully aware of this transaction and that doesn't fulfil the, equally a registration of a share transfer wouldn't have fulfilled the Section 67 requirement."

Question 470: If you were going to get the shares registered, how would that not fulfil, wouldn't you have to write to Fyffes and say 'Lotus Green is now the legal owner of the shares, please register'.
Answer: "Yes."

Question 471: Isn't that notification by Lotus Green of its interest?

Answer: "I think not. I think if you read the section, I think you have to express it to be notification for the purpose of Section 67."

Question 472: Then over the page, and you are probably aware I have gone through this in considerable detail, and on the second page for the first part it is on the one hand and the other hand view, isn't that correct?
Answer: "It is yes."

Question 473: When you use the word 'strictly literal basis' what did 'strictly' add to 'literal'?
Answer: "Nothing, but I suppose I was trying to juxtapose that with the 'purposeful'."

Question 474: Again, insofar as this is concerned did you have an awareness of the circumstances in which you could use a purposeful or purposive of approach?
Answer: "Yes, yes."

Question 475: What were those circumstances?
Answer: "When the legislation didn't on the face of it appear to be achieving the purpose for which it was clearly intended I think."

Question 476: If the words were clear, if there was no ambiguity in this section why would one in those circumstances have to look to the purpose?
Answer: "Because the section didn't really, or the part, or the collection of sections didn't seem to really work in a group situation where you were having eight or nine companies all deemed to have the same interest which is unknown to law, that they can't all be the beneficial owners of the shares. Therefore you were driven to say 'Well, who is the person that is being spoken about in these sections?' That was driving us in to going up the chain because that is the way Section 72(2) seemed to work, and who was the party that ultimately controlled all of the interests that had previously been notified."

Question 477: Could we just look at the sections that you say drove you to that conclusion?
Answer: "Mr. Shipsey I should qualify all of this that I am not seeking to persuade anybody that this is the proper construction or anything else. What I am recounting is…" (Interjection).

Question 478: Is what you did?
Answer: "Is what I did exactly – warts and all. Indeed, there may well have been better arguments for the purposive approach that we had identified in 1994 that are long since…" (Interjection).

Question 479: You don't remember?
Answer: "That I don't remember."

Question 480: You have known this was going to be an issue?
Answer: "Well, not really."

Question 481: You have known since my appointment?
Answer: "Absolutely yes that's right."

Question 482: So it is not as if you hadn't had the advantage of what you considered in 1994 but you have the advantage that the Act hasn't changed since then?
Answer: "No, absolutely not but it has been difficult to try and rake up in your own mind as to what it was."

Question 483: I suppose what I am trying to ascertain from you is that if you didn't want to notify and I don't mean you, if the company didn't want to notify and that was communicated to you either expressly or implicitly you might look harder for reasons not to notify, I am just wondering did that operate?
Answer: "No, that didn't operate."

Question 484: In the context of this?
Answer: "No, all I can do is point you to the fact that the exact same advice had been given in the previous year in Flogas."

Mr. Price was then asked about the advice in his letter where he said that 'a contrary view can be taken in that the purpose of the relevant sections of the 1990 Act are clearly to enable public limited companies and the public to know who are the true owners of a particular substantial block of shares …'.

It was suggested to Mr. Price that Lotus Green were the true owners.

Answer 489: "I hear what you say but I would say to you that the Act then goes on to say seven or eight other companies are the true owners as well. So I don't think you can really read the Act in the simplistic way that you and I would recognise that company A is different from company B. I think when you read the Act...it drove us in the particular context, but into the belief that the group of companies are to be treated as a single entity. Indeed, it is ironic in the Fyffes' case on Part V that is exactly what Judge Laffoy held, that the group of companies were to be treated as a single economic entity and that Lotus Green wouldn't be regarded as a separate company from the rest so there are times when the corporate veil is lifted off the group…"

Mr. Price was then asked about the advice in his letter which said, "while making notification is clearly the more cautious approach it is for the DCC group alone to decide upon given the legal and commercial considerations involved".

He said, "what I believe I had in mind in relation to this paragraph is and what I was really saying is that what I have done is I have given you the legal advice that in my view a notification is not required in this case, and that was the end of the advice. Then I was going on, because there was always the possibility that DCC might turn around and say 'we hear your advice Mr. Price but it suits us to make notification here, Neil McCann has made an issue out of this'." (**Answer 491:** Page 109).

Question 492: Was that likely? The signals you were getting, if I am right, were that they didn't want to do it?

Answer: "At an earlier point you are probably right and that is true but there was a debate going on and certainly from Michael Scholefield chasing after Michael Meghen there is certainly an indication that there was an attempt to come to a compromise position on matters and restore good relations as it were. I don't think I would have been absolutely astounded if somebody had phoned me up and said 'we have decided to make a notification'..." (Interjection).

Question 493: There was no particular technical difficulty with notifying?

Answer: "Absolutely none, no. I personally would be of the view that it would have been of little consequence to anybody. I had a little bit of sympathy that for the point of view that somebody might be mislead by putting two and two together and getting five but other than that I really don't think it was a matter of great moment."

Question 494: You are the one writing this. You weren't trying to say "there is doubt here, the cautious approach is to notify?"

Answer: "Definitely not. DCC would not have accepted that from me. They had got the advice consistently over various emails and telephone calls or faxes and telephone calls over an 18 month period that that was our view. For me to turn around now and say 'it is up to you guys, make up your mind' just wouldn't have been acceptable."

Question 495: It is not what you said, notifying is the more cautious approach but in view of the legal and commercial considerations… (Interjection).

Answer: "No, what I was trying to say is 'there is the legal advice, you do not have to notify but you always have the possibility of notifying if that is what you want to do'."

Question 496: Was there any reason why you didn't mention the civil or criminal consequences?

Answer: "No, only the letter couldn't cover everything I suppose and that has been talked about."

Question 497: With whom?
Answer: "Certainly with Michael Scholefield I would believe and probably with Daphne as well."

We then turned to the letter of the 25th of July which dealt with the insider dealing provisions. The letter made reference to civil and criminal liability under the insider dealing provisions and that Mr. Price was very definite that there were going to be no civil or criminal liability consequences under insider dealing legislation by contrast with the letter, dealing with the notification issue.

"I don't think there is any significance in that. This particular letter, as I recall, was generated under some pressure of time. I think a call came in and they said they wanted to get a letter that was to go in the board papers, so I think I just cut to the bottom line as quickly as I could, because it did seem to me, yet again, and I suppose I was a little bit exacerbated, I had given the advice several times on this topic. There was no price sensitive information and now there seemed to be a question coming back yet again, that even if there was no price sensitive information could it be…so there is a certain amount of irritation I think on my part, so I was just trying to chop it off and say that is the end of the matter because it just seemed to me that I could be endlessly asked for letters." (**Answer 498:** Page 112)

Mr. Price confirmed that he didn't attend the DCC plc., board meeting on the 31st July 1995 but he was at the various meetings on the 9th August including a Lotus Green meeting at 4 or 5 p.m. on the 9th of August and it was suggested to him that that must have been the meeting at which he received a question from Mr. Breen or Mr. Murray in relation to his advices. He agreed that that was so.

Question 507: The reason I ask it is, it is not recorded in the Minutes of Lotus Green but there is reference to consideration of your advice at the S&L Investments meeting.
Answer: "Yes."

Answer 512: "I see that. Can I explain that? I'm not sure, it just may have been drafted by different people but I do think they were all pre-prepared."

Question 513: Yes I think that is likely.
Answer: "They couldn't literally record what actually happened at the meetings."

Questions 514: Mr. Breen and Mr. Murray are the ones who were at that meeting along with Mr. O'Driscoll. Again subject to correction and I don't have the transcript here, I don't remember Mr. Murray, but I did ask Mr. Breen about whether he was in receipt of the William Fry advice and I don't believe he had a recollection of being in receipt of it for this meeting.
Answer: "Yes."

Question 515: Yet you think that either he or Mr. Murray asked you a rather obscure question?
Answer: "Yes."

Question 516 Which is somewhat unusual or, sorry… (Interjection).
Answer: "That is why I think it was Kevin Murray because Kevin would be given to quirky things like that."

Question 517: I will have to look at what I asked Mr. Murray in relation to that but is that something you would expect him to have remembered?
Answer: "Frankly, no I have no recall of anything else at these meetings other than that little…"

Question 518: There is no record of the directors of Lotus Green being informed of your advices in the Minutes at least there is in S&L Investments and there is in DCC plc.
Answer: "I would have absolutely no doubt that the advices that were being given generally to DCC were known by all of these people. The fact that it isn't recorded here I wouldn't think…" (Interjection).

Question 519: How would you know that?
Answer: "Because I was there and I was discussing the entire matter with him and people were checking were my letters there and all that kind of thing, and the Compliance Officer was there. It is just inconceivable that people were attending at the board meetings and not knowing what the advice was."

Question 520: They would have had to have been told about it to know about it?
Answer: "Yes."

Question 521: If they were not told about it then they wouldn't raise anything. These meetings that were taking place on the afternoon of the 9th of August were all taking place in pretty rapid order. There wasn't much time between 4 and 5 p.m. and 4.15 p.m. to do very much at that meeting?
Answer: "Yes. There is a very small group of people out in DCC, all these people here are senior executives. I would be just amazed if they hadn't had a briefing on the entire transaction that they were participating in, otherwise they wouldn't have known what I was talking about or what they were doing."

Question 522: They could know what the tax transaction was about but they wouldn't have to know what the legal advice was in relation to whether the transaction was notifable or not?
Answer: "You're absolutely right on that but I still would be amazed if they didn't."

Question 523: Did you ever have cause to discuss your advice with the persons who became the Dutch directors of the company?
Answer: "No."

Question 524: Did you every have any dealings with them?
Answer: "No, no never."

Question 525: In 1995 or 2000?

Answer: "No in neither, no. I had some dealings with them in the litigation in 2005 and 2006."

(q) Terry O'Driscoll

Mr. O'Driscoll explained that he was a Solicitor by profession. He qualified in Cork in 1982 but focused from the beginning on tax with a firm called McCarthy Stapleton in Cork for about three years until 1985 and then he came to Dublin to join CooperS&Lybrand and has been with them ever since.

In 1995 he would have been a senior manager in CooperS&Lybrand and then he became a partner in 1996. He explained that senior manager is just below partner level.

He explained that he would have been working very closely with the partner on all jobs and the partner with whom he would have been working was Pat Wall.

CooperS&Lybrand were the tax advisers and auditors to DCC. He explained that this would have been fairly typical to have the same auditors and tax advisers. He explained that CooperS&Lybrand were actively involved with DCC in the late 80s and early 90s and then heavily involved in 1994 leading up to the floatation.

Mr. O'Driscoll explained that when he was advising he was focusing solely on the tax code and it was nearly always corporation tax or Capital Gains Tax or stamp duty, one of those.

When considering a tax scheme he wouldn't have had regard to the Companies Act considerations. If they arose we would say "look you do need to take legal and accounting advice, and then leave it but I certainly wouldn't have been given legal advice or anything like that". (**Answer 28:** Page 12).

When asked what would motivate him to say "well we need to get lawyers involved, be it solicitor or be it counsel" he said "well in a case like DCC for example you wouldn't need to say it. They would have had no hand, act or part in terms of saying you need legal advice. They would simply know that. They would go away and do their own stuff or whatever." (**Answer 36:** page 14)

He said that in relation to tax advice and a decision to instruct counsel it would generally come from their end and they would say, 'look for the amounts involved or the complexity or whatever you may be better actually getting a second opinion here in terms of Counsel's Opinion'. (**Answer 41:** Page 15).

"The reasons: it may be the complexity of legislation, it may be that it was a specific issue where you were comfortable with the view but just saying well, actually, this is coming at it sometimes from a narrow taxation adviser's point of view, a firm of accountants, you may need somebody to come in here…with a bigger perspective or a different perspective." (**Answer 42** and **43:** Page 16).

In relation to this particular tax scheme he believes that the idea to go to Tommy McCann would have come from themselves but they would have discussed it with Fergal O' Dwyer. The issue he thinks that they would mostly have sought advice on was the Section 86 issue, the general anti-avoidance section because it was one that hadn't been through any litigation. (**Answer 43:** Page 16).

Question 44: No precedent, yes?
Answer: "The Revenue were extremely reluctant to use it and we were aware that there were constitutional aspects out there as well floating around."

Mr. O'Driscoll said that he would always have been aware that DCC had a significant interest in Fyffes. As they came up to the floatation there was a lot of reorganisation being done within the group to create holding companies in Ireland and the UK. (**Answer 53:** Page 19).

He explained that DCC were always as a group interested in Capital Gains Tax because there was always the potential to dispose of various shareholdings. His memory of it is that there may have been some meeting at the start of 1995. (**Answer 56:** Page 19).

Then they had a meeting in early March where they had a discussion and narrowed it down to their preferred structure.

He explained that there was very limited planning that could be done with a minority stake in Fyffes. "If you owned 100% of a company and you are disposing of it you had more options in terms of extracting value by way of taking dividends in it prior to the sale and reducing value in it or whatever. With a minority shareholding particularly around 10% or 11% that wasn't really an option." (**Answer 63:** Page 21).

His broad memory of it would be that there were two options around: the one that was eventually decided upon and the other one was "in theory, if you had a large Capital Gains Tax loss company or a loss, you know, there were companies for sale which had incurred large losses you could then transfer your shareholdings to this company and shelter with a loss." (**Answer 65:** Page 22).

Question 71: Had you ever done a scheme like this before for any other client?
Answer: "Not as far as I remember, no. I was involved in another scheme subsequently that was broadly similar but this was the first time."

Question 72: Yes, were you pioneering in this particular scheme or was there some awareness out there that somebody had done it or some other firm had attempted it?
Answer: "No, well, like one of the good things is that you end up copying what has gone before you to a certain extent. So we were really basing it on a UK case **Burman –v- Hedges.** The novel bit of it was, I suppose, the way that we wanted to do this. In Burman and Hedges, it was the purchaser who came in as a minority shareholder. We wanted to

do this within the group so that we could then say well, you can go and dispose of it, rather than actually a specific vendor or purchaser in mind coming in there."

Question 73: I think in **Burman –v- Hedges** it was with a view to a fairly immediate sale?
Answer: "A fairly immediate sale with the purchaser coming in as the shareholder for the 24 B shares or whatever. So insofar as there was a novel element to it that would have been a bit…" (Interjection).

Question 74: It was the lack of immediacy?
Answer: "A lack of immediacy and the fact that we were doing it within the group."

Question 78: If I understand it correctly whoever first thought of this scheme would have looked at that UK Burman decision, is that right?
Answer: "Yes."

Question 79: That is where somebody would really say… (Interjection).
Answer: "That is interesting."

Question 80: That is interesting, there is an angle here?
Answer: "Yes."

He explained that for the scheme to work you had to break the link of the company to the DCC CGT group and you had to break a residence link with Ireland, because Ireland didn't make any allowance for a CGT exemption or relief from CGT on inter group transactions. You could have kept it in the Irish transferee company but the base cost, its base cost for Irish Capital Gains would always be below historic base of when the first DCC company acquired it so there was really no advantage. Theoretically there was, if you could persuade somebody to take on a company with a low base cost, but it was certainly inflexible. (**Answers 83, 84, 85** and **86:** Page 24).

When asked if he was the architect of the scheme he said that it had emerged from brainstorming sessions between a group in CooperS&Lybrand. The **Burman –v- Hedges** case was well known and then they would have sat down and said "well how could you apply it in these particular circumstances". (**Answer 88:** Page 25).

He explained the loophole in the Irish tax legislation which allowed this to happen.

Mr. O'Driscoll explained that after Burman, the UK Revenue closed off the loophole. When asked was there a risk that the Irish Revenue would do likewise, "it could have been closed off at any time in Ireland is that fair". (**Question 102:** Page 28) "Yes." (**Answer 102:** Page 28).

Question 103: … It wasn't a very difficult thing to close off?
Answer: "No, because I think they had a precedent in the UK closing it off and it didn't require much."

He stated that in 1995 the tendency in Ireland was to follow the UK.

Mr. O'Driscoll said that he had experience of the Revenue closing off loopholes. "Yes they do close off loopholes. They certainly accelerated the process in recent years … sometimes they close them off quite efficiently. Other times they took quite a bit of time to actually do it." (**Answer 109:** Page 29).

He agreed that it was important that they would get the scheme done before the Revenue did anything about it but didn't remember that actually being to the forefront of his mind but it certainly would have been unfortunate if it had happened. (**Answer 114:** Page 30).

There was no question of them looking for clearance for this scheme from the Revenue. He explained that there was no statutory basis for a pre-clearance mechanism for certain transactions as they have in the UK. "We don't have any statutory basis for it and

typically the Revenue don't really like being asked for the view in advance." (**Answer 116:** Page 31).

He explained that it does happen but there is still not a statutory basis for it. "Circumstances where you would see people going for clearance would generally be if you had a large inward investment project or whatever and the guys coming into Ireland were looking for certainty on certain issues like are we certain that the income of the company will be subject to the trading regime or something like that." He also gave an example of a company restructuring and where there is some subjective element, i.e. is it a scheme of reconstruction where the Revenue could be difficult on it and are Revenue happy themselves. "The Revenue don't have resources and they take the view, which I think is probably right, that the taxpayer does the transaction and then they will review it." (**Answer 118:** Page 32).

He explained that this particular scheme didn't lend itself to pre-clearance. When asked if Mr. O'Driscoll was aware or familiar at all with notification obligations under the Companies Act 1990 he answered 'no'. He said he was aware of it now but wasn't aware of it at the time. His present awareness came through the case between Fyffes and DCC. Mr. O'Driscoll then explained the outline of the tax scheme that was put to Mr. McCann in March of 1995.

When asked what was "in it" for the Dutch in having participation exemption he answered "Very little. They encourage this type of thing because they want to portray themselves as a good location for a holding company. They get additional jobs in terms of the service industry, in terms of that type of thing." (**Answer 138:** Page 35).

Question 139: Is it a bit like an IFSC?
Answer: "It is to a certain extent. Not quite the same extent in terms of financing."

Question 140: With trying to attract the management of these businesses in circumstances where you probably wouldn't get their holding company if you didn't make it attractive?

Answer: "Yes. And in certain cases certain interest income would be taxable to a certain extent. So there was nothing directly in it for them but it assisted them in terms of…" (Interjection).

Question 141: It would give them some competitive advantage in terms of decisions as to where to locate?
Answer: "Yes."

He explained it would have been well known that this was possible in Holland in 1995 but it did not become possible in Ireland until 2004. He explained that the stamp duty saving point was there from the very beginning. To avoid paying that you couldn't have Lotus Green as the registered owner of the shares. (**Question** and **Answer 157:** Page 38).

Question 160: The decision to defer the final step of giving it the legal title was tax driven to save the IR£380,000.00.
Answer: "Yes, it wouldn't have been that unusual because at the time we did have a stamp duty relief for an associated company…so in a lot of inter group transactions you would leave it at contract stage effectively rather than completely."

When asked if he thought that any notification under Section 67 or Section 91 would have prompted a stamp duty query from the Revenue, Mr. O'Driscoll said "I don't believe so. I don't think that Revenue, sorry, I just think it is unlikely that that would have prompted any queries from the Revenue." (**Answer 166:** Page 40).

Question 167: Right.
Answer: "I think the other point that was there was that the legislation was actually changing in 1995 to actually bring in an exemption for stamp duty, you know. The budget would have said we are changing the associated companies from even 2% to 0% so Revenue would not even have thought that stamp duty was due, I suspect."

He also said that Revenue typically look on stamp duty as a self policing tax "in terms of if you want to achieve certain things like conveyancing, if you want to get good title or whatever you need to ensure that you have a stamped document. So there are certainly incentives to that. It is an incentivised honour system and it is not one to my mind that they typically spend a lot of time focusing on things like that or chasing it." (**Answer 168:** Page 41).

Mr. O'Driscoll said that by and large he dealt with Fergal O' Dwyer and Daphne Tease in relation to this transaction, when it came to implementation, it would have been quite a lot with Daphne.

Mr. O'Driscoll was referred to the sentence in Tommy McCann's Opinion where he said "whether Subco would be able to change its residence with ease or at all would depend on any new legislation, which is in force at the time, when it purports to do so. I cannot advise on this at present." And whether he considered there was a risk that by telling the Revenue about the scheme it might accelerate any contemplated change in the law. Mr. O'Driscoll said he didn't think so. "In theory yes, but in practice this was an issue that Revenue were struggling with anyway for a long time, the residence, because you were dealing with an Irish incorporated company but one that was managed and controlled overseas and there was a lot of concern at the time and I think what Tommy (McCann) is getting at there is that the Irish authorities were struggling with this because at the time there was a lot of talk about thousands of Irish companies actually being incorporated and they had no Irish, if you like, they were just a passport of convenience to have an Irish incorporated company so that nobody who looked at it would see. So the Revenue and the Authorities were struggling with that for a long time because it wasn't easy to change the residence rules because the same structures were also used by a lot of good countries. US companies investing in Ireland would have used these structures. So that would have been going on. It was unlikely that somebody would say something is going on here with a change of residence and closed the loophole. The change of residence was actually a very politically sensitive issue." (**Answer 179:** Page 44).

Question 180: Yes, but the change in the loophole about the winding up was an easier one?
Answer: "Was an easier one yes."

When asked if it would have been smart to notify the Revenue of the scheme Mr. O'Driscoll said "well, it wouldn't have been the wisest thing, no." (**Answer 184:** Page 44).

Question 185: Neither wise nor likely?
Answer: "Wise nor likely, but the likelihood that it would trigger an immediate response from the Revenue was pretty obscure even when they do change the legislation, a lot of them actually say 'well we disagree with you and therefore we will take you through the court and it is only when they have found out the existing legislation does not work, they would change it. It would be unlikely that I would expect them to rush through legislation. That wouldn't have been on their mind'."

Question 186: Sure, but they had the UK experience?
Answer: "Yes, technically, I assume it would have been a matter at looking to see how they closed this loophole in the UK and seeing how that fitted in."

Mr. O'Driscoll explained that he gave evidence in the High Court in 2005 and that is the first time he had an awareness and an appreciation of Section 67 and 91 of the companies Act 1990 on the notification of the transfer of interests.

Mr. O'Driscoll was then asked to explain a reference in a letter of the 2nd of May from CooperS&Lybrand talking about a proposed change to the Finance Bill which would apply to Irish registered companies which are not tax resident here to report certain information to the Revenue. He said his broad understanding of it "having looked at it over the weekend that this was a way of getting information on some of those Irish registered non-resident companies that were floating round the place at the time – quite a lot of them". (**Answer 203:** Page 48).

Prior to this if you were incorporated but weren't carrying on a business here, you didn't need to notify them, whereas this proposal was designed to extend the reporting requirements. (**Answer 204:**Page 48).

He explained that this had nothing to do with the obligation to file tax returns. The obligation on Lotus Green to file tax returns arose while it was tax resident here. (**Answer 207:** Page 48).

And therefore the only tax return or the only period in respect of which Lotus Green was required to notify was until the 25th August 1995.

He explained that Lotus Green had to be part of the Irish Capital Gains Tax group when it acquired the shares. "So insofar as it was ever resident anywhere, until we took a positive action to change it, it was Irish resident. The most difficult bit was actually showing that you had acquired Dutch residence so it needed a positive change in terms of the directors." (**Answer 217:** Page 50).

Mr. O'Driscoll explained that the liquidator of Marjove, Mr. Ray Jackson was, he believes chosen by Fergal O' Dwyer.

Whilst most of the documentation was drafted by Fry's somebody in CooperS&Lybrand would have reviewed them. When asked if the anti-avoidance provision of Section 84 was a concern in 1995, Mr. O'Driscoll said it was. He said that nobody really knew because Revenue were concerned about it themselves. He explained that Section 86 "would have given the Revenue the authority to form an opinion that something was done for tax avoidance and then to re-categorise certain transactions you know, either ignore them or re-categorise them, or whatever, and quantify the tax benefits and it was achieved and then saying 'well this is your obligation and now you have proved to us why it wasn't'. So effectively it allowed the Revenue to take a view as to what the overall intention was here of the scheme on the series of transactions." (**Answer 245** and **246:** Page 56).

Question 247: Yes.
Answer: "Quantify the tax advantage and then effectively say 'that is our view and now cough up'. And you could then challenge that."

When asked if he was of the view that the scheme implemented for Lotus Green, was the sort of scheme that was contemplated by Section 86, he said that they didn't know how Revenue were actually going to use Section 86. He thought that this was not one in itself and that there were other schemes that were far more vulnerable to Section 86 where there was no commercial reality, there weren't real actions happening or whatever and it was just effectively doing something, relying on a wording and a legislation which gave you bizarre tax results. "I am not absolutely sure whether the scheme was particularly susceptible to it, but certainly it was there with a view to avoid Irish tax, Irish Capital Gains Tax. And it was (a large amount of money)." (**Answer 249:** Page 57).

He did not think however that this was a scheme that was likely to attract Revenue attention because "whatever else, Revenue mightn't like it or whatever, but there were real actions happening". (**Answer 250:** Page 58).

He did agree that the greater the money involved the bigger the incentive was for the Revenue to take an interest.

Question 261: Therefore in terms of addressing the language that was used to describe this scheme you would be more careful and mindful?
Answer: "Funny I don't actually think so…I mean there was no attempt to disguise what was happening or whatever. I mean it would have been simply joining all the dots."

He said that Revenue would have looked at the overall transaction.

Question 265: … You wouldn't want to make it easy for them?
Answer: "Yes, certainly."

Question 266: You wouldn't want to put red lights around certain elements of the transaction or describe it in such a way that they would be more interested in it than less interested?
Answer: "Yes, although you know I think you should see there are a few times as you went through the paper, what I mean, it is all done on the basis that Revenue, the working assumption the whole time is that Revenue would be interested in this."

Question 267: Yes?
Answer: "That was the underlying assumption."

Question 268: When would Revenue be interested in it?
Answer: "Well, the only time that they would be interested in it, is the first time they could be interested in it is when we return it to them in the tax return. Whether they were particularly interested in it at that stage or when the shares in Fyffes were sold is a different issue, but they would become interested in it at that stage."

Mr. O'Driscoll was then asked to comment upon the advices obtained from Mr. O' Brien from SKC. He explained that Pat O' Brien's particular concern was that this transaction was being done in advance of any imminent sale and therefore he felt from his perspective that it was aggressive. (**Answer 274:** Page 63).

Question 275: Is that something you would agree with or not?
Answer: "It is a personal thing. I wouldn't actually …"

Answer 276: "…The group hadn't actually done anything. If this thing carried along for years the gap made it less likely that there was going to be a challenge."

When asked if he had considered the question as to whether a tax liability could be triggered at the time of the transfer, of the beneficial interest to Lotus Green he said "yes the possibility of it being triggered had been considered by them. It would have been there against the weighting of the different issues." (**Answer 278:** Page 64).

He agreed that Mr O' Brien was "interrogating" the view that had been taken by CooperS&Lybrand on the scheme.

Towards the end of June he became aware that Mr. O' Dwyer had consulted Mr. O' Brien of SKC. It arose in the context of Mr. O' Dwyer asking Mr. O'Driscoll to go back to Tommy McCann for further advice in relation to the meaning of 'liquidation' in the context of Marjove Limited.

Subsequently the tax clearance came through from the tax Inspector in Holland. He explained that DCC would have had a direct relationship with CooperS&Lybrand in Holland and in particular Mr. van der Hoeven. He was referred to the dilemma, referred to by Mr. O' Brien, who made the point that if the scheme was postponed they ran a not insignificant risk of a change in the Irish legislation to close the loophole. However that had to be weighed against the risk of getting caught with a tax liability pre-disposal outside of the group if they went ahead with same.

Question 347: So, you were weighing two things up. One cautious approach would be "listen, wait until nearer the time that Lotus Green decides it wants", or whoever "Lotus Green decides it wants to sell its shares", but in doing that you run the risk that that was a long period of time and the legislation could change and you couldn't do that?
Answer: "Yes."

Question 348: As against taking the risk that they might raise an assessment against DCC by doing it, but implementing the transaction in August. So there were judgment calls to be made in relation to that, and I take it your view is pretty clear that it was worth running the risk….
Answer: "In fairness, I don't think we would have been involved, in the terms of these discussions, these internal discussions. We were being asked to deal with technical points."

Question 349: Yes?

Answer: "I mean that would really be a matter for the company themselves and how they assessed it. All we would do was give our assessment of the technical risk."

Mr. O'Driscoll never saw the advices Mr. Price gave to the company in late July 1995 prior to the Fyffes' litigation. He explained that he attended various board meetings in August 1995 for the purpose of implementation of the transactions. He said he attended board meetings over two days in DCC house.

Question 363: What was the purpose of your presence there?
Answer: "I can't remember. I think Fergal would have just asked me to go out and sit in just in case any of the directors had any specific tax queries, or just wanted to know more of the background to it, or whatever. I don't remember any queries actually being raised."

He did not go to the DCC plc, board meeting but just to the S&L Investments, Lotus Green and Marjove meetings. He does not remember any questions arising.

Finally Mr. O'Driscoll confirmed that he had no concern about the time lag between the liquidation of Marjove on the 10th or 11th August and the transfer of the residence of Lotus Green to Holland on the 24th or 25th of the same month.

(r) Pat Wall

Mr. Wall explained that he was a partner in CooperS&Lybrand in 1985. He joined CooperS&Lybrand in 1981. He was an Inspector of Taxes prior to that and his involvement with DCC went back to that time. By 1995 he was a partner in the firm for about nine years. He had a big team of people. Terry O'Driscoll would have been the resident expert as it were on corporate restructurings. He and Terry would have worked together on a number of acquisitions/mergers. He explained that Mr. O'Driscoll wasn't far off partnership at that stage so he would have been very comfortable delegating a lot of the work to Terry. He explained that although his name was on most of the documents,

most of the drafting would have been done by Mr. O'Driscoll. His involvement would have been to read through it and check it. He described his role as being "an overall relationship management with DCC". At that time he was the partner in charge of their tax practice. Making sure that a partner was signing off on opinions that we were giving or work that we were doing. They had internal procedures which required advice matters to be reviewed by a partner and in some cases by two partners. He explained that in relation to the advice given by Mr. O'Driscoll he did carry out the review and didn't merely tick boxes.

When he joined from the Revenue in 1981 DCC was one of the first clients he actually got involved with. Mr. Wall was asked if he would assist in giving an understanding of what the compliance culture was within DCC. He explained that CooperS&Lybrand would have had a very compliant culture themselves. "In fact we would have always taken the view that, for example, tax planning had to be done on the basis of full disclosure of all the facts, that the Revenue had to be made aware of, within the law, of all the steps that were being taken. So, I would have to say that would be my general experience of dealing with clients. Against that background I wouldn't have said that DCC was exceptional but they were definitely very conscious of compliance obligations." (**Answer 391:** Page 86).

When asked where in the compliance spectrum DCC fell Mr. Wall said "I would say very much on the compliant end. In fact I would say that DCC, as an organisation, were particularly careful to ensure that all the t's were crossed and the i's were dotted. That I would have felt, was a very strong cultural aspect of DCC from the beginning." (**Answer 395:** Page 87)

Question 396: Yes?
Answer: "You know, it is hard to make direct comparisons but that certainly would have been my overall impression."

Mr. Wall explained the tax mitigation of the type that was eventually implemented in the scheme, would have actually been something that would have exercised the minds of any well run industrial holding company.

Mr. Wall explained that the Dutch were using the participation exemption and their holding company regime as part of the competition for business. "We, Ireland Inc., engaged in the same, what is known as fair tax competition, for inward investment. So, there would have been quite a lot of pressure over the years for our regime to reflect what was available in other EU countries, because apart from anything else under the Treaty of Rome and Freedom of Movement of Capital, you are entitled to move your residence to, as it were, a lower tax jurisdiction, so we weren't in fact collecting taxes as a result of these rules because companies were doing, as we did in this instance, planning their way out of this situation. So, Ireland Inc., as it were, was not benefiting. All it was doing was chasing business off to places like the Netherlands."

(s) Pat O' Brien

Mr. O' Brien explained that he was a Commerce graduate of University College Dublin, a Fellow of the Institute of Chartered Accountants, a Fellow of the Irish Taxation Institute and a Tax Partner in KPMG formerly Stokes Kennedy Crowley.

He qualified from UCD in 1978 and as a Chartered Accountant in 1982. He explained that he did the normal taxation exams in the Chartered Accountancy examinations, which everybody took and then because his specialisation was tax he did the examinations of the Irish Taxation Institute. He explained that in 1979 Stokes Kennedy Crowley took a new approach of taking people directly into tax while doing their accountancy exams and he was one of the two that it took in, in that year to do that route. He has been exclusively engaged in tax since he joined SKC.

In 1995 he had been a tax partner in KPMG since 1987. Prior to 1995 he had had no direct involvement with DCC but he did advise Flogas in which DCC had an interest but did not provide tax advice to DCC as such. The first personal contact he had of speaking

to anyone in DCC about tax matters was in relation to the 1995 transactions. He did not provide any tax advice to DCC before 1995 and he hasn't advised DCC after 1995.

The circumstances in which he came to advise them in 1995 was at the request of Fergal O' Dwyer He believes he was telephoned by Mr. O' Dwyer and after that they had a couple of meetings and he then wrote to Mr. O'Dwyer with his opinion on what was being contemplated. He has no recollection of that initial conversation. He was subsequently sent the papers that had been prepared for Tommy McCann as well as what he believed was a draft opinion of Mr. McCann. He knew that CooperS&Lybrand were involved and just from being in the practice of tax that CooperS&Lybrand were DCC's tax advisers. He did not regard himself as being asked for a third opinion because he wasn't shown the CooperS&Lybrand opinion as such. He would have regarded the Tommy McCann opinion as being the opinion that he was being asked to look at.

He agreed that this was unusual. The more usual practice would be where KPMG would ask Counsel to opine on something that they were suggesting to a client which he said was a fairly rare occurrence in any event. He had only sought Counsel's Opinion three or four times over 20 years. Usually the interest would be if there was a particular point of maybe constitutional law in which he is not expert, which might be relevant to the contemplated transaction.

Section 86 gave rise to a request for Counsel's Opinion. He explained that the circumstances in which they would seek Counsel's Opinion was not where the question of the tax law itself was challenging but more where terms, which were more from the provenance of non-tax law were incorporated without any definition into tax law. (**Answer 42:** Page 13).

He gave as an example the concept of what is the "beneficial owner" of a piece of property would be used without definition in tax law and if that has a particular sensitivity for tax structure, it would be sensible to get the view of legal counsel. (**Answer 45:** Page 13).

He explained that the 'fairly conventional wisdom' among the tax profession would have been that one of the significant values of going to Senior Counsel on a significant piece of intended tax planning was that you were, in a sense, getting a preview as to how a Judge might react to a tax plan if it went to Court. (**Answer 47:** Page 14).

He thought it was somewhat unusual that DCC were coming to him. But he also said that it would not have been unusual that KPMG might be asked to look at a tax plan proposed by PWC or visa versa. What was unusual here was that he was being asked to look at a Counsel's Opinion rather than getting a Counsel's Opinion on his own view of a matter. That was unusual in his experience. (**Answer 50:** Page 16).

When Mr. O' Dwyer approached him he didn't know that CooperS&Lybrand didn't know, that he was contacting him, but it wouldn't have surprised him either way. (**Answer 53:** Page 17).

Mr. O' Brien was asked if he had a sense that there was an unusual level of confidentiality about this scheme. He answered that he didn't think it was unusual "I would say that it would be fairly routine on significant structures that, perhaps, are going to a number of advisers not just an ordinary tax advisor but a number of advisors, that project names are used and that designations are used in the scheme of things. That would not be unusual." He also said that with a scheme such as this you would never go to the Revenue for informal clearance. "In a transaction like this, there would have been no incentive for Revenue to say yes because all that could happen if they were to say yes was that they would get less tax than they otherwise might have got. So in this type of pure tax planning position…" (Interjection) (**Answer 156:** Page 38).

Question 157: You would never go?
Answer: "No, you would not."

Mr. O' Brien was asked if he knew of the notification obligations that were imposed upon companies, where above a certain threshold any shares that they held in a public company had to be notified, to which he said "no, I did not". (**Answer 170:** Page 41).

He also said he would not have to concern himself with provisions of the Companies Acts as far as notification obligations were concerned nor did anyone mention to him that consideration was being given to whether the transaction, that he was advising on, may have had to have been notified to Fyffes or the Stock Exchange. He said it wouldn't have affected the tax advice if they had done. It was tax advice neutral.
When asked what he meant when he referred to this as being an aggressive position for a plc., to be in, he explained that on the basis that a tax charge could arise on the transfer in August 1995 even though the shares did not sell for a significant period afterwards. During that time the value of the shares could have fallen and in such circumstances the company would end up paying tax at the value of the shares in August 1995, even though when the shares were sold the price had fallen. He also mentioned a second point that was in his mind at the time and that would have been "that if this was seen to be an aggressive transaction, then you know, DCC had to be comfortable that they would have to tax litigate this if Revenue chose to litigate it in the glare of publicity and plc's differ in their propensity to take on that risk quite frankly". (**Answer 182:** Page 44).

Question 183: Because of reputational issues?
Answer: "Absolutely, yes."

Question 185: Was that just saying to Fergal this is a matter you as a plc., will have to decide, in other words do you have the stomach for withstanding a Revenue challenge?
Answer: "I think that's right yes."

Question 186: That is part of your duty as a tax advisor. You would see that as part of your obligation to your client to at least alert them to that, or is that something that you would leave to themselves?
Answer: "No I would raise that with the client."

(t) Peter van der Hoeven

Mr. van der Hoeven explained that he was now retired, but in the period from 1995 to 2000 he was the Tax Partner dealing with the Dutch affairs of Lotus Green and DCC. He obtained a Masters Degree in Tax Law from Leiden University in 1974 and was an International Tax Lawyer from 1975 to 2004 and a Tax Partner in PWC from 1985 until 2002.

After his retirement in 2002 from PWC he continued to provide advice to the firm until 2004. His clients were primarily large multinational companies. Many with Stock Exchange listings. Special areas of interest for him were the relations between the United Kingdom and the Netherlands and South Africa and the Netherlands. He was also a board member of the Netherlands Chamber of Commerce.

When asked when he first came into contact with DCC he said he didn't know exactly but he knows, that before the Lotus Green issue came up DCC was already a client. He explained that his point of contact in DCC was Fergal O' Dwyer. He was also liaising with CooperS&Lybrand, as they then were, in Dublin first, Pat Wall and at a later stage Terry O'Driscoll and John Kelly.

Mr. van der Hoeven was referred to a letter which he had jointly written with an Andrew Casley, also at PWC Netherlands, on the 10th May 1995. He explained that Andrew Casley was seconded from the London office from PWC. Mr. Van der Hoeven explained that when he was first contacted, what he recollects is "that they said that there was an intention that Fyffes would be sold, but they didn't know exactly the timing on that, there was not an immediate intention of selling that, but it could have happened if something would come up, that required a quicker sale, but the intention was that it would be sold in the future and the structure should be in place when the time would come up." (**Answer 34:** Page 14).

When asked if the proposal which emanated from DCC was something he was familiar with or which had happened before he said "no certainly, not often. I will not say never before, not in my practice, so it was relatively new. It was not – we knew that companies could be shift their residence. There are court cases of what happens then. But in this particular case, and the reason they wanted to do that is something, at least in the Amsterdam office, had not happened yet.

The way it was approached from PWC in Dublin is that they asked if the Netherlands could work for the proposed scheme and they came back and said "yes" provided you take certain steps. PWC Holland were not concerned with the position of the Irish tax authorities because that was looked after by their PWC colleagues in Dublin. He said that there was no particular confidentiality around this proposed transaction. It was "about as confidential as I expect". (**Answer 44:** Page 17).

He explained that he was the person who made contact with the Dutch tax authorities. When asked what he had to satisfy them of to get the clearance that he got from them in July 1995 he explained "well, first of all, you have to give them all the issues which are relevant and you have to give all of the details of the companies involved, names etc. Then what the intentions are, so in fact, all facts which are relevant for a Tax Inspector…a ruling practice is that we explain to a Tax Inspector what our views are on international tax law, and how this has an impact on Dutch tax law. So we give them all the facts, and based on all those facts, and he agrees with our understanding or does not agree with our understanding, so that it is not just rubber stamping." (**Answer 46:** Page 17).

He explained that the tax clearance obtained is as good as the information that you had given to the tax authorities "there is a last clause in each ruling that if the information is incorrect or incomplete then the ruling is not valid". (**Answer 47:** Page 18).

He also explained that the Dutch tax clearance was also rendered invalid if the Irish tax authorities had not been properly informed "so they should not be told story A in country

A and story B in country B. It should be story A in country A and in country B." (**Answer 50:** Page 18).

When asked if there was any question that the Dutch authorities might have to contact the Irish Authorities. He explained that they might. There was always the possibility that for whatever reason they would contact a foreign fiscal authority and he had no control over that.

He said he didn't concern himself with the legality of the scheme from the Irish perspective. He explained that he was only requested by the client to look after the tax law issues. The Dutch tax implications based on a certain given set of facts. (**Answers 60** and **61:** Page 20).

He said that this particular scheme could be described as ambitious. "It was not a standard issue – that it was relatively unique to my knowledge. The transfer of a seat of an Irish company where there was an idea that in the future shares would be sold…it was relatively unique." (**Answer 65:** Page 21).

The unique feature was "that one wanted to avoid Irish Capital Gains Tax in the future and transfer the whole seat of a company to the Netherlands. I hadn't experienced that before." (**Answer 67:** Page 21).

"This was tailor made work." (**Answer 68:** Page 22).

Mr. Van der Hoeven then explained the Dutch tax regime. To the extent that there was a capital gain prior to August of 1995 that became irrelevant and not taxable in Holland and to the extent that Lotus Green's shareholding in Fyffes appreciated, post August of 1995, that obtained the benefit of the participation exemption. He explained that they had nothing to do with group relief.

He said he had advised DCC on the steps that needed to be taken for Lotus Green to establish residence in the Netherlands which was largely dependent on having its management and control as it is called in Dutch law in the Netherlands. "And if you have management and control in the Netherlands then the company is deemed under international tax law to be resident in the Netherlands."

He explained that it was easier to convince the tax authorities in the Netherlands that the company was resident in the Netherlands because the Tax Inspector will say "thank you very much I can tax another body. So it is less difficult. It's not that he will sign off everything but it is less difficult to demonstrate." (**Answer 80:** Page 25).

He explained that what view the Irish authorities took of that, was neither here nor there from his perspective. He was not sure whether he knew about the involvement of Marjove Limited and the liquidation of that company so that assets could be distributed. He explained that DCC was his client even though under DCC there were subsidiaries but "the client was DCC, not Lotus Green. I had not Lotus Green as a client." (**Answer 91:** Page 27).

He said any obligations to notify Fyffes or the Stock Exchange "had nothing to do with me, certainly not". (**Answer 93:** Page 27).

He explained that they were paid for tax law advice. They would never advise on investments and would never say what should or should not be done with shares. "It is 100% forbidden by our company to do any management issue whatever. So we were paid for tax advice and nothing more, and nothing less." (**Answer 95:** Page 28).

He explained that the ruling which was obtained from the Dutch tax authorities on the 30th June 1995 was in anticipation of Lotus Green acquiring the beneficial interest in the shares and on Lotus Green subsequently moving to Holland. Mr. van der Hoeven explained that he had submitted the application for clearance to the Dutch tax authorities on the 1st of June and the Dutch Tax Inspector gave his ruling on the 30th June.

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