

## **9. The Interviews Continued**

### **9.2 2000**

#### **9.2.1 The Officers**

##### **(a) Michael Scholefield**

Mr. Scholefield reiterated that he was Company Secretary and Compliance Officer of DCC from January 1995 until August 2000. He explained that on behalf of DCC he prepared a Compliance Report to the board twice yearly which involved him sending out a detailed questionnaire to all the group companies seeking information on compliance matters and asking “have you done X, Y, Z and W”. (**Answer 32:** Page 14).

When asked what type of discussion took place at Board level with the Compliance Report he answered “there usually wasn’t a significant discussion around it”. (**Answer 39:** Page 15).

**Question 40:** Was there a Compliance Committee?

**Answer:** “No there wasn’t, no.”

Mr. Scholefield expressed the view that the DCC officers who were directors of other public companies namely Fyffes, Flogas and Greenway “were equally as well aware of their responsibilities” (under Section 108) as he was. (**Answer 67:** Page 22).

**Question 69:** What value then did the Compliance Officer add to the process if your view is they knew as much as you, what were you adding?

**Answer:** “A second opinion.”

**Question 70:** Right, and that is all you felt was being added?

**Answer:** “Well, a second opinion, you know, formally. Bring some formality to the process and a responsibility to ensure that action was taken – that it was formally considered.”

**Question 71:** There are two extremes. You could form the view that having the Compliance Officer there was something that was substantive and important or, on the other extreme, you could take the view that this was ticking the boxes, going through the motions, formal but not substantive. Do you understand?

**Answer:** “Well, I think it was substantive. You did ask me the question as to whether I would have had a lot more knowledge than my colleagues in this area and I actually believe that they were very well informed in this area. So there may be other areas I mean, if you got into the depths of the listing rules I would say yes I knew more in the depths of the listing rules than the guys did about the depths of the listing rules. Or something obscure somebody would say ‘well I don’t know about this. Will you go off and have a look at this Michael?’ But actually as regards insider dealing I would have to say I think my colleagues were well informed in relation to that and very well aware of it. I mean, I suppose if you had been dealing with public companies for as long as DCC had and with as many of my colleagues who had involvements it was something that was pretty high on the agenda, to be quite honest.”

**Question 72:** What was pretty high on the agenda?

**Answer:** “The whole issue of insider dealing. Being aware of insider dealing. It was something that was very seriously considered. From the top down, from Mr. Flavin. Mr. Flavin had a very strong awareness of it and I believe that my senior colleagues did too absolutely.”

**Question 73:** But you as Compliance Officer were somebody that they not only looked to but were entitled to look to for guidance and advice?

**Answer:** “Oh yes, yes.”

**Question 74:** To that extent, you were looked up to insofar as compliance matters were concerned?

**Answer:** “Looked up to? I think people would respect my opinion, yes.”

**Question 75:** Therefore, there was a responsibility upon you that was separate and different from the responsibility of the individual director?

**Answer:** “Yes, yes.”

Mr. Scholefield was asked if the DCC resolution that the shares in Fyffes would be sold by Lotus Green at the appropriate time or whenever it was considered sensible was documented anywhere. He answered “no”.

When asked why that wasn’t documented he explained that it was not a decision taken at any one particular time but that it was a view that evolved over time. That was something that was there in the background all along. Furthermore when they came to resolve to transfer the beneficial interest in July 1995 there was a focus on the mechanics of the inter group transfer and he thinks there would have been an understanding through a number of comments but it never made it as far as a minute. He explained that this was surmise on his part. (**Answer 79:** Page 26).

Mr. Scholefield said that once the beneficial interest was transferred to Lotus Green “the responsibility was on the directors of Lotus Green to decide what to do with that stake and I think everybody understood that clearly.” (**Answer 83:** Page 27).

**Question 84:** Now are you saying that once you transferred it to them they could do what they like?

**Answer:** “Well, I think that was their prerogative, yes.”

**Question 85:** Are you seriously suggesting that Lotus Green directors had unfettered discretion to do what they liked with the Fyffes’ stake?

**Answer:** “Well, they were aware as I understand it what the DCC strategy was that the shareholding would be sold at some point in time, but beyond that.”

**Question 86:** Yes, the DCC strategy was that it be sold at some time. What guidance was there for them then?

**Answer:** “I am not aware that there was any guidance.”

He explained that the DCC strategy vis-à-vis Fyffes would have been contained in the Annual Strategy Report of DCC but he didn’t think anything was communicated through a formal document or record to Lotus Green. (**Answer 89:** Page 28).

When asked if this constituted a gap or an oversight Mr. Scholefield said he didn’t think so. (**Answer 91:** Page 28).

Mr. Scholefield was asked if the compliance questionnaire which he sent out would have gone to Lotus Green. He said he didn’t think so and that the compliance questionnaire just went to DCC’s operating companies. “companies managed at head office.” (**Answer 94:** Page 29).

Mr. Scholefield said that he would have overall responsibility for Lotus Green company secretarial returns and they would have had a schedule to ensure that Lotus Green, among other head office companies, would file its annual returns. (**Answer 95:** Page 29).

When asked what ING Trust did which was Lotus Green’s secretary as opposed to what Ms. Mairead O’ Malley did he said that ING looked to head office to advise them of Irish Company law and Company Secretarial type filing requirements. (**Answer 97:** Page 30). They would have dealt with things that would be within their expertise (in Holland). (**Answer 98:** Page 30).

He agreed that everything that was done in the period between 1995 and 2000 with regard to Lotus Green had the single purpose of ensuring that when it came to the time to sell, the return to DCC would be optimised by the minimalisation of tax. (**Answer 101:** Page 30).

He also agreed that the way that Lotus Green was regarded from DCC's head office was that nothing would be said or done or written that would potentially jeopardise its tax status but there had to be real substance behind it to have the tax status. "The fundamental point was decisions had to be actually made in Holland." (**Answer 106:** Page 31).

Mr. Scholefield said that the real important element of control in Lotus Green was the stipulation that no decision could be taken without the vote of the 'A' Director Fergal O' Dwyer. Mr. Scholefield said that if there was a concern about the Dutch Directors "you could always remove the board". (**Answer 116:** Page 233).

**Question 117:** But you might not be able to remove it quickly enough. Theoretically, you could have had a situation where the board of Lotus Green rang up stockbrokers in Dublin and said "we are the beneficial owners of this stake. Sell at market or 15 to 20% discount."

**Answer:** "Yes."

**Question 118:** Now that was not going to happen because the resolution to do that would be blocked by Fergal?

**Answer:** "Right."

**Question 119:** Ultimately, as you said, if they were even moving in that direction DCC had the power of appointment and removal?

**Answer:** "Yes."

Mr. Scholefield agreed that it was unlikely that the Dutch directors of Lotus Green were going to do other than DCC's bidding in terms of the decisions that they as Lotus Green

had to face. “Just like I don’t think it is likely that any other subsidiary of DCC would go off and do something mad.” (**Answer 121:** Page 34).

When asked if it would be correct to say that the signal to sell Fyffes’ stake was going to come from Dublin even if the ultimate decision in terms of the sitting down and the resolving to do it may have been taken in Holland Mr. Scholefield said “I have no idea how it was going to come”. (**Answer 124:** Page 34).

**Question 125:** ... But was it ever going to come from the Dutch initiative?

**Answer:** “I don’t know, I just don’t know. I think it is unlikely. In practical terms I think it is unlikely.”

Mr. Scholefield said he didn’t have cause during the period of from August 1995 to January 2000 to consider the implications of a sale of the Fyffes’ stake by DCC. (**Answer 132:** Page 36). He said he was aware of the review by Lotus Green of its strategy in relation to the Fyffes’ stake in 1998 and that it was mentioned in the Minutes of DCC of the 8<sup>th</sup> of May as follows:-

“During a discussion of the results of DCC group Mr. Flavin noted that the board of Lotus Green a Dutch subsidiary of the group was currently reviewing its strategy in relation to its interest in Fyffes. The current market value of Fyffes was approximately ...”

Mr. Scholefield had a note of the May 1998 meeting at which Mr. Flavin reminded the independent directors about Lotus Green and that it was managed and controlled in Holland.

**Question 147:** Yes, this read, and we did go through this yesterday, this read as if it was almost a reminder to people who may have forgotten about Lotus Green?

**Answer:** “It was, yes.”

**Question 148:** How could that have been?

**Answer:** “Well, to be honest, Fyffes wasn’t discussed at DCC board meetings at all really and I take it that it is three years since the internal transfer...”

**Question 149:** Were you surprised that there was this need to remind people about it?

**Answer:** “A little bit yes...I suppose sometimes some people want to go through the mindset and ‘remind me again and you just go through the logic of it all and where it all comes from. We know it already but go through it again...to be sure to be sure.”

Moving on to December 1999 Mr. Scholefield says he was aware that the share price of Fyffes was improving during that month. He confirmed that he was Investor Relations Manager in DCC so he would be expected in that role to know public information in relation to Fyffes because any investor could ask you any question about Fyffes at any point in time. (**Answer 155:** Page 41).

He explained that they had a screen in their office in which the share price of Irish companies was shown. He said the Fyffes and other share prices were being watched by Fergal and Jim Flavin. “Jim was an avid follower of share prices and in particular DCC’s.” (**Answer 160:** Page 42).

He agreed however that the DCC share price and the Fyffes’ share price would have been the particular focus.

When asked what contact or what communication he would have had with Mr. Flavin about Fyffes in his role as Compliance Officer and Investor Relations Manager “none as regards Investor Relations Manager with that kind of hat on. I can’t think of any reason why I would have had contact with him other than, as I say, just for my own knowledge having to follow the public announcements of Fyffes’ press comments so that would be the one. Then in terms of my other roles I suppose Mr. Flavin would occasionally consult me on technical matters that arose with Fyffes. There is something in the court case about the Model Code and the application of the Model Code to the DCC group shareholding in Fyffes and Jim would have consulted me on that.” (**Answer 168:** Page 43)

**Question 169:** Was that as to whether DCC was required... (Interjection).

**Answer:** “To get the Chairman’s approval in advance of dealing.”

**Question 170:** In Fyffes’ shares?

**Answer:** “Yes.”

**Question 171:** The view you took was that he didn’t or he didn’t have to because he was not connected?

**Answer:** “Yes, that is the view I took and I would have confirmed that with Alvin Price at the time, and I know he subsequently went back and confirmed that with Alvin Price and he would have copied me on some correspondence in relation to that issue between himself and Fyffes.”

Mr. Scholefield said at one stage he contacted Fyffes’ Solicitors at Mr. Flavin’s suggestion to assist them in relation to a share option scheme that they were setting up.

**Question 174:** In terms of Fyffes’ documentation for Mr. Flavin, where would they come to, the board package?

**Answer:** “It would come to him in his office, I suppose.”

**Question 175:** Did you have any knowledge of when they came, where they were kept, anything of that nature?

**Answer:** “No, if you asked me to guess where they were kept I probably could have done it because there were a couple of cabinets outside Mr. Flavin’s office which were kind of confidential cabinets. I think they have things like salary details for people in DCC and Fyffes’ papers but I had no access to those.”

**Question 178:** Was there any chat in DCC after 14<sup>th</sup> December and as the Fyffes’ share price started to rise which you can recall?

**Answer:** “Not particularly. Mr. Shipsey, if you forgive me on this particular area now and this is something I do want to say to you that obviously I was involved and I don’t know



whether you know this, in terms of managing the legal case for DCC and a lot of information has come to me and I have been made aware of a lot of information. Where we were trying to assemble the picture ourselves, and I will do my very best because I understand you actually want to know what I knew at the time and not what I know now. But there are areas where it is difficult for me because of that, because people have told me things subsequently, for me frankly to pull apart..." (Interjection).

**Question 179:** To distinguish what you have learned?

**Answer:** "What I have learned and what I knew then, yes."

He went on to say that he believed that he would generally have followed the Fyffes' share price and he believes that it would have been more in January than December being the subject of some comment. "But it was going up so fast that it really was unprecedented. We had just never seen anything like it." (**Answer 180:** Page 46).

**Question 181:** What was happening to the DCC share price around this time?

**Answer:** "I think it was increasing but not as rapidly as we might have liked."

**Question 182:** Nothing like Fyffes?

**Answer:** "Nothing like Fyffes, no."

He explained that the increase in the Fyffes' share price was the subject of public comment insofar as it impacted on DCC. "So every million that Fyffes went up DCC was going up 100,000."

Mr. Scholefield doesn't remember anything specific about January 2000 just a general consciousness that this was a good thing that was happening for DCC because the Fyffes' share price was rising. (**Answer 191:** Page 49).

When asked when he became aware in January that there was a greater possibility of the sale of the Fyffes' stake he said, "I don't think I had any awareness of that until Jim Flavin

had that compliance conversation with me. I think that is the first point which I can identify or ever could identify when I would have said ‘right, something might happen here’.”

Mr. Scholefield did not think there would have been any extended period of time in which there was a contemplation of selling the Fyffes’ stake before Mr. Flavin came to him on the 1<sup>st</sup> February. Mr. Scholefield would have been surprised if anybody else in DCC was contacted by a broker apart from Jim Flavin. (**Answer 210:** Page 52).

He said that if a call had come through to him he would have put it on to Jim Flavin or Fergal O’ Dwyer and nobody else. (**Answers 219 and 220:** Page 53).

When asked about the conversation that he had with Jim Flavin on the 1<sup>st</sup> February he said “all I can say is that I believe it was in my office. He couldn’t recall whether it was morning or afternoon.” (**Answers 224 and 225:** Page 54).

“I believe Mr. Flavin came in and shut the door and said; ‘there is something I want to talk to you about’ and I don’t know the form of words he used but he made it clear that he wanted to have a confidential discussion with me.” (**Answer 226:** Page 54).

“I guess a 10 or 15 minute conversation.” (**Answer 228:** Page 54).

“I think what I recall of it is what I put down by and large within my note. Those would be the essential things that would have been discussed during the conversation.” (**Answer 230:** Page 55).

“...I do have a fairly clear memory afterwards of very quickly trying to get the essence of the conversation down on paper. Those notes are pretty contemporaneous and I would have recalled that Mr. Flavin would have come in and done a bit of a brain dump in terms of everything that he knew and that he wanted to discuss with me. Similarly my note was a bit of a brain dump as well, if you like.” (**Answer 231:** Page 55).

**Question 232:** ...Is it likely that you were writing notes as Mr. Flavin was speaking or is it likely that you were listening to him and asking some questions, getting a response, asking some more questions and then he went away and you jotted down a series of notes and then you typed up those notes into something formal? Would it have been your form to be listening...and jotting down notes or would you listen...engage, and then take down the notes?

**Answer:** "I think probably the former, but I couldn't be definitive, more likely the former."

**Question 233:** You would be taking notes, shorthand notes as you went along, is that correct?

**Answer:** "That is more likely the case and then I might supplement that afterwards."

**Question 234:** Supplement them with what you recall of the fleshed out conversation?

**Answer:** "Yes."

**Question 235:** ...What was your understanding of why Mr. Flavin was coming to you about this matter?

**Answer:** "I understood it would be absolutely normal in terms of DCC as a group that if there was a prospect of a transaction involving another public company, that we will consider whether we were free to deal in that company, in the shares of that company. It would have been absolutely standard for Jim to come and talk to me."

**Question 236:** But if that was the case, and I'm not sure what your understanding was, if this sale was going to be effected, it was going to be effected by the beneficial owner, Lotus Green?

**Answer:** "Sure."

**Question 237:** Why would you not have stopped and said 'well, why are you coming to me Jim, these are Lotus Green shares. You are not a director. You are not an officer of Lotus Green. What are you worried about'?

**Answer:** “I think the events of the last while have demonstrated what we could have been worried about. I wouldn’t have believed that there was any prospect of the DCC group selling shares in a public company when any executive of the DCC group was in possession of price sensitive information.”

**Question 238:** As far as you understood your remit, it wasn’t just technically looking at who was going to be selling it?

**Answer:** “Absolutely not.”

**Question 239:** You would not have rebuffed him?

**Answer:** “Certainly not.”

**Question 240:** And said ‘Chief Executive go back and start worrying about what you should be worrying about’?

**Answer:** “Certainly not.”

**Question 241:** ...What did you understand of Mr. Flavin’s involvement at that time in relation to the sale of the Fyffes’ stake was?

**Answer:** “I didn’t understand necessarily that he had any involvement and I don’t think it was terribly relevant to me whether he had an involvement or not. All I know is that as Chief Executive of the DCC group he was advising me that there was a potential transaction, there were circumstances that might result in the potential transaction happening and that we were to consider whether or not the group would be free to deal.”

**Question 242:** He was certainly sufficiently worried to come to you?

**Answer:** “He wasn’t worried. I do want to get that point across, this was a normal process. This wasn’t something that implied any degree of worry. In fact I didn’t see any degree of worry in Mr. Flavin. This was something that was absolutely standard and normal. It just was inconceivable to me that a share sale would have taken place without Mr. Flavin coming to me and it was in line with previous practice in DCC.”

**Question 243:** What previous practice?

**Answer:** “Greenway Holdings, when we sold that shareholding there was a file note and Jim came and spoke to me then. I think my predecessor Hugh Keelan had notes on files and there are other circumstances.”

**Question 244:** Maybe ‘worried’ is too strong. But if Mr. Flavin had no information in relation to Fyffes other than the published information...let’s say he had come to you on the 14<sup>th</sup> December.

**Answer:** “Yes.”

**Question 245:** And the results were out. You can see the likelihood in those circumstances that he might not even have come to you?

**Answer:** “No.”

**Question 246:** Do you think he would have come to you?

**Answer:** “Absolutely.”

**Question 247:** Therefore, if he had come to you what was he coming to you for?

**Answer:** “I think he was coming to me to record that the DCC group had formally given consideration to the issue and to ensure that that was recorded.”

**Question 248:** Formally given consideration to the sale of the Fyffes...(Interjection).

**Answer:** “No, no formally given consideration to the compliance implications as to whether or not the group was free to deal. There is a process to be gone through.”

**Question 249:** I suppose this is my point, is he going through the motions or are you trying to create a file note?

**Answer:** “No.”

**Question 250:** Are you actually doing something that is substantive in a compliance sense?

**Answer:** “Absolutely doing something that is substantive in a compliance sense.”

**Question 251:** You are the Compliance Officer?

**Answer:** “Yes.”

**Question 252:** Why is he coming to you?

**Answer:** “Because a matter of that nature is something that the Chief Executive and the Compliance Officer would discuss and formally consider and record.”

**Question 253:** So it is not just that he is coming to you and saying “this is what I know, this is what might happen, please record it”.

**Answer:** “No.”

**Question 254:** He is coming to you looking for advice?

**Answer:** “Yes, well yes, yes, okay.”

**Question 255:** Is there any doubt about that? You are the Compliance Officer?”

**Answer:** “Yes.”

**Answer 256:** “He is coming to me to engage in a process, I think and he would respect that I have...” (Interjection)

**Question 257:** Let us say you as a Compliance Officer as a result of what you heard said ‘Jim, under no circumstances can the DCC group be part of a sale of the Fyffes’ stake at this time’. What then?

**Answer:** “Then it wouldn’t happen.”

**Question 258:** So to that extent he was looking for your advice?

**Answer:** “Yes, fine.”

**Question 259:** He was looking for you to make a decision either if you had a view that it wasn't price sensitive or that it was, so something was required of you?

**Answer:** "Yes."

**Question 260:** That was a decision as to whether in your opinion, the DCC group could participate in a share sale or not?

**Answer:** "Yes."

**Question 261:** To that extent it wasn't just to come as a Compliance File post box. He wasn't giving you his view and asking you to deposit it in the Compliance File?

**Answer:** "No."

**Question 262:** It was a process?

**Answer:** "It was a process."

**Question 263:** Again, how real and how substantive that process is depends on the level of engagement between you and he in that regard?

**Answer:** "Yes."

**Question 264:** If you had listened to what he had said and asked no questions and recorded your agreement and filed it that would have been a rather minimal process?

**Answer:** "It might have been, yes."

**Question 265:** If you had asked and interrogated him over many hours and looked for documentation that might have been a very extensive process?

**Answer:** "That's right."

**Question 266:** What I would like to get a sense of from you is what questions you did ask and what responses you got?

**Answer:** “I can’t remember specific questions. The only question I can specifically remember and probably because it is not in the note, is that I certainly asked Jim whether he was aware of any significant transactions involving Fyffes that he might be aware of.”

**Question 267:** Like a takeover?

**Answer:** “Takeovers or anything else like that yes. I would have been particularly conscious that that would have been something that would have been in the press, for instance, around the time of the Fyffes’ results.”

**Question 270:** He had information to relate to you and that information related to Fyffes’ trading results in the period post 31<sup>st</sup> October 1999, is that right?

**Answer:** “It formed the substantive part of our discussion, yes.”

**Question 271:** Again, you can have many types of inside information that might be price sensitive. The one you mentioned about major transactions being one of them but the other major one would be either good or bad trading results?

**Answer:** “Typically.”

**Question 272:** They are the two things that you put as the main classes of inside information?

**Answer:** “Correct, absolutely.”

**Question 273:** He wasn’t telling you about a transaction?

**Answer:** “No.”

**Question 274:** For you to ask him about a transaction was perhaps proper?

**Answer:** “That was me doing my job.”

**Question 276:** What did you ask him about the poor, and I don’t know what the expression was, poor trading results for the period post 31<sup>st</sup> October 1999?

**Answer:** “Individual questions that I asked him?”



**Question 277:** Yes.

**Answer:** “I don’t recall the detail of individual questions. It was a discussion between us. I don’t have a recollection of an individual question.”

**Question 278:** Forgetting about the words that you might have used or how you might have phrased the question, do you recall asking him any questions about the trading performance?

**Answer:** “We had a discussion. I am sure within that there were questions, there would have been an interplay between us, if you like, on the trading because I would have been trying to get a sense of the information that Jim did have.”

**Question 279:** If that was the case and certainly that is what you would expect a Compliance Officer to do because for me to come in to you and if I am Jim Flavin and say “listen, we are thinking of selling or there is a possibility that the DCC group stake which it owns in Fyffes is going to be sold, I am aware that there have been disappointing trading results in the period post the published returns” I would expect that you would interrogate me about that because in order for you to give an informed opinion, you need to know something about the nature or extent of the poor trading results?

**Answer:** “Yes absolutely.”

**Question 280:** What I want to find out from you is what you found out from me, from Mr. Flavin, about the nature or the extent of the disappointing trading results?

**Answer:** “As I said to you, I think it is recorded in my note what I found out.”

**Question 281:** I don’t see anything other than what Mr. Flavin said to you about the nature or the extent of the poor trading results in your note?

**Answer:** “Sorry, I’m not following you at all. Why would there be anything in my note other than what he told me?”

**Question 282:** If I tell you there were poor trading results that doesn’t tell you whether it is 5% down, 10% down, 40% down or 100% down?

**Answer:** “Absolutely, but what I would have been trying to do is get a sense of the substance of that information and Mr. Flavin told me that the information he had was in line with the information that he had as a result of the board meeting in mid-December so that it was on all fours with that information.”

**Question 283:** If all he had was what he had on the 14<sup>th</sup> December?

**Answer:** “No, what he was saying was that the information he had was in line with that information so he had received subsequent trading information from Fyffes which was in line with that information.”

**Question 284:** But that was not public?

**Answer:** “No, it wasn’t public information.”

Mr. Scholefield explained that Jim Flavin would have had information for November and December and the first couple of months of the year at the time of the December 14<sup>th</sup> board meeting.

**Question 293:** How could he have had information for December on the 14<sup>th</sup> of December?

**Answer:** “Because he would have had a forecast at the time in the board meeting.”

**Question 294:** How did you know that?

**Answer:** “That is what he was telling me.”

**Question 295:** Are you telling me that this note told you how bad or how good the results were for November/December.”

**Answer:** “In the context of the task that I was trying to do, yes absolutely.”

**Question 296:** What is the task you were trying to do?

**Answer:** “I was trying to find out whether that information was potentially price sensitive.”

**Question 298:** Did you ask when the November and December information was available?

**Answer:** “Pardon me.”

**Question 299:** Did you ask when Jim Flavin had the results, not the forecast, but the results for November/December because ‘profit is down for two months’. That doesn’t seem to be referring to a forecast. It seems to be... (Interjection).

**Answer:** “Absolutely.”

**Question 300:** It is not a forecast, is it?

**Answer:** “No.”

**Question 301:** So he couldn’t have had the profit figure for the month of December on the 14<sup>th</sup> December?

**Answer:** “No, what I am actually saying is that he had more recent information, the November and December accounts. That that information was in line with the forecast that he had had at the board meeting.”

**Question 302:** Yes, but the forecast he had at the board meeting was not public knowledge?

**Answer:** “No.”

**Question 302:** Are you saying that because in a sense Fyffes didn’t feel it necessary to say anything, he didn’t feel it necessary to say anything?

**Answer:** “If Fyffes didn’t feel it necessary to say anything or felt, it would be expected that a company would bring the market up to date at the time of its preliminary results announcement and set expectations for the year ahead ...”

**Question 304:** Why then go through the process if you are relying on Fyffes to put the information out there? If what gave you comfort was that Fyffes hadn’t done anything why would you need to go through a compliance procedure yourself?

**Answer:** “Because we would want to be assured to do our process. It was important that Jim actually said that to me, that it was in line, that it was information Fyffes had in hand as opposed to some sort of new information. I would have been coming at this saying, ‘what kind of new information do you have Jim’. I have to say I can’t recollect the exact questions but I would have been concerned I think about...something that was in Fyffes possession at the time or that there was something which was substantially different from the time of their preliminary results announcement. That was the key that I was trying to get at. Again, I am saying what I believe to be the case.”

Mr. Scholefield explained that the outlook statement in the preliminary results announcement had predicted a poor first two months and when the first two months results came out they were ‘in line’ with that prediction.

**Question 312:** ... In terms of your function and protecting DCC surely you had to find out how bad the results were to form an independent assessment of the likelihood that that was or was not price sensitive information. Not by reference to “well, they are not good but Fyffes clearly took the view that they weren’t so bad that we don’t have to say anything”. Do you follow me?

**Answer:** “I think in other circumstances you would go to the company as the first port of call and you would ask the company ‘what do you think’? The people who are best placed to look at this are the company.”

**Question 313:** Would you go to the company?

**Answer:** “If I was to trade in shares in DCC I would go to Ger White (Company Secretary) and say ‘am I able to trade shares in DCC’?”

**Question 315:** How practical or feasible is that? Could you have gone as Compliance Officer of DCC to Fyffes and say... (Interjection).

**Answer:** “I don’t think it is practical.”

**Answer 316:** “What I am actually saying is that you are actually trying to interpret from Fyffes own actions and Fyffes own position as to whether or not the information is price sensitive.”

**Question 317:** I suppose what I am querying is did you and do you regard that as being sufficient to comply with your obligations as a Compliance Officer?

**Answer:** “Absolutely.”

**Question 318:** Without enquiring as to the extent of the poor trading results?

**Answer:** “I have an indication of the extent of the poor trading results.”

**Question 319:** Where is that indication?

**Answer:** “Because they are similar to the two months that were in the possession of Fyffes at the time they were making the preliminary results announcement. You are asking me in absolute terms?”

**Question 320:** Absolute or relative?

**Answer:** “That is in relative terms.”

Mr. Scholefield agreed that he subsequently saw the results for November and December.

**Question 323:** They were substantially below budget, isn't that correct?

**Answer:** “Correct, yes.”

**Question 324:** I am just suggesting to you that if you had that information as to how substantially they were (below budget), you would have at least been in a better position to assess whether that was or was not price sensitive information?

**Answer:** “I am not too sure that I would be, to be quite honest.”

**Question 325:** You were never sure in an absolute sense, but you didn't have that information?

**Answer:** “I didn’t have that information – I want to be clear with you about that.”

**Question 326:** And you didn’t ask for it?

**Answer:** “I didn’t ask for it.”

**Question 327:** What you relied upon is what I might describe as a proxy for the decision. What gave you and Mr. Flavin comfort was, ‘well, listen, Fyffes themselves didn’t feel it necessary to make any announcement about this and therefore why should we worry about it?’

**Answer:** “A few things. I was also relying on the fact that Mr. Flavin was a director of Fyffes and you’d expect him to know as well what would be price sensitive for Fyffes. Absolutely, I was relying on what Fyffes was doing...” (Interjection).

**Question 328:** Again though, Mr. Scholefield you were asked to bring an independent judgment to bear on it and I am just wondering whether you agree or disagree that you can’t really, whether you would now or you did then, rely upon either Mr. Flavin because if you were just relying on Mr. Flavin there is no point in him coming to you?

**Answer:** “I am asking questions, and we haven’t gone through the rest of the note, but there are other things that actually gave me the comfort. You are asking a range of questions or Mr. Flavin is offering me a range of observations and various things. You are putting them all in context and you are saying, ‘now where are the red flags here’. I’m not seeing any red flags.”

Mr. Scholefield was then taken through the detail of the note. He explained that the note was an interactive process, some of the items were matters which Mr. Flavin told him about. There was also some element of him processing the information and some element of him suggesting things to Mr. Flavin.

**Question 336:** “Profit down by two months.” That is not something... (Interjection).

**Answer:** “No, that was something Mr. Flavin told me obviously, yes.”

**Question 337:** The history would be something he told you?

**Answer:** “No, he wouldn’t. You see, history is something that as regards overall profit growth, when we talk about history that refers to the fact that we are saying that look, Fyffes has a history overall...” (Interjection).

**Question 338:** Is that something you would have known?

**Answer:** “Absolutely.”

**Question 345:** “Active in making presentations recently since the results?” Something told to you?

**Answer:** “Mr. Flavin told me that obviously.”

**Question 346:** “Similar conversation with AP.” He told you that?

**Answer:** “Yes.”

**Question 347:** “Banana prices followed by analysts.”

**Answer:** “I think that is something that both of us would have agreed upon.”

**Question 348:** “Share price more or less doubled since World of Fruit.”

**Answer:** “That would have been both. We both would have talked about what would have been driving the share price.”

**Question 349:** “Discussed matter with Alvin Price in Fry’s and likewise agrees.” That is a repeat of what he said earlier other than he having said that Alvin agreed.

**Answer:** “Yes.”

**Question 350:** “DCC under the code, DCC not a connected party.” Is that something you would have told him?

**Answer:** “I think he was referring to his conversation with Alvin and saying, ‘that was something I discussed with Alvin’. That would have been part of his conversation with

Alvin and it is something that obviously I would have been readily able to agree with him as well.”

**Question 351:** “Indeed in any event a decision for the Dutch board.” Who said that do you recall?

**Answer:** “I think I probably I said that actually.”

**Question 352:** I don’t know if you saw at the time his note with Alvin, did you?

**Answer:** “No I didn’t, no.”

**Question 356:** There is no mention of ‘indeed, in any event a decision for Dutch board’, (in Alvin’s note) and unless that is something that Mr. Flavin twigged between the time he spoke with Mr. Price and you, does it not suggest that it is more likely something you brought up?

**Answer:** “If you ask me to interpret Jim going to Alvin, I think Jim would have been going to Alvin and talking about the DCC group and I don’t think he would have been getting into particulars about companies. I may be wrong in that. I don’t know.”

**Question 357:** The purport of having this (written) down, ‘indeed a decision for the Dutch board’, that offered a measure of distance and protection in terms of the... (Interjection).

**Answer:** “I don’t think so. It is a by the way comment.”

**Question 358:** Is it not there as suggesting that it is one less reason to be worried about?

**Answer:** “No, no.”

**Question 359:** Why would you record it then?

**Answer:** “I think I recorded that, as I say, by the way, recording formally the fact that the decision has to be made by Lotus Green and I think it is intended to be a ‘by the way’ comment in my note, I can see that, that if for some chance we got this horribly, horribly wrong, there is a distance between the people who have actually made the decision and the information, that is not in any sense to excuse it or anything else like that, but it is just saying it would be a fact.”



**Question 360:** It would be an exonerating fact...

**Answer:** “It wasn’t intended to be an exonerating fact. It is not exoneration because I don’t think you could be exonerated. It is more a sense of in terms of culpability. There is a difference between somebody who makes a decision and it might be said that they made it on the basis of that decision, and somebody who makes a decision and it is absolutely clear that they don’t have unpublished price sensitive information. It is not a big deal...” (Interjection).

**Question 361:** Mr. Flavin was not on the board of Lotus Green. He was never going to be part of the Lotus Green decision.

**Answer:** “Absolutely.”

**Question 362:** Unless he tipped them off about it, there is no way that Lotus Green, if Lotus Green was the entity making the decision independent entirely of DCC or Mr. Flavin, that it could have arisen?

**Answer:** “That what could have arisen?”

**Question 363:** That insider dealing could have arisen unless Mr. Flavin tipped off Lotus Green about the price sensitive information.

**Answer:** “I think you are going through, if you like, the technicalities. At this stage we were trying to see ‘look, is there any price sensitive information in the DCC group that we should be aware of’, and it is, ‘by the way, the decision is being made by Lotus Green’, that is all that’s in that note. It isn’t a case of anything else.”

Mr. Scholefield agreed that where the note said “FOD (Fergal O’ Dwyer) has informed Jim Flavin and myself that the directors of Lotus Green may be considering realising the company’s investment in Fyffes plc”, that Mr. O’ Dwyer didn’t inform him. He confirmed that he had made that clear in the High Court. “It was perhaps a clumsy way of doing it, but I was actually trying to say Jim has told me that Fergal has told him that the

directors of Lotus Green may be considering realising the company's investment in Fyffes and I wrote it down that way for ease of reference.” (**Answer 366:** Page 81).

**Question 367:** Was it not also part of ensuring that from a tax compliance point of view that this would always appear... (Interjection).

**Answer:** “Absolutely.”

**Question 368:** That it was Lotus Green's decision?

**Answer:** “Absolutely.”

**Question 369:** Is it part of that?

**Answer:** “Not only appear, that it was the substance of the decision as I understood it.”

**Question 370:** In terms of Mr. O' Dwyer telling Mr. Flavin that Lotus Green are going to sell, that would never occur without reference to Mr. Flavin?

**Answer:** “I don't know.”

**Question 371:** Do you really not know that, Mr. Scholefield?

**Answer:** “Fergal and the board of Lotus Green could do whatever they wanted to do.”

**Question 372:** Without reference to Mr. Flavin?

**Answer:** “I think it was unlikely. But they could do it, they could go off and do whatever they wanted.”

He agreed that the reference to “DCC Lotus Green Limited” was an error. “It shouldn't be DCC Lotus Green. I think I might have started out writing that note in a previous draft and I might have written DCC being the DCC group but maybe considering realising the company's investment in Fyffes plc.,” so then I reworded it.

**Answer 381:** “The DCC shouldn't have been there. That is the long and short of it.”

Mr. Scholefield agreed that the reference in the note to the profits in Fyffes for the two months to the 31<sup>st</sup> December are behind last year didn't give any indication as to how far they were behind. He agreed that this suggested that he didn't ask and that he didn't have it in absolute or quantified terms.

**Question 387:** Again, we would all probably do things differently in our lives if we were doing them again. Would you ask that question now?

**Answer:** "To save you asking me it again, and that is the honest answer to it, I honestly think it would not have made any difference to what I did. I was asked the same question by Brian Murray."

Mr. Scholefield also agreed that he didn't ask him anything about any January 2000 information.

**Question 394:** By 1<sup>st</sup> February he probably knew something about January?

**Answer:** "I don't know. The context Mr. Flavin was telling me was that the information that he had at that point in time was in line with the information that he had got at the board meeting on the 9<sup>th</sup> December. When you look at the evidence that was there in the High Court, and obviously I didn't know it at the time, Mr. Flavin was telling me the truth as I would have expected him to do."

He also explained that working out how Fyffes was doing was a lot easier because their share price was affected by banana prices and exchange rates. "So if there is a bad industry factor in relation to those businesses the market knows it and it interpolates that into Fyffes' share price and Fyffes would be much more transparent in that sense about its trading...that would have been clear to analysts at the time."

The other point that is absolutely clear to analysts and would have been absolutely clear to him is that as a commodity business, short term fluctuation in Fyffes' trading results could absolutely be expected. (**Answer 396:** Page 88).

“The essence of this that Jim was telling me was this information is within the bounds of normal fluctuations in trading. He wasn’t coming to me and saying to me, ‘hold on a second here, there is something really different that has gone on in Fyffes here’. We have had a bad couple of months in the sense that you can have a bad couple of months and the company has taken that into account in terms of briefing its expectations to the market. This is something that the market generally would follow and track. He wasn’t coming to me and saying he had information or that the information that was in front of him was that this is some fundamental change to Fyffes’ business that is going to fundamentally change the market’s expectations about Fyffes’ profits going forward. It was a couple of bad months that is all.” (Answer 397: Page 89)

**Question 400:** Can you tell me honestly and in fairness whether you have any regrets about not asking certain questions or not doing more? We can always do more and better, but knowing what you know now, what would you do, because this was very costly, and I don’t say it is your fault, but the outcome of all this cost something like €42 million to DCC and distraction in management time and 87 days in the High Court.

**Answer:** “I am painfully aware of that. It has also taken up an enormous amount of time over the last while.”

**Question 402:** What would you do differently?

**Answer:** “Overall if we had to do everything, all again, knowing what we now know.”

**Answer 403:** “I think the only thing that I can think of that we could have done differently is I think there is a provision in the Companies Act (Section 108(7)) where you can put in a Chinese wall and formally segregate people in terms of information, and I think that is the only thing we could have done.”

**Question 404:** Segregate Mr. Flavin?

**Answer:** “Yes.”

**Question 406:** In terms of your role as Compliance Officer is there any sense in which you lie awake at night and say ‘if I’d asked that question. If I had’... (Interjection).

**Answer:** “No, there isn’t.”

**Question 407:** If I had gone to?

**Answer:** “No.”

**Question 408:** You have never had a second guess?

**Answer:** “It has left me lying awake at night wondering what else could I have done, but I have never come up with an answer of anything that I think I could have done that would have prevented this.”

Mr. Scholefield was then asked if he would have approached his Compliance Officer tasks differently if it had not been Mr. Flavin.

**Question 411:** ...Saying ‘I disagree with you’ to the Chief Executive is presumably more difficult than to somebody who is not your boss?

**Answer:** “I don’t think it is any more difficult as regards something like this.”

**Question 412:** Why?

**Answer:** “Because this is important for the sake of DCC. If it had been...anybody else it would have been handled in exactly the same way.”

**Question 413:** Would there not be an inclination to ask more searching or more teasing questions of somebody who is not your boss?

**Answer:** “No more than I did on this occasion, I don’t think so. I think I would have done exactly the same thing. I am dealing with people who are sensible. I am not dealing with people here who don’t have a sense of what this is about either, the importance of it or what is involved in terms of price sensitivity.”

**Question 414:** There was a big profit to be made here though, isn’t that correct? The doubling of the price even from the time in December?

**Answer:** “Yes.”

**Question 415:** That made it very tempting to sell. The profit that accrued was of the same magnitude as DCC’s annual profits for that year.

**Answer:** “Yes.”

**Question 416:** Therefore, the bigger the return, the greater the willingness there can be to take the risk?

**Answer:** “I don’t think there would have been any willingness to take a risk in relation to this. We would have approached this, in fact I probably wouldn’t have done as long a note, but we would have approached this in exactly the same way if it had been 1 million rather than 100 million. This is not something that you play around with here or you take with any degree of flippancy. There had never been any degree of flippancy about price sensitive information in DCC. It had always been treated extremely carefully...by Mr. Flavin...”

When asked if I should infer anything from the fact that there was no written legal advice taken in 2000 by comparison with what was done in 1995, Mr. Scholefield answered, “no”.

**Question 418:** The implications for a sale outside of DCC were greater than a sale internally within DCC, isn’t that correct?

**Answer:** “Yes.”

**Question 419:** Yet in 1995 you not only got detailed advice about the Section 67 notification obligation, but also about insider dealing?

**Answer:** “Yes.”

**Question 420:** That was put in writing?

**Answer:** “Yes.”

**Question 421:** Why was there no advice taken?

**Answer:** “There was advice taken. Mr. Flavin spoke to Mr. Price.”

**Question 422:** Advice taken and reduced to writing?

**Answer:** “I don’t think anything turns on that. The important thing was that advice be taken.”

**Question 423:** I know that is what you say and I am just wondering was the reason that written advice was taken in 1995 was because the matter was coming to the board of DCC, whereas in this instance the matter never came to the board of DCC?

**Answer:** “I think there might be a touch more formality about a board decision but I wouldn’t put it any higher than that.”

**Question 424:** Does it not then follow that the structure you put in place in 1995 meant that there was going to be less board scrutiny of this decision than you would expect when DCC was selling 15% of its company?

**Answer:** “Yes.”

**Question 425:** We know that in fact the board of DCC never got to consider as a board the decision to sell the Fyffes’ stake

**Answer:** “Sure yes.”

**Question 426:** From a compliance and corporate governance sense do you think that was a good thing?

**Answer:** “I don’t think it would have made any difference is the bottom line really.”

**Question 427:** You don’t think it would have made any difference to the outcome?

**Answer:** “Yes.”

**Question 428:** That doesn’t mean that something is good corporate governance or bad corporate governance. Otherwise you can say the outcome would have been no different but it is a fact that the board of DCC... (Interjection).

**Answer:** “It is a fact absolutely.”

**Question 429:** As a Compliance Officer is that something that leaves you a little bit uneasy or unhappy, even if the result was going to be the same but there was no endorsement of this or nothing ever came to the DCC board?

**Answer:** “I don’t think it makes me feel any different. Do you mean somebody should have been looking over my shoulder as well?”

**Question 430:** I am not saying it is your fault that it didn’t come, but the fact that it didn’t come because of the structure that was set up do you think there was – if it had come to the DCC board and if the DCC board had asked some questions about ‘we told you back in 1995 we were worried enough about the insider dealing to get Alvin Price to do an opinion for the board. What about now? This is much bigger, this is not just a sale to ourselves, this is the possibility of a sale outside’. Do you have no sense as a former Compliance Officer that it would have been better even for how it looked and how it smelled for this to have come to the DCC board?

**Answer:** “I can understand somebody saying that yes, I suppose I can understand somebody saying that.”

**Question 431:** More than understanding it, would you agree that yes, it would have been better or might have been better?

**Answer:** “There might have been more people to blame, I suppose.”

**Question 432:** Not in any checks and balances sense – that this is better governance?

**Answer:** “Honestly I think the board would have looked to Jim. They would have looked Jim in the eye and they would have said ‘Jim do you really think you are free to deal here’ and they might have turned to me and said ‘have you asked Jim the appropriate questions?’ They might have even asked him more questions themselves. I think that is the order in which it would have gone.”



**Question 436:** Their status (the independent directors) is to scrutinise the work of the executives and you would expect, if they are doing their job properly for them to say ‘you know, there is a major risk here for DCC if we get this wrong’. They wouldn’t necessarily have known how much it would have happened, but at least you would expect them to scrutinise it?

**Answer:** “Absolutely.”

**Question 437:** The fact that they didn’t get to scrutinise it deprived them of the opportunity and DCC of the opportunity of somebody putting their hand up and saying “now wait, we need to do some more here. Yes there is a profit, but the downside for DCC is we would be stuck in the High Court for eighty seven days. We would lose in the Supreme Court and this could cost us 42 million”. That is prophetic. They wouldn’t have said that, but that possibility was deprived or they were deprived of that possibility because of the structure. Do you think if you were doing it again, would you want to have the DCC board having a view in relation to the disposal of the Fyffes’ stake rather than leaving it to, as you would say, the board of Lotus Green to do so. It was a sale of €100 million of assets and it is done without the board. It sort of by-passed the board?

**Answer:** “Yes.”

**Question 438:** Is that something that from a compliance and corporate governance perspective you were happy with or would be happy with, or do you have a view on it?

**Answer:** “I suppose the more people that scrutinise things possibly the better. I can only answer it in those terms. If there is a belief that greater scrutiny would have made a difference then you have your answer. You are saying that from an optics perspective, it might be better to do that as well but...”

**Question 439:** From good corporate governance?

**Answer:** “You have to ask I suppose the directors that themselves because they are probably in a better position to give their view on it. I presume they felt that the structures that were in place were sufficient to given them comfort that they hopefully have employees with integrity and...” (Interjection).

**Question 440:** They also had structures in place and I understand that any acquisition or disposal above 5 million by DCC had to come from the board?

**Answer:** “Yes.”

**Question 441:** Here was a disposal 20 times that and the board don't get to look at it. For tax advantageous reasons the structure was set up, but I am just asking you whether you have a view as to whether some weakness is manifest there and not just by reference to would it have made any difference because we don't know that?

**Answer:** “By reference to optics then? I am just trying to get a sense of which would have been a better thing.”

**Question 442:** You don't know what the board (involvement) would have triggered ...?

**Answer:** “No, I don't.”

**Question 443:** Or it didn't happen?

**Answer:** “It didn't happen, and maybe it would have made a difference, I don't know.”

After preparing the note on the 1<sup>st</sup> February Mr. Scholefield went back and showed it to Mr. Flavin. He explained that that would be a standard process of his when he is recording a conversation between two people he would typically give them the facility of seeing the note.

**Question 446:** And give them an opportunity of saying whether they agreed with it?

**Answer:** “Yes, and if there was anything they felt that I was missing.”

**Question 447:** Were any changes made?

He explained that he had a vague recollection that there was one small point but he can't recall what that was. Mr. Scholefield explained that such a memorandum would not find its way into the bi-annual compliance report.

**Answer 451:** “It is there for the record. Mostly, hopefully things on Compliance Files are never looked at again.”

**Question 452:** Yes, just tell me why you keep it then? It may be fairly obvious?

**Answer:** “I suppose to demonstrate that the matter is being considered and how it is being dealt with for the record.”

He confirmed that he didn’t discuss the conversation with anyone else on the 1<sup>st</sup> and he didn’t discuss it with Mr. Price nor did he feel the need to contact Mr. Price.

**Question 460:** Back in 1995 by comparison with 2000, when you got the written advice from Alvin, it was Mr. Flavin asked you to do that?

**Answer:** “Yes.”

**Question 461:** He didn’t ask you to do it this time. Was that a surprise to you in terms of his thoroughness or completeness that he didn’t?

**Answer:** “No.”

**Question 462:** Well, if it didn’t surprise you now, were you surprised back in 1995 that he had asked you?

**Answer:** “I was probably a little, just a little, but only because I thought the matter was pretty well dealt with, but that is fine.”

Mr. Scholefield explained his involvement on the 3<sup>rd</sup> February was in preparing the draft Stock Exchange announcement. He explained that a draft of the announcement was sent to Neil McCann around midday. He explained that Mr. Flavin would have explained to him that he wanted to send an outline to Neil McCann of what a Stock Exchange announcement might look like and to work on it. “So I would have drafted up a draft announcement and shuttled back and forth. Typically that is how we put together a Stock Exchange announcement that I would probably, based on whatever I was told, draft the

bones of it and then Jim would make some amendments and I would make some amendments.” (**Answer 464:** Page 102).

Mr. Scholefield explained that he was also busy on the 3<sup>rd</sup> February getting out a set of board papers for the board meeting on the 7<sup>th</sup> February. Mr. Scholefield said he was interacting with Jim Flavin, Fergal O’ Dwyer, Mairead O’ Malley and then Ronan Godfrey in relation to the Stock Exchange announcement. Mr. Scholefield explained that the obligation to make an announcement to the Stock Exchange was an obligation on DCC plc under the listing rules. Mr. Scholefield understood that Mr. Flavin was sending it to Neil McCann out of courtesy. The Stock Exchange announcement refers to the fact that the shares were placed by Davy’s and Goodbody Stockbrokers with institutional investors.

When asked if he was aware as to who was directing the process on the day he said “I have no recollection of that at all”. (**Answer 514:** Page 112).

Mr. Scholefield explained that the disposal of the Fyffes’ stake was a Class II announcement, i.e it was the sale of below 25% of the net assets of DCC which if it were above same would have required shareholder approval. A Class II announcement which this was only required a Stock Exchange announcement. He explained that he rang Alvin about the Section 67 announcement “to confirm that with him and what the form of the announcement might be”. (**Answer 541:** Page 118).

He said that the formal notification to the Stock Exchange under Section 91 wasn’t done “not in terms. No.” (**Answer 544:** Page 119).

**Question 548:** ...In terms of the failure to make the formal Stock Exchange announcement is that just inadvertence or what?

**Answer:** “It is total inadvertence. I think the reason for it is, is because we were conscious that we were making an announcement in the main Stock Exchange announcement so we felt that okay, it was being announced publicly, the Stock Exchange

is noting that so I suppose it just wasn't a regular thing, a 10%, Section 67 you would be used to flying back and forth regularly."

**Question 549:** Why Section 67 regularly?

**Answer:** "Because we would have notifications from our own shareholders under Section 67 all the time so you would be very conscious of Section 67 notifications."

**Question 553:** You (had) never done a Stock Exchange notification?

**Answer:** "Under a Section 91, I don't think I had personally, actually. Ken Rue. I think did...when the Act came in."

**Answer 554:** "I don't think it was twigged, until – it might have been twigged in the High Court case, it might have been mentioned in passing at that point in time. I can't remember whether it was."

It was clear however from the formal Stock Exchange announcement that the Stock Exchange were aware of the sales. When asked if somebody had asked him who was handling all this he answered "if it was a guess I would guess you know that an offer would be made into Jim because that would be...but you know I knew at the time that Lotus Green were doing the acceptance." (**Answer 563:** Page 121).

**Question 564:** The formal acceptance?

**Answer:** "The formal acceptance. So where it lay between the two I don't know."

When asked what his sense of the mood in DCC was after all this happened he answered, "brilliant, absolutely fantastic". (**Answer 567:** Page 122).

Mr. Scholefield has no particular recollection of meeting Mr. Flavin after the Fyffes AGM on the 20<sup>th</sup> March. Mr. Scholefield said that Mr. Flavin had asked him to get a copy of the Fyffes' profit warning and he contacted their PR advisers to get same. Having obtained the Fyffes' profit warning Mr. Scholefield doesn't recall the discussion that he had with

Mr. Flavin. He does know that Mr. Flavin got a copy of Alvin's file note and thinks that he probably got a copy of his compliance note at that point in time. Mr. Scholefield didn't speak with Mr. Price on the 21<sup>st</sup> March or at any time in March. He confirmed that nothing was sent out to the directors with the board papers, for the 27<sup>th</sup> March board meeting on this issue. Mr. Scholefield confirmed that he would have drafted the Minutes following the meeting of the board on the 27<sup>th</sup> March.

When asked what he recalled of the discussion about the Fyffes' profit warning at the meeting he said, "I just recall Jim coming in early in the meeting, at the time under 'matters arising' because we would have picked up the Lotus Green share sale from the previous Minutes and referring to the profit warning, just saying what had been done in DCC and giving a brief overview of it." (**Answer 650:** Page 136). He said there was a discussion about the profit warning.

**Question 655:** Who brought that up?

**Answer:** "Mr. Flavin."

**Question 656:** I take it that that was not news to any of the directors?

**Answer:** "I doubt it. I am sure they read the papers."

**Question 657:** ...I am just wondering do you have any sense that there was surprise that Mr. Flavin would be even raising it?

**Answer:** "I think people would say that Mr. Flavin was a careful and prudent person and that they would probably be surprised if he didn't raise it but that it was treated in a very matter of fact kind of way."

**Question 658:** Yes, but they had not had any involvement in the sale?

**Answer:** "No."

**Question 659:** And they knew about the profit warning?

**Answer:** “They did yes.” [Mr. Scholefield was then referred to the manuscript notes that he took at the meeting]

**Question 662:** ... I take it these are notes being recorded by you contemporaneously?

**Answer:** “Yes.”

**Question 663:** Where you say ‘unfortunate profit warning’. We can take it that the words ‘unfortunate profit warning’ were mentioned.

**Answer:** “Yes, I would take it, yes.”

**Question 664:** What did you take that to mean, unfortunate for whom?

**Answer:** “I think just unfortunate in the sense that if you were orchestrating events, you would not orchestrate an event whereby the DCC Group had sold shares and Fyffes had a profit warning six weeks later.”

**Question 665:** Was there a discussion or were questions asked of Mr. Flavin?

**Answer:** “I don’t recall much discussion about it at all.”

**Question 666:** Is that indicative of an engaged board of directors where somebody says, ‘on the one hand you are recording that you have sold something at a profit of 80 million’, and then there is a profit warning six weeks later and somebody says it is ‘unfortunate’ and nobody asks questions. Should I be surprised at that?

**Answer:** “I have to say I think we are all being influenced by events afterwards. No you are, if you are asking a question like that, but that is my perspective on it now. It was dealt with in a matter of fact kind of way. Jim explained the situation to the board and I believe everybody was happy with the explanation.”

**Question 667:** “JF had no information beyond December.” Was that true?

**Answer:** “He had the December accounts, yes.”

**Question 668:** Which were referring to matters in January?

**Answer:** “A two line statement in relation to January, yes.”

**Question 669:** So to that extent it was not the complete picture. The trading results for November and December, but some forecast for January as well. Isn't that right?

**Answer:** “It had those things. Whether that December relates to December accounts or December I don't know.”

**Question 670:** What did you take it to mean, you are taking it down?

**Answer:** “I don't know at this stage. I am looking at it the same way as you now. I don't know.”

**Question 671:** It is referring there to November and December as small months in the business. There is no suggestion of any awareness for January, is there?

**Answer:** “No there isn't. No, no.”

**Question 672:** Again, how long did this discussion last?

**Answer:** “I think this was very brief.”

**Question 673:** Was it all just Mr. Flavin saying this and others accepting it and moving on?

**Answer:** “That is my recollection.”

**Question 674:** Is it not surprising that nobody would ask any questions about it?

**Answer:** “I didn't find it so at the time.”

**Question 675:** Sorry, on the very day of the profit warning, you had a discussion with the Chief Executive. The Chief Executive goes and gets on to the solicitor who he has called about it before the sale. It just suggests a greater degree of concern than I am sensing from you and I'm just wondering am I wrong to be reading this and saying I can't believe that nobody asked any questions, any follow up questions or that nobody was saying ‘what does this mean for us. Do we need to be taking legal advice in relation to this or not’? If



that didn't happen, did that not happen because there was such trust in the Chief Executive that nobody would have believed or contemplated or that the Chief Executive had so much power? You are sitting there at the meeting. You are hearing this. You are looking around at your fellow board of directors and what I sense from you is that nobody says anything, and I am wondering were you surprised or expecting a reaction?

**Answer:** "I thought we had acted properly at all times, so I wasn't expecting a reaction, no. I thought Jim dealt with it in a very matter of fact manner."

**Question 676:** It wasn't recorded in the Minutes?

**Answer:** "No."

**Question 677:** Why was that?

**Answer:** "Because I didn't think it was something of enormous import."

**Question 678:** Even from the perspective of setting out the proper steps?

**Answer:** "That was recorded in the Compliance Files."

**Question 679:** Which was?

**Answer:** "The steps that we had taken. What we had done was in the Compliance Files."

**Question 680:** But not this discussion at the board meeting?

**Answer:** "No, but I wasn't sure what I would have been minuting if I put this down."

**Question 681:** What do you mean you weren't sure? 'It was recorded that there had been a profit warning in Fyffes, Mr. Flavin explained what had been done. He had spoken with the Compliance Officer and his solicitor'.

**Answer:** "Yes."

**Question 682:** 'And both were in agreement with him that it was fine'?

**Answer:** "I could have, but I didn't."

**Question 683:** I am just wondering why you didn't?

**Answer:** "You choose as a matter of judgment what you put in Minutes. You can look down through those Minutes. In fact I was astonished how many pages there were because I don't usually take Minutes as discursive as that and most of it doesn't find its way into the Minutes of the meeting. It just wasn't something that I perceived as having related to any kind of a decision of the board or something that was raised in terms of level of materiality by the directors that somebody was saying to me or that there was a message coming back to me, 'this is something pretty serious, you better put it in the Minutes'. In some ways it kind of reflects the answer I have been giving to you about how the issue was treated. That is a judgment. I don't write everything that is discussed in a meeting. You have to make a call. It tends to focus mainly on decisions particularly rather than recounting past events that are recorded elsewhere. As I say, the only other thing we would do is where there has been an acquisition or disposal that fact tends to be recorded, so the fact the Fyffes' share disposal was recorded, but every time we do a compliance review or the results of due diligence on a particular acquisition, I wouldn't necessarily put the details of that in."

**Question 686:** Is there any reason why this didn't go in?

**Answer:** "The only thing I can surmise, and it is surmise at this remove, is that it just wasn't perceived to be anything additional or anything that required to go in the Minutes."

**Question 687:** Was there any reluctance on your part to have this... (Interjection)

**Answer:** "I don't believe so."

**(b) Fergal O' Dwyer**

Mr. O' Dwyer was asked to explain what had happened in Lotus Green from August 1995 onwards. He explained that Lotus Green obtained a loan from DCC Properties Limited to finance the acquisition of the beneficial interest in the shares from DCC plc and S & L Investments Limited. Initially the loan was interest free and denominated in Irish pounds and then subsequently denominated into guilders. The reason for the re-denomination

was tax driven “it was to avoid if there was a movement in the exchange rate between the Irish pound and the guilder. Lotus Green was going to be preparing its accounts in guilders and there could be an exchange gain and that could be taxed”. (**Answer 17:** Page 10).

This also meant however that DCC Properties had an exchange risk. Subsequently the loan was transferred from DCC Properties to DCC Healthcare and thereafter it attracted interest at the market rate. Mr. O’ Dwyer said he was a director at all material times from 1995 down to 2000 and still is a director. For most of the time he was the only ‘A’ director. The three Dutch directors were Mr. Roskam, Mr. Diepenhorst and Mr. Venneboer. All of these were non-executive directors. When asked what Lotus Green was doing during the period from 1995 to 2000 he answered “it was set up for tax. It had a narrow focus, it was to manage and control the investment in Fyffes. So essentially it was dealing with the management of that investment throughout that period. We are talking about the period from late August 1995 through to February 2000.” (**Answer 35:** Page 14).

He confirmed that Lotus Green was still in operation. He estimates that there were approximately twenty meetings of the directors of Lotus Green between August 1995 and January 2000.

For each meeting there would be an agenda with a set of board papers and the board papers would include the management accounts for Lotus Green, i.e. its balance sheet and profit and loss account. “It was reasonably simple in the sense that its profit and loss account was mainly dividend income. It didn’t initially have any interest expense but later it did obviously when the loan (became interest bearing).” (**Answer 40:** Page 15).

He explained that the dividend income paid to Lotus Green was not taxed as it was “franked investment income” which basically meant that income from company to company was not taxed. The rationale for same was that it allows companies reinvest dividends without there being a take and also to reflect the fact that it has already been

taxed once in the company that is paying the dividend because the dividend comes after tax.

He explained that the board papers and agendas for the meetings were prepared in Dublin. The Lotus Green accounts would come from the person who prepared the corporate accounts for the various DCC entities/subsidiaries. He explained that there were four receipts of income annually. Two preference share dividends and two ordinary share dividends, which came in at different times of the year. These came by way of a cheque from Fyffes to DCC and S & L Investments which were either endorsed over or else cashed and lodged into Lotus Green's account. There was never a time that Fyffes would make a cheque out to Lotus Green. It was paid to the registered holder who held it in trust for the beneficial owner and paid it over to the account of the beneficial owner. Lotus Green had its own bank account. Initially in Ireland and then in Holland.

When asked what happened to the dividends paid Mr. O' Dwyer explained that it kept some of them and sometimes it paid a dividend to its parent company DCC International Holdings BV. Once it became liable to pay interest it had to pay its interest out of its income, which was the dividend. He said that the dividend income would have paid the interest on the loan. Mr. O' Dwyer explained that all announcements from Fyffes would have been included in the board papers for the Lotus Green Board. For the most part interim and final results announcements. This was to ensure that the directors of Lotus Green were kept informed about Fyffes. The meetings of Lotus Green took place in Mr. Roskam and Mr. Venneboer's offices on the Kaisergracht in Amsterdam. Mr. O' Dwyer explained that they used to have the BV Board meeting on the same day. Mr. Roskam and Mr. Venneboer were also on the BV board. Mr. Diepenhorst from ING Trust would also attend with one of his colleagues. The meetings were reasonably informal in the sense that they knew each other well and they had a good collegial atmosphere. They would either take Lotus Green first or DCC International Holdings BV first. One meeting was held after the other. DCC International Holdings BV was a holding company and it owned the DCC UK Group. It didn't trade other than owning shares. It didn't own 100% of the UK group it owned 70% of that group. The balance was held by DCC plc. He

explained that Henri Roskam was always the Chair of the meeting out of deference to his seniority, not in terms of age but in terms of his business experience. The board papers and the agenda were typically circulated a couple of days in advance, typically faxed to ING and faxed on to Mr. Venneboer and Mr. Roskam. The papers included an agenda and Minutes of the previous meeting, the accounts and any information publicly available on Fyffes or banking matters.

He said the format at the meetings would have been fairly consistent throughout the 5 years. He agreed that it was not like a DCC plc board meeting where they discussed strategy. He explained that there was an agenda item for acquisitions but no acquisitions were made and were probably unlikely. Acquisitions would more likely go to DCC International Holdings BV. He said the Lotus Green meeting lasted anything up to an hour. Mr. O' Dwyer explained that the Dutch directors got a fee which started at being €2,000.00 per annum rising eventually to €8,000.00 per annum. Mr. Diepenhorst was remunerated through the ING agreement which was on a per hour basis. Mr. O' Dwyer said that the typical discussion would be around the last set of Fyffes' results. "It was reasonably limited in terms of the discussion. You must remember the share price wasn't doing anything at that time, it was flat lining essentially." (**Answer 119:** Page 28).

Mr. O' Dwyer explained that it would have been communicated to the Dutch directors initially that the Fyffes' stake was a non-core investment for DCC and that Lotus Green was there for tax purposes. The actual detail as to how it came to be was not explained to them. "...The strategy from a DCC perspective was that at some time it would be disposed of and that essentially Lotus Green was there from a tax point of view to ensure that we would avoid paying tax. Generally they would have understood these terms as that is a reasonably normal structure." (**Answer 122:** Page 29)

Mr. O' Dwyer was asked where the decision making power lay over the disposal of the Fyffes' stake. "The ultimate decision was for Lotus Green to take." (**Answer 135:** Page 32).

**Question 136:** Yes.

**Answer:** “To say yay or nay in terms of whether it wanted to sell in the first instance.”

**Question 137:** If that is the case, and there is evidence to support the ultimate decision, but when one talks in terms of ultimate decision it doesn’t necessarily mean that the person taking that ultimate decision has any or any great or any real freedom in relation to the taking of that decision, if you know what I mean. That can be the end of a process, but the actual real decision is taken at a different stage in the process. What I want to get a sense of from you is how real and substantive was that ultimate decision, as opposed to a formal decision, because that is the entity that held the beneficial interest in the shares?

**Answer:** “It may have ultimately been a decision that came after a period of time, but it involved, to my mind, very substantive consideration of the issue. It involved the day before a decision being taken, the available directors being Henri and Gerard sitting down with me in Amsterdam, considering our position on the matter, by and large having made up our mind by the end of that day and then having the board meeting the following day to make a formal decision, including Tom Diepenhorst. It was a very real decision with very real consideration being given to the facts by the board of Lotus Green.”

“The strategy had been set as far back as 1995, so if you want to bring that into it in the sense that Lotus Green is following through on that strategy, it knows the strategy of DCC, yes, but at the end of the day it still has to make a decision whether it is the right thing or not.” (**Answer 138:** Page 34).

**Question 139:** I suppose it is the degree of freedom to make a contrary decision that I will want to explore with you. The policy was set back in 1995?

**Answer:** “Correct.”

**Question 140:** On one extreme Lotus Green could have been cast free onto the corporate high seas and then it could have decided five years later that actually now is the right time to dispose of the Fyffes’ stake and you were asked to fly over to Holland, you met, you had this discussion, the board took the decision and you flew back to Ireland and said

‘Jim, Lotus Green have now done what we envisaged they would do in 1995’ and that is a possibility or there is the possibility that yes, that was the general thrust of it, but the trigger to get Lotus Green to meet, to even have the discussion would come from Dublin. And it being triggered in Dublin for you to get on a plane to go over to Holland to discuss it, as it were, to signal to the Dutch directors, “the parent company in Dublin has now decided that now is the right time”. In law you and they could have ignored the signal in my example, if there be a signal, but query whether if you had gone over in early February 2000 and said “no, we ain’t for sale”, and you came back to Dublin and said “Jim, I’m terribly sorry despite my eloquence and persuasiveness the Dutch directors decided not to sell”. Do you think that was even remotely on the cards?

**Answer:** “As a practical matter subsidiaries follow their group strategy just as a generality. So Lotus Green from that point of view is similar to other DCC companies but it still had to make up its own mind and it was structured that it had to make up its own mind on the merits of a transaction at a point in time. We talked about the three Dutch directors being essentially non-executive, okay. You could characterise me as being a non-executive but probably more like an executive director of Lotus Green. I didn’t get a fee or a salary or anything like that but for all intents and purposes I am an executive director of Lotus Green because I am closest to it. So I am aware of DCC’s strategy, the board of Lotus Green generally is aware of DCC’s strategy. I know I have a job to do. I saw this as an opportunity. To bring it to the end of your speculation, you may be implying that I go over and I try and convince my three Dutch colleagues that this is the right thing to do and then come back and report it is a more collegial thing than that and I thought it was a good thing to be doing, they thought it was a good thing to be doing and we went and did it.”

**Question 141:** We will come to the setting up of the meeting. Somebody had to make a decision though that you would go to Holland to do it?

**Answer:** “I made that decision.”

**Question 142:** You made that decision to go to Holland?

**Answer:** “In 2000.”

**Question 143:** In 2000?

**Answer:** “Yes.”

**Question 144:** You are saying you made that decision on your own initiative or wholly on your own initiative?

**Answer:** “When I say my own initiative, absolutely my own initiative. What prompted it was some approaches unsolicited to Jim which he informed me of and they seemed to be reasonably strong approaches. Therefore, we hadn’t considered it as a board, our decision in relation to price that we might be prepared to sell at since May 1998 to July 1998.”

**Question 145:** Is it conceivable that you would have gone – is it conceivable and then if we moved down to likely or possible that you would have gone to Holland on the 2<sup>nd</sup> of February without Jim’s blessing to go?

**Answer:** “I don’t think the word ‘blessing’ comes into it. If there had been approaches, the likelihood is I still would have gone to Holland because we now had a share price that was screamingly high and as a board we ought to be considering our position in relation to it.”

**Question 146:** Even if there hadn’t been approaches is it likely you would have gone without consulting the DCC Chief Executive?

**Answer:** “I would have told them I am going. ‘Consulting’ implies I am asking for his permission to go and I didn’t need anybody’s permission to go to Holland.”

**Question 147:** Let’s say you had consulted him or you told him that you intended to go and you had been told not to go, what then?

**Answer:** “We are in the realm of speculation. I have to say I would have gone. It is my right to go and I would have gone.”

**Question 148:** Against the wishes of your Chief Executive?



**Answer:** “But I am on the board of Lotus Green. I need to deal with this.”

**Question 149:** Yes, but you are a nominee of DCC plc and you are there at the pleasure of DCC plc.

**Answer:** “I suppose in essence we were all there at the pleasure of DCC.”

**Question 150:** Yes, that is true?

**Answer:** “A and B.”

**Question 151:** That is true. I am dealing with you now just for the moment.

**Answer:** “I have to say I believe I would have gone.”

**Question 152:** Even against the views and wishes of the Chief Executive?

**Answer:** “Absolutely. I suppose I reinforced myself and give myself some bottle on the point in relation to just the tax advice and we had to be pretty robust and resolute in terms of Lotus Green’s position.”

Mr. O’ Dwyer agreed that the meeting in February 2000 was different from the regular board meetings. It was a ‘single purpose meeting’. There was no BV meeting. This was purely Lotus Green. (**Answer 157:** Page 39).

**Question 158:** There was a degree of urgency about it?

**Answer:** “I would say that, yes.”

**Question 159:** Because the Fyffes’ shares which you have described as spiking, it had gone up, it had doubled?

**Answer:** “It had gone from €2.00 to €3.00 in the space of whatever, 20 days.”

**Question 165:** Somebody had to make a decision in relation to that and I am just wondering who were the persons involved in making a decision that now is the time to go?

You had to do something when you got to Holland, but for Holland to happen somebody had to decide what was to happen?

**Answer:** “It was me that decided.”

**Question 166:** You on your own or you with Mr. Flavin?

**Answer:** “Me on my own.”

**Question 167:** If we go back to 1998 can you tell me what happened in 1998?

**Answer:** “Despite decent trading performance the Fyffes’ share price went nowhere between 1995 and 1998. Then I think for their year to the 31<sup>st</sup> of October 1997 they beat the market expectations by 30% or 40%, something like that. Somebody started to love them in terms of the market and they got a re-rating and the share price moved from and I’m talking Irish now, IR£1.60 to...”

**Answer 169:** “To £2.10...”

**Answer 172:** “It is the first time it has moved so I decided I should go and have a special meeting with the board and consider our position and talk to the board. We decided that we should actually put together a formal paper on the matter which was put together over the ensuing couple of months because I think the share price came off reasonably quickly thereafter. The paper was presented at the July 1998 board meeting but it (the opportunity to sell) was gone.”

**Question 173:** Missed the boat?

**Answer:** “Missed the boat, it was gone.”

**Question 174:** When you say a paper was put to the board are you talking about the DCC board or the Lotus Green board?

**Answer:** “Lotus Green board.”

Mr. O' Dwyer then explained that the documentation prepared for 1998 was the Minutes of the board meeting, some advice letters, faxes that they got in consultation with Coopers & Lybrand, Price Waterhouse.

Mr. O' Dwyer explained that although the board of Lotus Green considered the matter in 1998 by the time it came to consider it the price had gone back down. He explained that Lotus Green was "probably not going to go out and try and sell shares. It was more if somebody came bidding for stock". (**Answer 182:** Page 43).

**Question 184:** What happened in the end (in 2000) was a bit of a surprise then in the way it came about?

**Answer:** "Yes, absolutely."

**Question 185:** Was there anything about that 1998 experience that informed what you did in 2000, in other words did you do anything differently in 2000 as a result of what you learned or may have perceived you learned from 1998?

**Answer:** "No, it was the same style of memorandum. Essentially it was to ensure commercially the board can make the correct decision and have sufficient information to make the correct decision. That went hand in hand with the tax advice and said 'look, if this is to be managed and controlled in Holland, it has to have both time and adequate information to make an informed decision about what it is deciding on'."

Mr. O' Dwyer confirmed that he was close to Mr. Flavin and that there was nothing he wouldn't or couldn't discuss with him. He also explained that Mr. Flavin was a hands on Chief Executive and that there was little of materiality or import that moved within DCC that he didn't know about. When asked how important in late 1999, going into 2000, was Fyffes' from an earning perspective Mr. O' Dwyer explained that they still consolidated the Fyffes' results into DCC and that worked as follows.

"... We are a 31<sup>st</sup> March year end. So let's take 31<sup>st</sup> March 1999 as DCC's year end and we would take the Fyffes' results, published results to 31<sup>st</sup> October 1998, so five months in

arrears. Now if our shareholding was 10.2% then we would take 10.2% of their turnover and include it as part of our turnover under the heading 'Share of Turnover of Associates', which Fyffes was from an accounting point of view and pretty much down each line you would have share of operating profit, share of interest, share of profit before tax, share of tax, all the way down to share of earnings. So we brought in our share of their reported earnings on a proportion of 10.2% or whatever percent basis." (**Answer 200:** Page 47).

**Question 205:** So you mirrored on a percentage basis the Fyffes' accounts?

**Answer:** "On a proportion basis, yes."

Mr. O' Dwyer was asked if he can ever recall being informed by Mr. Flavin at any time between 1995 and 2000 about Fyffes' trading difficulties to which he answered "no."

**Question 232:** Either formally or informally?

**Answer:** "Neither."

**Question 233:** Were you aware in January 2000, just before the time that you went to Holland, that Mr. Flavin had some concern about his position vis-à-vis the disposal of the Fyffes' stake and his role as a director of Fyffes?

**Answer:** "No I wasn't."

**Question 234:** There are two memos that you may or may not have seen both dated 1<sup>st</sup> February 2000, one taken by Mr. Alvin Price and one taken by Mr. Scholefield have you seen those Memos?

**Answer:** "I saw them as part of the discovery process and obviously I have seen them now again."

**Question 235:** When you say as part of the discovery process?

**Answer:** "Some years after the event."

**Question 236:** The discovery process in the litigation?

**Answer:** “The High Court.”

**Question 238:** Is it your information or evidence to me that you never saw, nor were aware of the content of that concern on the part of Mr. Flavin prior to seeing the document in the discovery procedure?

**Answer:** “That is absolutely correct in terms of seeing a document.”

**Question 239:** Yes. Well just forget about seeing the document. Obviously it was a Fry’s document that you wouldn’t have seen. In terms of the Compliance File you have access to the Compliance File?

**Answer:** “I presume I do.”

When asked if it surprised him when he saw the Memos he answered, “not particularly, no”. (**Answer 242:** Page 54).

**Answer 243:** “...It is a suggestion of a normal compliance procedure being followed.”

**Answer 245:** “...But just a practical matter you would expect there to be a compliance procedure.”

When asked if Mr. Flavin ever discussed with him a concern about whether he might be in possession of any price sensitive information Mr. O’ Dwyer answered “no, he did not”. (**Answer 252:** Page 57).

**Question 253:** That is at no time during January or at any time prior to the sale in February of 2000?

**Answer:** “No.”

**Question 254:** So when you approach your task wearing your hat as a director of Lotus Green in early February 2000 did you have any concern in your mind from any source that

what you were doing or contemplating might be done on the basis of knowing about Fyffes more than was publicly available.

**Answer:** “None whatsoever. The only information that Lotus Green, the three Dutch directors, ever had on Fyffes was published information. I had unpublished information prior to 1996 but for many years after that, obviously, I did not.”

**Answer 255:** “When I say ‘obviously’, I mean obviously to me. The board of Fyffes had just issued its preliminary results on the 14<sup>th</sup> December and we discussed them on the 16<sup>th</sup>. We had a special board meeting in early February and a memorandum was presented to them at that. The memorandum was based solely on published information...”

**Answer 256:** “So from my point of view and the point of view of the board of Lotus Green we in no way had unpublished information of any sort in relation to Fyffes.”

When asked if he was ever told about the ‘not too wonderful’ trading of Fyffes he answered ‘no’.

When asked if he was surprised that Mr. Flavin didn’t come to him to discuss his concerns he said “no, not at all, no”. (**Answer 263:** Page 59).

He agreed that if Mr. Flavin had price sensitive information and the shares were sold when he was in possession of that and he caused or procured the sales that would have a potentially enormous bearing on DCC. He said that whether he knew that the profit could be taken back was irrelevant “I knew that you don’t deal with inside information, plain and simple”, (**Answer 265:** Page 60) and that it was an “absolute serious matter”. (**Answer 266:** Page 60).

**Question 267:** With that in mind, you were the person responsible for the finances within DCC and here was perhaps 15% of the worth of DCC being sold. Are you not now at least surprised that Mr. Flavin didn’t confide in you or seek your counsel in relation to it?

**Answer:** “Not particularly, no. I have to say I would have expected the compliance process to have taken place.”

**Question 268:** But not to have discussed his concerns with you?

**Answer:** “Not particularly, no.”

**Question 269:** When you say ‘not particularly’, there is a suggestion, and it may be just your choice of words, or your style in terms of dealing with it, but are you saying you are not surprised or you are surprised but surprised only to, is there a part of you... (Interjection).

**Answer:** “Probably more like ‘not surprised’.”

He stated that Mr. Scholefield did not discuss his discussion with Mr. Flavin as referred to in his memorandum and he was not surprised that Mr. Scholefield did not discuss it with him or seek to take him into his confidence.

When asked about the letter from Henri Roskam of the 31<sup>st</sup> of January Mr. O’ Dwyer confirmed that “just from a tax record point of view I wanted to get this on the record so I rang him and said maybe it was a good idea if he as Chairman wrote to me to suggest that. Which he did.” (**Answer 303:** Page 67).

“The genesis of the letter was from me.”

**Question 304:** Okay, as you said or suggested it was to help shore up the ‘Lotus Green is a real entity’ in case, I mean it was with an eye to the tax man. You weren’t thinking in terms of Stock Exchanges or anything like this. It was tax driven?

**Answer:** “Everything I was doing around that time was driven by tax and also that part of that tax (concern) was that an independent decision would have to be taken by Lotus Green and the robustness of that decision would depend on the information it was given.”

**Question 305:** By the time you had this conversation with Mr. Roskam you would have had a conversation with Mr. Flavin about enquiries that he has been receiving. Can you tell me what you can recall of your conversation or conversations with Mr. Flavin about enquiries and expressions of interest in relation to the Fyffes' shares?

**Answer:** "I mean, it all becomes a reasonable sort of blur. I believe the first time I heard was towards the end of January in terms of there being a phone call or calls from Davy's enquiring about the stock."

**Question 307:** Okay, just tell me what you remember of Mr. Flavin's conversation with you?

**Answer:** "I remember – his office is upstairs and mine is downstairs...I suppose my memory of this is that he was standing just at my door saying 'look we've had another call from Davy's. This is hotting up'. He said 'where are you guys on this'? I said 'we haven't really done anything on this in a while'. I suppose generally, in context, we would have seen everything go up at that time. I mean, the dotcom boom was just, all boats were rising. Our own share price was going up. Every day you came in, the share price was going up. So in context, it wasn't just Fyffes, it was everybody, but Fyffes had this specific..." (Interjection).

**Question 308:** Driver?

**Answer:** "Driver, being worldoffruit at least as we perceived it."

**Question 309:** Yes.

**Answer:** "It was pretty soon. When I say soon, probably within the hour that I would have phoned him, (Henri Roskam)."

Mr. O' Dwyer said the memorandum of the 2<sup>nd</sup> February was his work. He prepared it on the 1<sup>st</sup> and then tidied it up as he travelled to Holland on the 2<sup>nd</sup>. He and Mr. Roskam and Mr. Venneboer discussed it on the 2<sup>nd</sup> and agreed that the price at which they would be prepared to sell would be around €3.00. "It was a question then of having a board meeting



with Tom (Diepenhorst) the following day because Tom was away.” (**Answer 362:** Page 79).

Mr. O’ Dwyer said he would have arrived in Holland mid-morning on the 2<sup>nd</sup> and met with Mr. Venneboer and Mr. Roskam. He would have given them the first draft of the memorandum. They read it. They talked about it. Towards the end of the afternoon they came up with a number. He said that there was communication between him and DCC in Dublin during the course of the day.

**Question 369:** But with whom?

**Answer:** “All and sundry.”

**Question 370:** It would have included Mr. Flavin?

**Answer:** “I think so yes.”

He would have discussed regular DCC business but he would have been enquiring as to whether there had been any other approaches. Mr. O’ Dwyer says he thinks the Fyffes’ share price closed at €3.26 on the 2<sup>nd</sup>. Mr O’Dwyer then explained why they would sell at €3.00 when the stock market price was €3.20 plus.

“I can tell you why we put €3.00 in. We knew the share price was over €3.00. We wanted a workable mandate so that we wouldn’t have to keep on jumping on planes, getting around a table and updating the mandate. He said that they always envisaged that they would sell at the market price.” (**Answer 379:** Page 81).

Mr. O’ Dwyer confirmed that he didn’t at any time discuss the sale with any stockbrokers and didn’t have any conversations with anyone about the sale of the shares. Insofar as he dealt with anyone he communicated with Mr. Flavin and with Mr. Diepenhorst. “That is correct.” (**Answer 389:** Page 83).

**Question 390:** Tell me then about the conclusion that was reached by Lotus Green on the 2<sup>nd</sup>. You didn't have Mr. Diepenhorst at this meeting is that right?

**Answer:** "Tom was away."

**Question 391:** Did you reach a decision or what was the upshot?

**Answer:** "We pretty quickly reached a decision that this is."

**Question 392:** This is easy?

**Answer:** "That this is it."

**Question 393:** This is it, we are sellers?

**Answer:** "We are sellers."

**Question 394:** At what, above €3.00?

**Answer:** "Above €3.00."

**Question 395:** Then who made the decision as to how much above €3.00 and where did that decision making process arise?

**Answer:** "That we would accept offers above €3.00. So if we got an offer above €3.00 we would take it."

**Question 396:** Okay, who was to communicate that offer?

**Answer:** "When you say 'communicate the offer', I presume that that is whoever wanted to make the offer. But who was to communicate the acceptance, there was a ranking."

**Question 397:** Right okay. But how was an indication that Lotus Green would accept an offer above €3.00 to be communicated? How were you going to let the potential buyer know?

**Answer:** "Our tactic had always been to keep our head down and let the market come to (us)."

**Question 398:** ...So they would have had to come to somebody in DCC and that had to be Jim?

**Answer:** "You know, most likely."

**Question 399:** Most likely?

**Answer:** "Probably."

**Question 400:** Was there anyone else that they would have come to?

**Answer:** "I don't believe so, no."

**Question 401:** Not you, not Mr. Scholefield, it was Mr. Flavin that they were going to come to about it?

**Answer:** "I would take that as being as a practical matter yes."

Mr. O' Dwyer was asked to look at the documents behind Tab 10 and was asked if he had any expectation going over to Holland as to what the board of Lotus Green would decide in relation to the disposal of Fyffes' stakes. He answered that he did.

**Question 408:** I take it that it was a positive expectation. They were likely because of the run up in the price... (Interjection).

**Answer:** "They were."

Mr. O' Dwyer explained that the intention when he left the meeting early in the morning of the 3<sup>rd</sup> of February was that the whole of the Fyffes' stake would be sold. As he is driving to the airport he starts then considering the implications in his own mind of a partial sale vis-à-vis what it might do to the participation exemption. He explained that he immediately rang Mairead O' Malley and said that that was something that he would like her to work on. Throughout the morning, he got back probably around midday and for certainly the early part, into the late part of the afternoon he worked with Mairead O' Malley on this in Dublin. He confirmed he didn't raise this at either of the meetings in Holland and didn't have a discussion with his fellow Lotus Green board members about

“what if we only sell half”. And it was something he needed an answer on really quickly and there were discussions going on throughout the afternoon between DCC, PWC in Dublin and PWC in Amsterdam. The conclusion was that if there is a partial sale that the preference shares should be sold first, conclusion number two, if you wanted to keep the participation example exemption there were a certain minimum number of shares you should keep, which you should keep, which roughly equated to half the shareholding. This all occurred from midday to afternoon of the 3<sup>rd</sup> of February. The sale of the first tranche of shares occurred sometime in the late afternoon on the 3<sup>rd</sup> February.

Mr. O’ Dwyer explained that when he returned from Holland he told Mr. Flavin of the decision of the board of Lotus Green and subsequently that if it was going to be not an offer for all of the shares, it should be for half.

**Question 450:** So the precondition that it would be for a certain amount, if not for all of it was a DCC precondition?

**Answer:** “It was me. Whether I am DCC or whether I am Lotus Green I am certainly acting (our of concern) for participation exemption.”

“I was in Lotus Green mode.” (**Answer 454:** Page 96)

As for the ranking, as to who would be called by the stockbrokers, there was a list of four and Mr. O’ Dwyer was last on the list. He explained that that was very much tax driven. Although from a legal perspective it made no difference to DCC, from the tax optics perspective it could have been, “here is the CFO of DCC and he is doing it in DCC House”. When he left Holland, he left his Dutch directors with the expectation that a potential offer would come to Tom Diepenhorst. When asked where he got the information to lead him to be able to tell them that that was the case he said “it was a noise level thing. It is now hotting up.” (**Answer 464:** Page 97).

**Answer 465:** Sorry, but somebody must have told you about the noise level and the hotting up?

**Answer:** “Jim was passing on all the details of the calls absolutely.”

He then explained that he spoke to Tom Diepenhorst late in the afternoon of the 3<sup>rd</sup> when an offer came through.

**Question 484:** How did you hear about the offer?

**Answer:** “Jim told me.”

**Question 485:** What did he tell you?

**Answer:** “That there had been an offer for 17.something million shares at €3.20.”

**Question 486:** 17.something was the amount of shares in number terms of the shares that you told him?

**Answer:** “50%.”

**Question 487:** That you could sell so that figure was as a result of information that you gave to Mr. Flavin?

**Answer:** “Yes and he is talking to one of the brokers refers to ‘it is all or half’, and there is a reason for that.”

**Question 488:** All right so he comes to you and says what?

**Answer:** “There is an offer for €3.20 a share.”

**Question 490:** ...What was the share price, the stock market price for Fyffes’ shares on that day?

**Answer:** “I think it might have closed at €3.30.”

**Question 491:** Was it ever at €3.20 during the day?

**Answer:** “I think it was, yes. I would have been passing a screen, the Reuters screen throughout the late morning and early afternoon.”

**Question 492:** The €3.20 was at market?

**Answer:** “Yes.”

**Question 493:** When was the deal closed, when was the deal concluded for the 17 million shares?

**Answer:** “The contract was done by Ronan Godfrey post this conversation with Tom Diepenhorst.”

**Question 494:** When, what time was that conversation?

**Answer:** “I think it is about 4.30 or 5 o’ clock.”

**Question 495:** When does the Stock Market close in Dublin?

**Answer:** “It was just before the close.”

In relation to the sale of the second tranche on the 8<sup>th</sup> February he was visiting a subsidiary called Brodericks and he got a call from Mr. Flavin and then he phoned Mr. Diepenhorst to say that he could expect a call from Goodbody’s. The second tranche of shares were sold at €3.60. Then on the 14<sup>th</sup> he was back in DCC House, Mr. Flavin calls him to say that they had an offer for the balance of the ordinary shares at €3.90 and Mr. Bruce Archer of Goodbody’s phones Mr. Diepenhorst.

After selling the ordinary shares they had no further calls for the preference shares and they were not sold until some time in 2002.

Mr. O’ Dwyer was then taken through the documents which were prepared in May and July of 1998, when the board of Lotus Green considered disposing of the Fyffes’ shares. Mr. O’ Dwyer agreed that it was unlikely that Lotus Green would have ignored the views of DCC plc as to what the right time was.

Mr. O’ Dwyer was then referred to the Minutes of his first meeting as a full director of DCC plc on the 27<sup>th</sup> March. Mr. O’ Dwyer said he didn’t recall very much of what was

discussed at that board meeting. He does recall Fyffes issuing a profit warning about a week before the meeting. He could not remember much of the conversation with Mr. Flavin after he came back from the Fyffes' general meeting on the 20<sup>th</sup> March. He said the conversations did not register with any particular degree of significance for him. All he remembers is Mr. Flavin saying that he was as surprised as anyone.

He was asked about the reference in Mr. Scholefield's manuscript notes to "JF: unfortunate profit warning". Mr. O' Dwyer was taken through the rest of Mr. Scholefield's manuscript notes but he could not remember anything of this from the meeting.

He admitted that he was surprised with himself that it didn't register with him now. When asked if he didn't feel it incumbent upon him as a director to enquire into this or about it he answered, "your supposition is that this was indicative of the concern by the board. I imagine that at my first board meeting if there was a concern by the board it would register in my memory."

**Question 640:** Yes.

**Answer:** "I have no memory of it. So whether that says it was a concern of the board I don't know."

Mr. O' Dwyer explained that they didn't take any advice on insider dealing in 2000 because he didn't believe it arose for Lotus Green. They did take advice in relation to the notification issue not so much as to whether it was required but as to the form of the notice. He confirmed that in relation to the Section 91 notification he said it wasn't complied with by error. It was just missed.

**(c) Jim Flavin**

It was explained to Mr. Flavin that I did not intend to go over all of the same ground that was covered in the High Court proceedings before Ms. Justice Laffoy.

At the outset Mr. Flavin stated that he approached the interview with deep feelings about the transactions which occurred in 2000 and stressed the importance of the Investigation process to DCC and to himself. He expressed the view that one could trawl through the companies, in terms of their compliance processes and the standards they tried to apply, and they would withstand any scrutiny.

He stressed that he recognised that ‘the Supreme Court is the final arbiter’.

“I recognise that as a legal fact I have dealt and as a legal fact the information was price sensitive, but I sit here as somebody who honestly believes I didn’t cause or procure dealing, bids or acceptance and I still believe the information wasn’t price sensitive.” He said he believes that he was not in denial but that “a combination of circumstances had arisen which were pretty unique”. (**Answer 221:** Page 59).

Mr. Flavin stressed that he was very happy with the strength and comprehensiveness of Ms. Justice Laffoy’s judgment and of her finding that he did not use the information “which is what insider dealing is understood all around the world to be”. He reiterated what he had said to her “if there is one thing I can get you to please understand, this information that I had, the bids had nothing whatsoever to do with the fact that I had received unsolicited offers and had nothing to do with the fact that those unsolicited offers were accepted”. He accepted that ‘unfortunately’ she found that he controlled the sale side. But he was very happy about the strength of her finding that he didn’t use the inside information and the strength of her other finding that there was no dishonesty in the case. He referred to the fact that she held that he didn’t cause or procure bids but rather that he caused or induced acceptance of the bids. He said he still doesn’t believe to this day that he did. He accepted that this sounds “incredulous” but he wished to try to give a better understanding as to why he thinks that. (**Answer 224:** Page 61).



“I respect the fact that Judge Mary Laffoy came to a judgment that I did. I have got to accept that, that is a legal thing, I can more readily accept that than I can (the Supreme Court).” (**Answer 225:** Page 62)

“I don’t think it is any disrespect that one has independence of mind. I find a judgment that I had insider information which gives no probative value to the supremacy and views of the company (Fyffes), which equates parity of the information and markets on the 20<sup>th</sup> of March or the 3<sup>rd</sup> of February I will never understand and which says that the Judge was wrong in, you know, ‘the reasonable investor test’. It is a nonsense. The reasonable investor is specifically provided for in the 2005 Act. I just don’t agree with that with full respect to the (Supreme Court).” (**Answer 226:** Page 62).

Mr. Flavin was then asked about the establishment of Lotus Green which he agreed was undoubtedly a tax vehicle.

**Question 259:** One of the consequences it had was that for the efficacy of the tax structure to work, you had to create the appearance and hopefully the reality of control being exercised by an entity that was removed from the central control within DCC group?

**Answer:** “Yes.”

**Question 261:** The fact that Lotus Green was set up and had the beneficial interest in a very substantial part of DCC’s net worth transferred into it, and the fact that that was in Holland and had to be seen to be in Holland so that when it came to implement what it was set up to do, it would work.

**Answer:** “Yes.”

**Question 262:** One of the consequences of that was that the board oversight by DCC had to be reduced for that to work.

**Answer:** “Yes, yes.”

**Question 263:** Do you understand?

**Answer:** “Yes. Absolutely, I fully understand.”

**Question 265:** Because of the tax structure that was set up, there was not the oversight that would have been there had the tax structure not been put in place?

**Answer:** “Well, the decision making to accept that offer, yes, would have been on the board of DCC rather than Lotus Green (if the transfer had not taken place).”

**Question 266:** Yes, but not just the decision making because, I mean, a decision can be what you might describe as a ‘no brainer’ and you can do it over the phone?

**Answer:** “Sure, yes.”

**Question 267:** But in terms of any discussion around it that would have been a discussion taking place...

**Answer:** “In DCC plc. yes.”

**Question 268:** With Alex Spain, Paddy Gallagher?

**Answer:** “Yes, Tony Barry, yes.”

**Question 269:** Tony Barry?

**Answer:** “Morgan Crowe.”

**Question 270:** You and Morgan Crowe and there were new people coming on the board at that time?

**Answer:** “Yes.”

**Question 271:** That didn’t happen?

**Answer:** “No.”

**Question 272:** It didn’t happen because of the imperative of the tax structure?

**Answer:** “Yes.”

**Question 273:** I am just wondering what the consequences of it are, but do you agree with me at least that the absence of that... (Interjection).

**Answer:** “Left DCC in someway vulnerable.”

**Question 274:** Well, vulnerable, yes, vulnerable and also in a sense... (Interjection).

**Answer:** “In more risk than it otherwise might have been.”

**Question 276:** But had it been discussed by DCC plc., I mean, the decision may have been no different?

**Answer:** “Well do you want me to say something on that?”

**Question 277:** Yes, I do.

**Answer:** “I think there are two relevant questions you are really asking; was it a reasonable thing to delegate it?”

**Question 278:** Well reasonable and appropriate.

**Answer:** “Reasonable and appropriate and, secondly, had they not delegated would the result have been any different. So if I take the first.”

**Question 279:** There are probably more but they are the two big questions.

**Answer:** “If I take the first part. Is it reasonable and appropriate. This wasn’t, as I think I said in my statement, a sort of blinkered transfer to (Lotus Green)...first of all...DCC never delegated its strategy in relation to Fyffes. It always could reserve for itself, that having made a strategy determination in 1995 that yes, look this has got to a point that it was evolving, it was no longer a core asset, you know, having decided that. All it delegated in 1995 was the implementation of that strategy that the sale of the stake was for the board of Lotus Green. Now was that an appropriate and reasonable thing to do? As Tony Barry said in the High Court when giving evidence the board of DCC in effect took a calculated risk, a very low calculated risk. Why do I say low risk? Because first of all the ‘management’ structure had an ‘A’ and a ‘B’ structure. It required the approval to sell

of the 'A' director. The 'A' director we were putting in was our Chief Financial Officer whom we had confidence in. So that is very important. B, the question was asked by the Chairman in 1995 and again in May 1998, you know, lets talk about these directors...at least two of the three directors were people who were businessmen, experienced and understood these things. Thirdly, not only the people, it was being put into a company in Holland where there was a full understanding that they were used to receiving assets and having to deal with them. You know, this wasn't something new to them. Fourthly and very importantly, it was always open to the board of DCC for any reason if they thought that this asset, you know, was something different, that you should have a different view of it, let me take an extreme example. Let's say DCC wasn't doing well and Fyffes were doing extremely well and Neil McCann had come along to me and said 'look, we would really like DCC to take a larger shareholding in Fyffes and it was really a great company to invest in'. The board of DCC could have used their collective wisdom and in fact I, in the first instance would probably have proposed it; 'look, gosh, we should readdress our strategy'. And we did in a very structured way address our strategy every year in; 96, 97, 98 and 99, and for confidentiality reasons didn't use the name Fyffes but did re-recommend and re-decide that this was a non strategic asset. But it could have been different and circumstances could have been different where it would have been responsible and appropriate for the board of DCC (and I as their Chief Executive) to come to a different view. Now we could have done that and changed the mandate of Lotus Green and said 'by the way, you know, you have received this, we have changed our strategy' and it might have meant 'well tax structures might have been less important if it was going to be a long term investment' but we could have taken a different approach. So I believe that the likelihood, we would have had a view that the likelihood of Lotus Green going off and doing something different than I wanted or the board wanted, the risk of that happening was very unlikely."

He described it as a "very small calculated risk in return for a significant taxation prize".  
"I like to think I have a reasonable feel for what is appropriate and responsible for a public company to do. I really do. Mr. Shipsey I believe that that was appropriate. He said that although it was 15% of their net worth they were more focused on the other 85% of their

net worth and in how they can grow and develop that. That was going to be the future of DCC.”

The 15% which the Fyffes’ stake represented was a share in a listed company and as a public company the price is set by the market. He said that, “not in our wildest dreams would we think what actually happened would happen, that the share price would be flying through the roof because the world had gone mad on dotcoms and Fyffes were leading the world in a dotcom subsidiary produce. I mean you couldn’t have imagined it and nobody could have. We always believed and not just believed, thought it was very likely actually that a corporate transaction would take place. I think I mentioned in the last module that there is a fair compelling logic of synergies between a Chiquita or a Del Monte or a Dole or something. Anyway, I think it was a responsible thing to do.”

“Was it reasonable and appropriate in all those circumstances? It was a non-core asset, it was a public company. We had by and large confidence in the (Lotus Green) board, and in the public company managing (our stake) because Fyffes were managing our 15%, if you like, and it was delegated to them to do that. It was for sale, it was a reasonable thing to do I believe.”

“On the question of would it have been different, would I be sitting here now if we never had set up Lotus Green? I think highly likely because we might have got a slightly better price for the shares because it would have been full blast or full negotiation on the thing, it may have been marginal, but the issue, just think about it for a second. When Kieran McLoughlin called me from Davy’s it was approximately the 27<sup>th</sup> of January. The first thing I would have done was ring the Chairman and say ‘look I am asking the secretary to call around the board to set up a board meeting of DCC’. Because I knew it was likely it was a possible bid. I think we would have had a board meeting very fast, probably sooner than the Lotus Green board but by the 3<sup>rd</sup>. Sometime, between the 27<sup>th</sup> of January and the 3<sup>rd</sup> of February. I would have said ‘look, we have this thing’ there wouldn’t have been any compliance process. As to whether somebody would have asked me, and I have to be honest here, would somebody have asked me at that board meeting do you have price

sensitive information? You know, in relation to trading, if I could just step back for a second. Just hypothetically, let's say this board meeting of DCC was taking place, Fyffes brought out the results on the 14<sup>th</sup> December, just hypothetically let's say this board meeting was taking place on the 15<sup>th</sup> December, I think you will readily accept Mr. Shipsey that there was no DCC director would have sat around, (it is the 15<sup>th</sup> of December, Fyffes have just brought the market up to date yesterday) I don't think anybody would have asked 'by the way do you have price sensitive information in relation to Fyffes'. You know, the question would presume that the board of Fyffes are either totally incompetent in their judgment that it was going into a year of further growth, as they just told the market yesterday in a statement, a considered statement of the full board and that every director was totally incompetent because every director of Fyffes would have been effectively a party to that, including me, or else they were deliberately setting out to mislead the market, you know. So here is the board of DCC, a hypothetical board meeting, here was a board of DCC meeting, including myself, who had every reason to believe that whatever bits of disputes we had with the McCann domination in Fyffes, that they were actually within their industry very good people, that they had an unblemished record of meeting market expectations. There were some companies that you could have a view 'gosh you wouldn't mind what they say', but here was a company that year in/year out since the year 1981 had at least met market expectations guided by them, they always met them. They were known to be competent people. So I hope you will accept that on the 15<sup>th</sup> December it would have been a very unusual question to ask do you have price sensitive trading information. Somebody might have said are you happy you don't have any, there was no bid coming because you were allowed to keep bids, under the Model Code, you are allowed keep bid information confidential but you have to virtually instantaneously go and announce if you think you have price sensitive information. And you have got to do it without delay.

Let's say the meeting was taking place on the 3<sup>rd</sup> of February. Very little time. It was very early in the financial year but particularly bearing in mind Christmas was coming up and people know that there is very little trading for about two weeks, it gets quieter. It is how much the board would have known that I knew, you know, that the early months of

the year, the first quarter in Fyffes' business was very unimportant. I think they would have had a general appreciation of that but they mightn't have had the knowledge that I had. But if somebody, and maybe somebody should have asked, 'presumably you are quite happy about trading'. I would have shared with them the same, I would have done precisely, pretty precisely what I did with Michael Scholefield and I will come back to it again which would be, if you like, I shared my state of mind in relation to my state of knowledge. I don't think anybody on the board would have said 'oh, hold on a minute. What do you mean it hasn't been great?' Once I had said the information I had was no different, that I believed was no different than the information available to the board of Fyffes and available to Fyffes at the last board meeting on the 9<sup>th</sup> December 1999. The information based upon which the preliminary results announcement of the 14<sup>th</sup> December brought the market up-to-date, you know, so I would be sitting here and there would be no difference."

He then went on to suggest that there was an unsound theme running through some of my questioning about the adequacy of the compliance process. "Now whether it was the board of DCC or it was Michael Scholefield I really think this is very important." He then gave an example using different names to take "the emotion of DCC and Fyffes and everything out of it".

"If you were on the board of CRH and you were Chief Executive of ABC Limited and you know I am the Compliance Officer of ABC Limited and you have the accounts for the first two months. Hypothetically you come to me and we, (ABC)...have a strategy to sell our 10% stake in CRH. Their year end is October and you come to me on the 1<sup>st</sup> February and you say 'Look I have the accounts for the first two months and as you know CRH have recently brought the market up to date. The information I have, it is the same as I got. It is not precisely but there is no news in this information I got. It is absolutely in line with what I would have expected. I was at a CRH board meeting on the 9<sup>th</sup> December'. You say to me. You scratch your head and you say 'look I want a compliance process'. If you were to have concluded that gosh, I want Jim Flavin or you know I want Michael Scholefield or indeed the board of DCC or the board of ABC to second guess whether it is

a price sensitive time for CRH, I would say ‘sure, Mr. Shipsey, you are my Chief Executive. Surely you know it and surely the executives in Fyffes’ or, ‘the executives in CRH, who are deeply experienced people they have been trading, they have never let down the market, surely they are the people. Ask them what do they think’. I ask you what do they think and you say to me ‘well, actually they gave permission to our most experienced Senior Executive, the Chairman of Fyffes UK to trade stock the other day’. You will tell me, I am Chairman of the Remuneration Committee. ‘CRH have just recommended, including their deputy Chairman, that we would grant new options’. Now what company in their right mind who are trying to get executives incentives would suggest granting options? Why would CRH grant share options if they thought they were in possession of price sensitive information or they thought the price was in the tank or something else.’”

“With deep respect, I honestly, want to say that there is a thread running through here as though, oh gosh the €106 million sale, there has to be a huge compliance process on price sensitivity. The compliance process is CRH (or Fyffes). It is what CRH think. I mean, I regard myself as a reasonably informed market person and I qualified as a Chartered Accountant. If somebody actually came and did ask me is it a price sensitive time in CRH I wouldn’t know where to begin. The first thing I would do is go down to the Chief Executive in CRH and ask him and maybe the Chairman. It is a ludicrous proposition for somebody to try and second guess, for one company DCC to second guess Fyffes in the produce business. At no stage was I ever asking Michael Scholefield ‘I want you to second guess the board of Fyffes’. What I was actually doing was, you know, and it was more instinctive because we never thought this would arise. They were most unusual circumstances. It was instinctive. We always had a compliance process. Having appointed a Compliance Officer (and I keep thinking maybe we would be better off if we hadn’t got one because it has caused more problems than solved them you know) but I was simply putting on record that I considered whether I had price sensitive information. Now with hindsight, you might find this hard to understand Mr. Shipsey, I was fully satisfied at that time that I did not have price sensitive information. Now if I was fully satisfied of that (personally I was) I was also fully satisfied that the board of Fyffes, the absolute supreme



authority when it comes to making a judgment, the board and the executives, I was absolutely satisfied that they didn't think it was a price sensitive time. So all I was doing was giving him (the Compliance Officer) my state of mind. I would do it slightly differently now because of what I know but what I knew then, I believe I did the correct thing. In no way would I have asked Michael Scholefield 'would you please go off', (and make enquiries) because that would have required a major enquiry. I would have to give him the accounts and I couldn't give him the accounts and I would have to get permission. I wouldn't have given him the accounts. Even if he asked me for the accounts, I wouldn't do it. I would have had to first get the permission of Fyffes to breach confidentiality. As it was they made a claim that I breached my fiduciary duty. Of course we won that because we didn't. So you know, I would never have done that. It is actually, with respect, a nonsense to think that either the board of DCC or a DCC Compliance Officer should set about second guessing it. It was for Fyffes to form a judgment and its responsibility and nothing changes that. And its responsibility in law on stock market regulations as to whether they had price sensitive information on trading.

He then explained that when the Fyffes litigation started they tried to find a case broadly similar like this whether it was Singapore, Hong Kong, Australia, New York, Britain or Ireland. Insider dealings generally. And said that they were not able to find any. He then explained that the markets on the 20<sup>th</sup> March were very different to the markets on the 3<sup>rd</sup> February. There wasn't parity in his view but they (the Supreme Court) said there was. "There is no compliance process in DCC could have got over those hurdles and I have thought about what the solution to that is." (**Answer 279:** Page 86).

"I think what we would have done. I think we could have gone to Alvin Price and discussed that or I would have gone or whatever. The board in the first instance would have said 'look, maybe Jim you should go off the board of Fyffes' or I would have said it. I think we would have concluded, for various reasons, that my role, that it was right that I stayed on the board of Fyffes, just for commercial reasons, if there was another way of doing it...and the alternative route was available to us under this very legislation (the 1990 Act)..." (**Answer 283:** Page 88).

“(It) provided precisely for the circumstances where an officer of a company was in possession of inside information, knowingly was in possession of inside information, that that should not preclude the corporate entity of which he was an officer from (dealing). They actually thought about that and provided in the legislation two things...actually three things, I don’t know why they have put the third thing. The third thing is provided the first two things happen. It provides that provided the officer in possession of information doesn’t deal or give advice on the dealing and secondly provided there are written arrangements (to ensure) that the officer does not pass on his confidential information and thirdly that ...” (**Answer 284 and 285:** Page 89).

It was open to the board of DCC back in (2000) to say now that we have done this (the decision to deal) could be ring fenced from him. (**Answer 286:** Page 89).

“I could be on the board of DCC. I could have price sensitive information. I could know I have price sensitive information, all right, and I wouldn’t share the fact that I have price sensitive information but I would share with the board that ‘bids have been made and you know we have ring fenced this, I am not telling you what I have or I haven’t. I am leaving the room. I am not giving any advice on it. It is over to the board.’ Provided it has been set out in writing that I was never to transfer information. So I actually believe that that is what we should have done.” (**Answer 289:** Page 90).

He went on to point out that back in June of 1995 Michael Scholefield actually advised him along these lines and he forgot about it. He actually advised me that the law provided that. Provided one didn’t deal or advise on a deal and provided there were written arrangements of confidentiality that a thing (like this) could be ring fenced.

He also contrasted the 2005 legislation with the 1990 legislation which requires the use of the information as well as its possession.

**Question 294:** Can I ask you why that wasn’t done?

**Answer:** “Well with hindsight if it was done we probably wouldn’t be sitting here. As I said earlier we pride ourselves in doing things correctly. We didn’t think to do that. The circumstances, a pretty unique convergence of all circumstances that have caused me to be sitting here, if you like, and DCC to have had a financial penalty they were pretty unique. Nonetheless, I would draw the lesson from that if I was Chairman of a plc tomorrow morning I would want to implement that, I would require it.”

Mr. Flavin was then asked why he had obtained written advices on insider dealing in 1995 but not in 2000.

“In 1995 it was just simply the applicability of insider dealing...whether it could be applicable to an inter company trade, was the law even applicable, was it relevant. In fact I don’t think I was actually the first person to think about that. I think to the best of my knowledge it was a reflection, and I know the document, and I think that started with Michael Scholefield but I can’t quite remember. I think once it started and I don’t know whether it was he first or me but it is certainly something I would have been interested in. In 2000, and it is slightly complex, in 2000 if you had asked me on the day has insider dealing any applicability to this particular transaction, the answer might slightly surprise you. It was all moving very fast and I think my instantaneous reaction would have been no, other than a very important PR sense, and I will come on to that. I would have thought on that day that I am not dealing and it is a decision for Lotus Green...I didn’t understand the point that I subsequently discovered that because the shares were registered in the name of DCC and S & L, and by virtue of the fact of me being a director of both those companies my knowledge was imputed to those companies, I didn’t actually know that, but that is beside the point. There wasn’t a legal point I had to find out. I was working and I was motivated at that time that I wouldn’t want to have been holding price sensitive information even if I thought that none of this could have been a consequence of it.”  
(Answer 299: Page 99).

**Question 301:** If you didn’t have a doubt about the legal (position) or if you weren’t looking for a legal opinion, and I understand the distinction you are making that you were

asking “well, were we even at the races in 1995” I can understand that difference between 1995 and 2000. In the first instance you go to a lawyer and you are not going to a lawyer for his commercial judgment, you are going to a lawyer for a legal take on something. He explained that in January 2000 he actually went to Alvin in connection with the applicability of the Model Code requirements as to whether, he as a director of DCC was obliged to inform the Chairman of Fyffes about any sale by Lotus Green of their shares. He said he wanted to be sure “that absolutely nothing had changed the game” in relation to “the Model Code requirements for a dealing by a director”. I knew the answer to that and I just wanted to make sure there was nothing new and nothing different. I have been thinking about this since and I probably didn’t bring it out in the High Court, but probably instinctively knowing that there was a possibility of a trade coming up, I probably instinctively would have picked up the phone to let Alvin know that because things might develop...I was likely to be talking to Neil McCann about the possibility (of a trade)...Instinctively I would have been letting him know. It has always been my recall that in fact it was he raised price sensitivity so I didn’t ring Alvin with the concern about price sensitivity. (**Answer 304:** Page 100 and 101).

Mr. Flavin stressed that one wouldn’t go to one’s lawyer to be advised on whether information you had was price sensitive. “On the law you might, yes.” (**Answer 304:** Page 101).

When it was put to him that there was an overlap between fact and law in this regard and that what was involved was a factual determination, in the light of what the law views as constituting price sensitive information. He was asked whether that made it more important to find out from Alvin whether as a matter of law Mr. Flavin was safe to have regard to what the McCanns were not doing in late January or February or up to late January or February.

Mr. Flavin said “if I had any doubt that it was a price sensitive time in Fyffes, my first port of call would have been Fyffes...I think the only reason I would have gone to Alvin Price was that if I went to Fyffes and they said it wasn’t, and I still had some doubt, I think then

I would have gone to Alvin Price and said ‘look I need a confessional with you – you know I am on the board of Fyffes. There are all these offers coming in and I think they are going to be accepted. Do I intervene and stop this because in fact I have a bit of a doubt I might have price sensitive information. Fyffes doesn’t think it is, but I think there is a doubt. Can I rely on Fyffes? Does my doubt notwithstanding the Fyffes (view) do I intervene, do I stop?’ I have often wondered actually what could happen to something like that...I think what I would have done is talked to Alvin Price. ‘I have a dilemma here, do I intervene in this trade? There are these unsolicited offers coming in, do I fetter the DCC group in the sale?’, I don’t know what the outcome of that conversation would have been. I would have certainly been very uncomfortable about it.” (**Answer 306:** Page 102),

**Question 307:** You would have been uncomfortable about what?

**Answer:** “The conflict, the natural conflict I had on being, on the one hand, an insider of Fyffes and on the other side being Chief Executive of the DCC group with an onerous responsibility to discharge the role in that the second I intervened in stopping that DCC thing, having all the shareholders knowing informally from the nods and winks that there was a non-strategic asset and suddenly if I intervened to stop the sale when offers are coming in a shareholder could come back and say ‘why did you do that?’ ‘I had a little bit of a doubt it might be price sensitive’. ‘Did Fyffes think it was price sensitive?’ ‘No.’ ‘Well, why did you stop us getting a profit?’ There is an inherent conflict.”

**Question 308:** Of course there is, but that conflict whether you thought about it was there whether you thought about it... (Interjection).

**Answer:** “I am not saying I didn’t think of it because I didn’t think I had a conflict.”

**Question 309:** It was there, even if you didn’t think it was there because once you are on the board of Fyffes, there is the potential for you to have information that others didn’t have?

**Answer:** “Yes.”

**Question 310:** Wearing your DCC Chief Executive hat, your primary duty was to the shareholders in DCC?

**Answer:** “Yes, yes exactly.”

**Question 311:** If there is an opportunity for you to realise the exit strategy that you planned for six years, not in 1995, but 1994 then your duty is to do that. So that conflict was a conflict, that sort of “existential” conflict was there.

**Answer:** “Yes.”

**Question 312:** Clearly the extent to which it is real or whether you should have done anything about it is conditioned by the level of concern that you showed.

**Answer:** “Yes.”

**Question 313:** In a sense all the more reason, and it may be hindsight judgment being better and saying “if I had picked up the phone”, let’s tease this out. Let’s say you picked up the phone to Neil McCann, and I know there were ongoing issues... (Interjection).

**Question 314:** Let’s say on the same day you were talking to Alvin, you pick up the phone to Neil (McCann)...and you say...”this is good news Neil”, because certainly a few days later they are popping champagne corks so there is no reason to believe that on the 31<sup>st</sup> of (January) three days earlier their view is different and they might have liked the courtesy of your call.

**Answer:** “Earlier.”

**Question 316:** Earlier, and you get on to Neil and you say ‘Neil this is coming in’. Even if you hadn’t said or asked the question ‘you are not thinking of announcement or anything?’ Wouldn’t you have been in a better position vis-à-vis Fyffes than the situation you were in because you didn’t tell them as it were until after the sale was done?

**Answer:** “Mr. Shipsey I had several phone conversations with Neil McCann on the 3<sup>rd</sup>. My first one was around 11 to 12 in the morning.”

**Question 316:** That is before the sale is done?

**Answer:** “Well before. I did actually call him very shortly after being informed that the board of Lotus Green had taken the decision to accept offers.”

**Question 317:** Above €3.00?

**Answer:** “Now, I wouldn’t have called Neil before that or called him on the 2<sup>nd</sup> because I knew, what I believed and I think it is important in the reality of Lotus Green if you like, even though I have the image of somebody like any founder, oh well, he founded the company he is the Chief Executive or Deputy Chairman, I was always a person who believed in the supremacy of a board. I can put my hand on my heart and say that I always sought to keep the board fully informed and if in doubt I informed them. I was very open. I just tried to do that on the one hand. On the other hand I never, I can say never in my 32 years did I ever do anything which even remotely exceeded my authority. I was always conscious of where was the board authority. I knew it was a smallish board for that period, but a lot of the non-executive directors you have met were younger (then). Alex Spain, most people would have regarded Alex as a very independent, strong person. Tony Barry by common consent, if you asked anyone in 2000, they would have said he is the best, the strongest and most able and if he has a view on something he will stick to it, highly independent but yet very supportive and somebody I had enormous time for. Paddy Gallagher had a different sort of experience. It never arose. I never, ever did anything that wasn’t recognising board authority. It was in my mind that this was a decision for Lotus Green, that the decision making didn’t require DCC and I didn’t have the authority. When I said to Ronan Godfrey (of Davy’s) ‘I don’t have the authority’, I meant that, I believed that, I knew that. That is why I wouldn’t have rung Neil McCann before the 3<sup>rd</sup> because once Lotus Green had made the decision and the increasing likelihood almost certainly that I would have had and very likely that there was going to be an offer. Certainly there would have been acceptance of an offer and there was likely to be an offer, and I felt that that was the right time to ring Neil McCann. Would I have liked on a personal level to have said it to him earlier? Yes, probably. In fact I felt a bit uncomfortable, quite frankly, going to meet them at the airport that in a way this was sprung on them. At 11 o’ clock that morning was the first he heard about it. In earlier

times I had written formally to him back in 1998 telling him that I didn't have authority on this. It is interesting, I formally told him in writing in 1998 that I wasn't on the board of the company that would make a decision about any sale, but that if I could tell him in advance, I would."

**Answer 318:** "There was one line in it (the letter) because I have it and I brought it up deliberately, Mr. Shipsey, because the third paragraph is a separate matter. This was 1998 now."

Mr. Flavin then referred to the Minutes of a meeting of DCC in May 1998 when there was a discussion about the appropriateness of relying on the Dutch directors of Lotus Green and secondly a letter that Mr. Flavin wrote to Mr. McCann informing him that the ultimate decision about the sale of the Fyffes stake would be taken by a company of which he, Mr. Flavin was not a director. "In 1998 I wrote that letter, not prompted by anything. There were other matters. That may be a long way round it, but you asked me would I have rung Neil McCann earlier, I wouldn't have rung Neil McCann in advance of a decision by Lotus Green." (**Answer 319:** Page 109).

Mr. Flavin was then asked was there really any possibility that when Fergal O' Dwyer went over to Holland with the recommendation that Lotus Green sell the shares that they are going to do anything other than that.

**Answer 322:** "Trying to be helpful about it, it is very interesting and I was trying to explain this morning that this whole question did I deal which really – if I was denying something and the tapes caught me out, not at all. Our whole challenge on 'dealing' was a legal point. If she (Ms. Justice Laffoy) said absurd and I presume she meant absurd at my actions, which we weren't denying, there was no doubt about what I did or what I said. We spelled those out. We argued that as a legal point those actions did not meet the criteria of causing, procuring or inducing. I have to say, Mr. Shipsey, personally as a layman I remember looking in the dictionary at what does 'cause' mean, what does 'procure' mean and 'inducing' and there seemed to be an active thing. I actually believe that I didn't do that with Lotus Green. I believed what I said was that I sort of acted as a



conduit. To be very frank on it, the only thing I ever did which might have been vaguely negotiation was actually talking about the preference dividend, the uplift. It was the only time I intervened, but curiously those preference shares never got sold as an aside.”

Mr. Flavin referred back to the question as to whether the board of DCC plc were responsible in delegating the execution of the strategy to Lotus Green. He believed that they were because, “they did it in the full knowledge that a corporate executive, a trusted Chief Financial Officer was going to be the A director and a buy or sell couldn’t happen without his agreement and in the full knowledge that of course he would know my view, but the distinction I am making...and I know people find this hard to believe but I was exceedingly careful, I gave Fergal no indication or advice ‘look you should do it’. I always remember being slightly surprised that they set the figure at €3.00 when he told me that, that was news to me, I had no hand, act or part. If he had rung me and said on the morning ‘we have set the price at €3.30 or €3.40’...I am saying I believe the risk that Fergal wouldn’t know and understand and be in like mind to me and the board of DCC knowing exactly what our strategy was, the chance of him going off into the board of Lotus Green and saying something entirely different to me I think was always very small. That is one thing, I can see that, but I am saying in relation to the acceptance of this offer I said nothing.” (**Answer 324 and 327:** Page 111 and 112).

“The facts are that offers came in unsolicited at €3.20 and Fergal knew that I would have been like a Cheshire cat back in the office, he and everyone. We said openly in the High Court and we all said we thought all our birthdays came at once. Then you (might) say ‘well, was there body language to signal (that)’ whatever and all I can say I was very careful at all times.” (**Answer 328:** Page 113).

Mr. Flavin disagreed on one point Fergal O’ Dwyer said in that he said that ‘Lotus Green was no different than any other subsidiary at the end of the day’. He explained that for all subsidiaries apart from Lotus Green the authority in relation to a purchase or a sale was €3 million. “Lotus Green was different than every other subsidiary... the €3 million (limit) didn’t apply to that. It didn’t apply to the sale of the Fyffes’ stake. To that extent Lotus

Green was different and Fergal maybe just didn't think about that at the time.” (**Answer 329:** Page 114).

Mr. Flavin was asked if the fact that Lotus Green was exceptional was there some weakness in that, in that somebody had to make a decision at the time to sell the Fyffes' stake. He was asked was it not the case that the trigger wouldn't have been pulled to even activate the process by which the shares could be sold, if he didn't give the nod to that. “I don't think that is quite right actually.” (**Answer 335:** Page 115).

**Question 336:** Do you not?

**Answer:** “No, because it actually happened in 1998. You just think about this, Mr. Shipsey. It is interesting and I hope there is not that much separating us. To be precise what you are asking, Fergal knew, and he didn't have the information on Fyffes, but in terms of the attitude to Fyffes and whatever, Fergal would have been picking it up. He was our corporate representative. DCC Corporate had its Chief Financial Executive in there as the 'A' director, so he was very informed, he knew that, he knew our strategy, he knew we were focusing on the 85% of our business if you like, that this was a market thing for sale. He would have known and we all knew that Fyffes' price would have been on the floor, it hadn't moved for years. Interestingly, when it did begin to move in early 1998, he went off. I didn't give him a direction to do that, he went off. He went off and did that. I did not give him direction to do that.”

**Question 337:** Went off where?

**Answer:** “He went off and had a Lotus Green board meeting to discuss the share price of Fyffes (in 1998).”

**Question 339:** ...That is July 1998?

**Answer:** “Yes. But this is picking up the point you made. Could he have done it? He did do it at that point. Did he have a sense? Would he have had a sense at that time or any other time? He would have instinctively known that both the board and me would have

had the view if the share price is going up, it might be the time to be thinking about getting out.”

Mr. Flavin was then asked if he knew that Fergal O’ Dwyer was preparing to go to Holland before he went to Holland in either 1998 or 2000.

**Answer 340:** “In 2000?”

**Question 341:** In 2000?

**Answer:** “Absolutely, absolutely. I believe I reported to Fergal every time I got a call from a broker, that has always been my recall...I do remember the first time it came up, going downstairs and I can remember talking at his door, and I was delighted to be getting these calls, but I had this concern in my mind the thing I always remember thinking was ‘God, some of those guys might be off skiing. Anything is possible because I knew some of them. I had this thing and I alerted Fergal to the fact that it is possible bids could be made and I just said ‘by the way is the board of Lotus Green around’ or I alerted him to the fact that he might need to react to an offer on the board of Lotus Green. I didn’t tell him ‘you better go and call a board meeting’. Of course he knew that it required a board meeting. He would have known what I was thinking. It is interesting, my state of mind, I was actually concerned as to whether an offer could come in and the board of Lotus Green hadn’t met and hadn’t considered it.”

Mr. Flavin was then asked to look at it from Fergal O’ Dwyer’s perspective.

**Question 342:** I am the CFO and I know what the policy is, that it is an anomalous non-core asset...you come down to me and you say “I am getting these expressions of interest”. I will probably be able to read something in terms of the way you are saying it, I probably will be able to tell if this is good or bad.

**Answer:** “I agree with you.”

**Question 343:** ...It looks as if my boss is happy with what is happening, this looks as if it is good...so yes, I know I am on the board, I am the A director, I have to actually physically do the going, but it would help at least if I had a signal from my Chief Executive to know that actually, if I do go, I am not going to be...criticised afterwards for it...?

**Answer:** "I am not denying any of that."

**Question 344:** ...So you can understand in that situation. You don't have to say anything to Fergal. Yes, Fergal has to make a decision. He can say 'I will go' or 'I won't go' but the probability...is that if he is picking up that signal from you, which is the signal you wanted him to pick up, if it was your decision, and accepting that it is not your decision, that he is going to go. If he is going to go and he is going to go and make the presentation to the board, and they are sensible people and they are being paid to do a job which is to manage Lotus Green until the right time comes to sell, they are certainly approaching the decision making process knowing what they know about it all and yes, they take the decision but you have to ask in your own mind how likely would it be or how likely was it that they were going to take (the decision) contrary to his view?

Mr. Flavin emphasised that the actual authority was with Lotus Green. He stressed that if Lotus Green hadn't actually taken the decision there would have been no transaction.

"I don't know what weight you attach to that but I personally believed that was where the decision making was. I completely accept, and I think it was very unlikely, and Fergal knew the corporate mind of DCC, we were confident, so I think the likelihood that Fergal would have, first of all, gone in and said something which was not in line or acceptable generally to DCC was very unlikely. In turn, I think the 'B' directors knowing the (information) which they received...they were very unlikely to go against what they thought was the corporate wish as expressed by the 'A' director." (**Answer 346:** Page 122).

Mr. Flavin was then taken through the documentation in the core booklet. His recollection is that the expressions of interest from the stockbrokers first came in around the 27<sup>th</sup> January. Mr. Flavin was referred to Tab 5 to a Price Waterhouse memorandum from Mr. van der Hoeven which read ‘it is considered by the DCC group that the share price of the shares held by Lotus Green in Fyffes plc has reached their full potential. The group is now considering selling those shares’. This memorandum is dated the 21<sup>st</sup> January.

Mr. Flavin said that this was not in connection with any expressions of interest as far as he was aware.

**Question 371:** Well, it is a mystery to you, is that right?

**Answer:** “Yes it is, yes.”

He was then asked to look at the letter from Mr. Roskam dated 31<sup>st</sup> January.

Mr. Flavin said that he is aware that although it was drafted by Mr. Roskam it was a letter which was suggested by Mr. O’ Dwyer. Mr. Flavin agreed that this was a tax ‘self serving letter’ in that from an optical point of view it was better that Henry Roskam was making the suggestion rather than Fergal O’ Dwyer.

He was then referred to the memorandum of his call with Alvin Price and was asked what motivated him to phone Alvin on the 31<sup>st</sup> January.

**Answer 377:** “Well, I said earlier it would have been my style if something significant is going on that I want to put Alvin in the picture, if you like, and particularly if it was Fyffes related. So that would have been a sort of sub-conscious thing. I cannot think that I deliberately thought that at the time. I am saying the trigger point, as I best recall it...is that the only thing in my mind of calling him was to talk, just to check again that DCC wasn’t caught by the Model Code for directors’ dealings which had been a long running debate, as you know from the last module, with Fyffes. That was the trigger for the phone call.”

**Question 378:** Yes that seems to be supported by the order in which the file note is drawn. If you look at the first paragraph.

**Answer:** “Yes.”

**Question 379:** ‘Want to be advised in relation to DCC’s freedom to sell shares at this time. It was not dealing by a director that was involved but rather a dealing by the company itself.’

**Answer:** “Absolutely, yes.”

**Question 380:** “DCC plc was not a connected person of him.” I will ask Mr. Price about this but if he is taking notes of the conversation and jotting things down and then doing a file note, you would imagine that he would do it in the sequence in which the discussion occurred.

**Answer:** “Yes.”

**Question 381:** So that seems to bear that out?

**Answer:** “Yes.”

**Question 382:** Now the next sentence, though. “He said that he had examined...” this is you. “He examined his conscience with regard to any price sensitive information and felt he didn’t have any.”

**Answer:** “Yes.”

**Question 383:** I mean that can arise in two ways; Alvin could have gone on to introduce the whole price sensitive issue.

**Answer:** “And I believe he did.”

**Question 384:** All right. But whether he did or he didn’t, I suppose the only difference is that if he did, it is not you ringing up with a troubled conscience and looking for counsel from Alvin on it, it is something that you respond to?

**Answer:** “Yes, yes.”

**Question 385:** But in terms of the way that is phrased there, is that likely to be your language? I mean, if I am Alvin and I said “well Jim you know...” (Interjection).

**Answer:** “I don’t think an awful lot turns on it, but in fact I did say in the High Court when I saw this note, look is it possible I used those words? I never thought and I said it in the High Court, I don’t think I used those words, ‘I have examined my conscience’ I don’t think I would have said it.”

**Answer 386:** “...It is like he asked a question and he is writing down the answer, I think. Anyhow maybe I am not right in that but certainly, if I used that word I don’t think anything turns on it but I don’t think I did. I believed that he asked: ‘there is nothing price sensitive?’ ...Alvin Price was probably a person, I have always known him as always very conscious of price sensitive information, insider dealing. It is an issue that he has often raised over the years. Not often, whenever. It was something he was very conscious of. I guess one of the reasons, to my knowledge, is that he has been an adviser over the years to the Irish Stock Exchange so perhaps that was something that he was aware of.”

**Question 387:** Yes but whoever raised it, it is clear that there was a discussion and a discussion to the extent that you were invited, if he asked the question, to give a view as to whether you did or didn’t have price sensitive information.

**Answer:** “Yes.”

**Question 388:** For that, you had to think, presumably, well, what am I doing? How am I involved in this transaction and what about what I know could have a connection with it? I mean, the way the mind works and if you are examining your conscience about a decision taken or not taken, a decision you are asking, can I or can’t I, is that fair that that would have gone through your mind?

**Answer:** “Well, the comment I made a few Minutes ago, I think it was very instinctive and the comment I made a few Minutes ago about it being a very busy time. It wasn’t that the only thing I was doing was managing Lotus Green, which I believe I wasn’t and thinking of only Fyffes and thinking of this...things were moving fast and I probably

thought, 'gosh I should ring Alvin', and rang him and cleared that point but there wasn't a directors dealing and he raised this point and I would have said very fast, whatever, no, I don't you know. I went on to talk about, and I only recall the conversation because I know what is written down, I would have gone on to talk about, 'look, they have just announced results and they are out advising the market bringing the market up to date'. My general recall, I am aided by this note, is that Alvin readily agreed that, 'look, yes, it is very early and all the rest. The market is likely to know as much as I do. It is up to date'...if this conversation was taking place say again on the 15<sup>th</sup> December, Alvin probably wouldn't have asked the question at all, or the conversation would have lasted half a second. If the conversation was taking place the following day or just before results were to be announced or something, it could have been a longer conversation. I guess that Alvin would have known, because he was an experienced person like I, that it must be very hard to have price sensitive information very closely on following a company bringing the market up to date, somewhat early in the financial year. So it is understandable on the one hand where I instinctively and quickly and knowing for definite that the company didn't think it was a price sensitive time and so therefore I didn't have any doubts that I had price sensitive information. It would take very few comments from me to Alvin for him to readily appreciate that as well. But I think at the same time it is important, in case the impression is given that I rang up Alvin to do a compliance process, to go and find out did he think I had price sensitive information. Clearly, I didn't do that. I was just sharing a couple of key points with him and that is all."

**Question 389:** So you are saying that it wasn't for compliance reasons that you were on to him?

**Answer:** "Sorry, it was for compliance. My primary motivation was for compliance. Well, in fact for compliance reasons I think the only motivation actually was the directors' thing. I may say this against myself, or how you judge it, but I don't believe I picked up the phone to Alvin for the purpose of insider dealing legislation. I think he raised that."

**Question 390:** Did that never cross your mind?



**Answer:** “But you see, would it have subsequently crossed my mind or something, or whatever, would I have thought of that? I don’t believe it did for the purpose of this call. It is for you to judge, Mr. Shipsey, but you know I can’t stress this point enough about the absolute supremacy of a company’s own view and the absolute obligations both legal and Stock Exchange, the Model Code and Stock Exchange, Yellow Book and all the rest of it, the company to without delay, (in) a matter of days to bring the market up to date. I confirm again that the first responsibility rests with the executive directors of the company to call the board and inform the full board and the non-executives. So your question seems to pre-suppose that there is a risk that it is price sensitive. Once there is a risk you can see a trigger to check something. I know this is difficult for me to get across in the light of the fact of what the Supreme Court found and all that subsequently happened but what is lost out on, things subsequently happened that were not expected to happen. I mean, Fyffes’ business went from bad to worse to awful which was not expected to happen. So I regard myself and I think others said it, I regard myself as a careful person.”

When asked again if there was any downside to phoning Neil McCann, Mr. Flavin said there was one potential downside. “And that is we would have got back in to an ‘argy, bargy’ about whether the Model Code for directors’ dealings applied to DCC plc.” (**Answer 399:** Page 140).

“...If it happened again, who knows. But in terms of Fyffes ability later to come after you, if you had consulted them beforehand, I mean a day or two beforehand and said, ‘listen, you know, we are thinking of selling and what is your view in relation to my being in receipt of price sensitive information?’ It is interesting, Mr. Shipsey.” (**Answer 401:** Page 140).

**Question 402:** I know you might say what is the difference between doing that on the 31<sup>st</sup> or on the 3<sup>rd</sup> but there seems to have been a difference from the Judge’s perspective?

**Answer:** “I contacted him around 11 o’ clock on the 3<sup>rd</sup>...if he suspected that it was potentially price sensitive that it required not just an announcement but in fact was potentially something we need to start thinking about...his responsibility...was to pick up

the phone to me and say ‘Jim, look we are a bit worried. Things have changed a bit since the board meeting of the 9<sup>th</sup> December’...but you see I wasn’t going through all those, that is a bit of a rationalisation now but I wasn’t going through all those thought processes. What I was very clear on was that I believed absolutely, at the time, that they didn’t think that it was a price sensitive time. The High Court, Judge Mary Laffoy having seen it, put it down very clearly that there wasn’t a screed of evidence to show that they thought, anyone in Fyffes, contemporaneously thought that I was in possession of price sensitive information.”

Returning to Mr. Price’s note of the conversation on the 31<sup>st</sup> of January Mr. Flavin was asked if he agreed that the value of that advice is contingent or dependent upon how forthcoming or how accurate the information is that he relayed to him.

**Answer 404:** “Yes I accept that yes.”

**Question 405:** I am just wondering here where you say ‘he did mention it to me that the company’s year end’ and that ‘to his knowledge the first two months trading had not been all that wonderful’. ‘Not all that wonderful’ is a little bit vague. Now maybe you were more specific than that.

**Answer:** “I think they would have been my words actually.”

**Question 406:** Yes.

**Answer:** “Those words sound familiar. Again, to put it in context, I wasn’t asking...I mean this wasn’t a compliance process. Sorry, this wasn’t an examination that I was asking or Alvin was asking me to second guess Fyffes. I keep stressing that. He just brought it up. Are you happy that everything is all right price sensitive wise? I said, ‘yes, yes’. ‘Start of the year, have the accounts for the first two months not too wonderful or whatever’. You know, it wasn’t an awful lot more than that because I wasn’t going on to do that and we seemed to readily agree and I always had the sort of thing that this whole point about it being very early in the year and the market being brought up to date and Mr. Gallagher put it to me in the High Court, ‘do you think you got clearance’ and I actually

challenged in a constructive way the word ‘clearance’, because nobody could every get clearance and we now know that in the light of the Supreme Court judgment. But I did say that I drew some comfort even though I didn’t give an awful lot of – I believe the fact that a conversation between us and my knowledge of Alvin and his experience in these matters that he didn’t sense there was a need to go on to more inquiry because it was early in the year. That was a key thing, you know. It just ended there. So I drew some comfort from it.”

**Question 407:** Would it be fair or unfair to suggest that you were not wanting Alvin to find a problem for you?

**Answer:** “No, I think it would be unfair.”

**Question 408:** Would it?

**Answer:** “Yes, it would yes.”

**Question 409:** I mean, this is when the whole tension that we were talking about (arises). There is a chance to make 80 million in profit for the DCC group. No profit warning has been issued by the Fyffes’ people.

**Answer:** “Yes.”

**Question 410:** Is there not an understandable or was there not an understandable human tendency for you to minimise that?

**Answer:** “Look, I loved the idea that DCC was going to make a bit profit, possibly. I also loved that the opportunity had come for me to get off the board of Fyffes. All I can submit to you is that I would ask you to look at the totality of the way DCC operated and the way I operated. I would hope you would accept that it would be completely out of character of everything I had every done in DCC and the way I have operated.”

**Question 411:** To take a shortcut?

**Answer:** “So suddenly take a blind eye and put myself totally personally at risk for DCC to secure (they weren’t even my shares, I know I would have benefited as a shareholder to

some extent) but the way I see it – look, I mean, you will have to come up with that judgment. If I thought I had price sensitive information there is no way I wouldn't have done more about it. Like, I cannot say any more or less than that. I can ask you to look at the Compliance Files that have gone on here since 1990 or anything you have seen, the style of DCC, but if I could just – I believe I would have been responsible on that matter, it is as simple as that – much and all as I would have very much regretted not seeing that profit.”

**Question 412:** Yes. Now the last bit - we then went on to discuss the company's attitude to such a sale at that time and Mr. Flavin was unclear as to whether the company would find the sale of the shareholding a positive or negative development.”

**Answer:** “My instinct would have been that they would have been delighted to see the back of me.”

**Question 414:** Why would you tell Alvin?

**Answer:** “I don't know. These things all happened very fast. I might have, maybe I suppose if I had sat down, if he had asked me go away and think about that, would you come back and let me know, I probably would have said, they probably would be glad to see the back of me, but you know, it gets all magnified now but it was...”

**Question 415:** It didn't assume that importance at the time.

**Answer:** “Why would I put my whole reputation and career with DCC. I mean, of course we wanted out of Fyffes but we didn't want to throw DCC upside down. You know, I would had to have taken leave of my senses to go blindly on if I thought the information was price sensitive.”

**Question 416:** Yes, but short of, and certainly there are express findings that there was nothing wilfully done or anything like that...but there can be an absence of sufficient care and that can be from the most minor extent down to something that is...

**Answer:** “But you know, I thought it was helpful, but when the profit warning came out I was very concerned, not that I would end up in this but I was very concerned about the optics of that, that people are going to say six and a half weeks later.”

**Question 417:** Yes, of course.

**Answer:** “As they did, ‘Flavin sold his shares’, and I had walked off with 106 million. I was very concerned about that. In fact as you well know, of course – you know I would have thought that it was positive that I had shared something, even albeit at Alvin’s instigation, something in my state of mind at that time and had initiated, if you like, a state of mind thing with Michael Scholefield, that that at least demonstrated that I had been responsible. You know, whatever inadequacy you might perceive with respect about the compliance role process that in fact it was...” (Interjection).

**Question 418:** It was better than doing nothing?

**Answer:** “It was, actually, it did demonstrate that not only had I thought about it but I had shared the fact and put on record that I had thought about it.”

## **Day 2**

Mr. Flavin was asked if the conversation which he had with Alvin Price was what prompted him to contact and speak with Michael Scholefield. He said he thought he would have gone to Michael Scholefield anyway but perhaps not on the 1<sup>st</sup> February. (Answer 6: Page 5).

**Answer 7:** “Perhaps Alvin’s prompting it put it in my mind, but knowing the compliance process we have, and as I mentioned before, I was Chairman of an English public company called Greenway Holdings where something sort of similar was arising and I went to Michael Scholefield, and it is on the record and a very similar sort of compliance process.”

**Question 8:** Yes.

**Answer:** "...I would have recognised that some form of compliance...process was appropriate for DCC plc. in the sale of its stake in Fyffes. I would have known that."

**Answer 10:** "But perhaps I accelerated that conversation with Michael by virtue of my conversation with Alvin. It might have."

**Question 11:** Yes.

**Answer:** "It might have taken place after Lotus Green. Otherwise it might have taken place after Fergal O' Dwyer called me that Lotus Green had made the formal decision."

Mr. Flavin was then asked to look at Michael Scholefield's notes. "Fergal O' Dwyer has informed Jim Flavin and myself that the directors of DCC Lotus Green Limited may be considering realising the company's investment in Fyffes' plc". Mr. Flavin was asked if he agreed that the reference to Fergal O' Dwyer having informed himself and Michael Scholefield that the directors of DCC Lotus Green may be considering realising the company's investment in Fyffes' plc was overstating the position. He answered, "look, it is not factually correct. It is there I believe, for..." (Interjection) (**Answer 13:** Page 6).

**Question 14:** Optical?

**Answer:** "Tax things I think."

Mr. Flavin explained that he would always have been concerned that if a DCC group subsidiary sold stock of Fyffes and it turned out that it had price sensitive information, there would have been a problem about that.

Mr. Flavin agreed that if the decision to sell the shares had been a decision for the DCC plc., board as opposed to Lotus Green that there would have been a compliance process undertaken with Michael Scholefield and "having done that, I think I would have done the same with the board of DCC plc". He went on to say that it was most unlikely that anyone would have said "have you trading price sensitive information?"

**Question 45:** Yes but just by comparison Mr. Flavin, you may well say, and it may be true to say, that the outcome would have been no different, but if we just park the likelihood or unlikelihood of the outcome being different, but is it not likely that if it had been brought to the DCC board?

**Answer:** “Yes.”

**Question 46:** Even if the ultimate decision was to be a Lotus Green one, that you would have gone, that there would have been at least an opportunity for the board of DCC in Dublin to question or to scrutinise the information that you had and whether that posed any impediment to Lotus Green selling it?

**Answer:** “I mean I have to accept that it is true that it would have afforded them the opportunity to consider it, that didn’t arise because of the delegation to Lotus Green.”

**Question 47:** Yes.

**Answer:** “But it is a judgment call. I would be 99.9% certain.”

**Question 48:** Yes.

**Answer:** “The conversation would have been very similar to what took place with Michael Scholefield, and it would have been very similar.”

**Question 51:** But in terms of playing it back in your mind do you every think “well, you know, I wish I had actually been more formal about it with the board”, even if you believed that the outcome was going to be no different?

**Answer:** “Well no, I mean, sorry not to repeat something I said yesterday, but I just stress I really have thought a lot about that question...and I am quite clear in my mind that no compliance process, no correct and responsible compliance process actually would have prevented me from being seated here today.”

**Answer 52:** “Because the only compliance process that could have prevented it was some compliance process which resulted in DCC or the board of DCC saying ‘Fyffes have it all wrong. They don’t know their business. Of course it is a price sensitive time. There is

not going to be further growth. We know much more than the executives of the board of Fyffes'. To me it is nearly a ludicrous proposition. They wouldn't have. It is only if they thought the board of Fyffes were fools, or were fools. So the only answer and I really do regret...I do regret that the logical situation back in 1995 and with the window of opportunity again maybe we all thought about it formally in 1998, the logical opportunity was to do precisely what you said yesterday, and for me to go off the board of Fyffes...Or in the alternative, as I mentioned, and we probably would have picked the alternative seeing as there was an alternative, to do this 'ring fencing' that was wholly provided for under the law."

**Question 53:** Yes under Section 108(7)?

**Answer:** "As I said to you yesterday, it is very interesting and I am kicking myself in a way because that is not just a theoretical exercise. It is very practical because Michael Scholefield sent me a Memo to that very effect in 1995, drew my attention to ring fencing."

**Answer 54:** "I don't think anything I could have done or the board of DCC, compliance wise, any reasonable consideration of what might have been done compliance wise would have stopped me sitting here today."

When it was then suggested to Mr. Flavin that what he might have done when he received a phone call from Kyran McLaughlin of Davy's that he would have explained to him that because of his involvement with Fyffes that he was going to delegate it to his Chief Financial Officer, Fergal O' Dwyer, Mr. Flavin answered.

"Well I find that a much more plausible thing and perhaps I should have done that."

(**Answer 60:** Page 17)

**Question 61:** Yes,

**Answer:** "As I said in the High Court, and as I'm saying here again, everything was instinct. If somebody had said to me 'by the way you are going to get a phone call from



Kyran McLaughlin and whatever and when you have had time to sit down and think', I instinctively reacted to Kieran on the phone and said it in the High Court because I could remember, you know, instinctively and I am a commercial animal. I cannot deny that."

"...I didn't know what the call was about when he came on. So we were into a conversation where he is indicating to me. So I had to, I sort of made an instinctive reaction immediately at that point, if you think about it, at that point I could have said just like you have said 'oh Kieran...I am on the board of Fyffes, look I have no authority on this'. 'Look actually, I have no authority in this matter. The board of DCC have delegated the decision to Lotus Green you should contact, well actually Fergal O' Dwyer is a director of Lotus Green, you should contact him'. Now that is something else I probably should have done. In fact that perhaps would have been helpful because, you know, I probably or mightn't have been sitting here then because I mightn't have been engaged or held to have been engaged in dealing. But my instinctive feeling was and I cannot say...but I mean I made an instinctive call and I probably made the wrong call."

Mr. Flavin explained that Mr. McLoughlin was upset that he, Mr. Flavin, had allowed Goodbody's to become involved. "We did have a difference. He would have been upset they didn't get the business, and I would have had a view that if it had been under my control he wouldn't have got the business at €3.00 anyway." (**Answer 89:** Page 26).

He agreed that the information that he relayed or discussed with Michael Scholefield on the 1<sup>st</sup> was broadly similar to what he discussed with Alvin Price on the previous day "a little bit more complete maybe." (**Answer 92:** Page 27).

[Mr. Flavin stated, as an aside, that of the 22 counterparties who bought the DCC shares in Fyffes in February 2000 only 4 of them, 2 Irish and 2 American supported Fyffes in the insider dealing claim.]

Mr. Flavin explained that he felt constrained from a confidentiality point of view in disclosing information to both Alvin Price and Michael Scholefield. "I didn't volunteer

the accounts.” (**Answer 125:** Page 41). “But I gave the broad building blocks of why I believed I didn’t have price sensitive information. In fact the key elements are there, you know. The key elements being I got no new information. The information I got came as no surprise to me. It was aligned with what was known to the board of Fyffes on the 9<sup>th</sup> December.” (**Answer 126:** Page 41).

He explained that he walked out of the Fyffes’ meeting on the 9<sup>th</sup> December knowing the first two months and indeed including January would be very poor months.

Mr. Flavin was asked if the constraint he felt in relation to confidentiality made it more difficult for Mr. Price and Mr. Scholefield to assist him as opposed to agreeing with him. If Mr. Price and/or Mr. Scholefield had known the magnitude of the losses as opposed to the more elastic expressions that were used “not too good”. Do you think that they could have or do you not think they would have been in a better position...a more informed position to agree with you rather than or to form some better assessment. “Yes.” (**Answer 140:** Page 44).

**Question 141:** I mean there are a lot of judgment calls there that you have got to make ‘can I breach confidence or do I not’?

**Answer:** “If they had the accounts, yes, it would have helped...With no disrespect to Alvin he wouldn’t have been the relevant person. I mean it wasn’t a legal thing. This is very much a commercial judgment. So it is more relevant to Michael Scholefield.”

Mr. Flavin also referred back to an incident in 1997 where a Fyffes profit warning had issued at his instigation and it turned out that Fyffes had a brilliant second half and Fyffes way exceeded market expectations in 1997. When it came to the board meeting of Fyffes in December 1999 the first draft of the Stock Exchange announcement said, “it is going to be another excellent year of growth.”

Mr. Flavin queried whether they should be saying “excellent” and it was toned down to a ‘year of further growth’.

“When I was talking about the need to tone this thing down I looked at Neil McCann at one point and I said ‘are we happy now we have this, have we got the balance right, are we happy it is going to be a year of further growth?’. He looked at me and he said, ‘Jim, remember 97’ and I was always the fall guy who brought the share price down and up and you know because it turned out (that that) profit warning wasn’t necessary. Well actually, it was by the way, but in fact with hindsight it wasn’t necessary, it was necessary at the time and I always remember feeling that was a put down and it is a thing that often came up, but it really reminded me of the unimportance of the first quarter and the volatility of, well not only the first quarter, you know, unimportance of short term trading results in Fyffes and the volatility of the business. It was somehow etched in my mind. I am just saying that, that was in my mind.” (**Answer 149:** Page 49).

[Mr. Flavin then explained the slight inaccuracy in Mr. Scholefield’s note in relation to the information that he Mr. Flavin had on the first two months of the year]

Mr. Flavin was asked if he had any involvement in preparing the memorandum that Fergal O’ Dwyer prepared for the board of Lotus Green.

**Answer 182:** “Absolutely not.”

**Answer 183:** “... I can say to you, you know, absolutely, that from the moment Lotus Green was set up I stayed a million miles away from it. I never engaged in anything to do with Lotus Green. I just absolutely was always conscious that was hands off...I was always conscious that it was Fergal’s baby.” [Mr. Flavin made a point about not being caught out by the Stockbrokers tapes]

Mr. Flavin said that the only prson on the board of DCC with whom he discussed the calls coming in from the Stockbrokers was with Alex Spain and he believed that there was only one call. “He was the first person I told”. He said he had not spoken to any of the non-executive directors beforehand. (**Answer 213:** Page 65))

Mr. Flavin explained that once he heard from Fergal O' Dwyer that Lotus Green had made a decision to accept offers and believing the deal was likely, he immediately asked Michael Scholefield to do a first draft of a Stock Exchange announcement. Mr. Flavin maintained that he was the conduit for the brokers, he was orchestrating the DCC plc., requirements and dealing with Neil McCann, and Fergal O' Dwyer was dealing with all the Lotus Green things. (**Answer 226:** Page 68).

He explained that there were a whole series of things that Fergal was controlling for example the decision whether to sell the whole lot or 50% and whether the preference shares would be sold with delayed delivery. (**Answer 227:** Page 69).

He maintained that he was doing the things that he should have been doing. The relationship thing with the McCanns and the Stock Exchange plc., announcement things and the recipient of the broker calls. (**Answer 228:** Page 69).

Mr. Flavin also referred to the issue of the witnesses who were not called in the High Court. "I think it is helpful to you and to this enquiry so I would like to give transparency to it because I know from something you raised earlier, from earlier days that I would like to tell you precisely why Alex Spain and Paddy Gallagher weren't called. I very much wanted...them all called because..." (Interjection) (**Answer 229:** Page 70).

**Question 230:** And I think in the course of your evidence (in the High Court) you said that they would be?

**Answer:** "Absolutely."

**Question 231:** Am I right on that?

**Answer:** "Exactly. You might be sitting there thinking that this was some tactical thing that the lawyers – that the lawyers advised them, gosh we won't let Alex Spain in, he might say the wrong thing or he mightn't suit our case. The matter is very simple. I actually believe that Alex as well as Paddy and Tony, would have been very helpful in

confirming what I believe was the reality of Lotus Green, confirming that they had no involvement, no information, no nothing on the 3<sup>rd</sup> February 2000. During the case, having heard me, having heard Morgan Crowe, having heard Fergal O' Dwyer and all the rest of it..."

**Question 232:** Tony Barry did give... (Interjection).

**Answer:** "If I may, before he came, Laffoy J. looked down at Kevin Feeney and said 'How many more times am I going to have to listen to this, Mr. Feeney?' Later Kevin Feeney said to me 'Look I am not going to call them. She just doesn't want to hear any more of this so I am not going to call them'. I said 'we can't do that'. I actually had quite a debate with Kevin Feeney about the whole thing and he said 'well all right, listen we'll have one then, so we'll have one'. So we had a discussion as to who – you know – you might automatically think it should be the Chairman just being open here. We had a discussion and we had a sort of view that Tony Barry was a man of, you know, he just had a stature and he had an understanding, I think, that maybe if we were picking one that he'd go in. So I was most disappointed that they didn't get – so there was nothing tactical or legal. In relation to – this was very interesting – Fyffes listed Roy Barrett as their witness, the Managing Director of Goodbody Stockbrokers. They backed down on calling him. We decided to call him. So we hadn't listed him at all but we called Roy Barrett in the absence of Fyffes deciding and Roy Barrett was probably one of our best witnesses. Now, this is the man who represented and who sold on the stock to 70% of the purchasers, you know, and we were delighted that he gave evidence. I don't know what weight the Judge attached to it but it seemed to me to be very helpful evidence from our point of view. So interestingly, Kieran McLoughlin, neither of us called him. The issue about Kieran was, just to be very transparent, Davy's are brokers to Fyffes or they were and are and were brokers to DCC and I knew and we all knew that Kieran didn't want to know, he didn't want to get involved in this. So we didn't call him. It was as simple as that. It was not for fear of something he would say, but he just didn't want to be there."

**Question 234:** But that wouldn't have stopped Fyffes calling him.

**Answer:** "No, but, sure they backed down from calling..." (Interjection)

**Question 235:** Roy Barrett?

**Answer:** “They had a choice of listing both of them and obviously Kieran made it clear to them that he didn’t want to be there and they didn’t call him and they didn’t list him but they did list Roy Barrett.”

It was also explained that there had been a witness statement submitted for both Alex Spain and Paddy Gallagher but not for Kyran McLaughlin.

Mr. Flavin was then referred to the board meeting of the 7<sup>th</sup> and he was asked what he could tell us about the discussion that took place on the 7<sup>th</sup>.

“...I have a vague recollection we were all congratulating ourselves, isn’t this wonderful. We were so pleased, so pleased, I mean, not in our wildest dreams did we think that we were going to, I mean if somebody had said to me driving out of that board meeting on the 9<sup>th</sup> December 1999 by the way, by the 14<sup>th</sup> February the DCC group will be out of Fyffes, would have realised €106 million cash and have a profit of 85 million, I mean, it just was a convergence of the unbelievable.” (**Answer 239:** Page 75).

He explained that in the days following the first sale Roy Barrett continued to phone him expressing interest but that they never heard from Davy’s. It went very quiet.

**Question 243:** After the 4<sup>th</sup>, no Davy’s? Radio silence?

**Answer:** “Radio silence for a while, we were in Coventry. It was Roy Barrett kept phoning and we just listened to what he had to say. So I knew that and don’t forget this is the 7<sup>th</sup> and, you know, there was a call on the 8<sup>th</sup> making a bid.”

**Question 246:** Did it ever occur to you on the 7<sup>th</sup> that you’d inform your board about the discussions you had had with Alvin or Michael on the connected party and price sensitive information issues?

**Answer:** “No it didn’t. I mean, I am certain I didn’t. I would remember had I done it. You see, I do understand as the inquisitor, you would say, ‘look, this thing turned out to be

price sensitive, did he not really', like, I hope it is plausible that I really didn't think that there was an issue here."

"...I think I covered the main building blocks (with Michael) and I think I gave him sufficient to know that it didn't require further enquiry...so there was no – it just wasn't an issue in my mind really." (**Answer 248:** Page 78)

**Question 249:** Yes.

**Answer:** "Actually, if you just think about it, which gives me an opportunity to say it, I would have been reinforced in that view by the 7<sup>th</sup> by the very fact that Neil McCann had written to me on the 4<sup>th</sup> February. Not only had he bought the bottle of champagne on the 3<sup>rd</sup> but, this, I could never understand how it was never given more weight by the Supreme Court that Neil McCann wrote to me on the 4<sup>th</sup>..." (Interjection).

**Question 250:** And said all was well for selling the rest... (Interjection).

**Answer:** "Yes. I mean if I had written a letter on the 4<sup>th</sup> February to Fergal O' Dwyer or an internal memo saying well done on the sale yesterday, that's terrific, Lotus Green has done a smashing job it augers well for the rest and, actually, I hope you will sell the rest because we don't want to be stuck with these further shares – do you think for a second I would have gone into the Court and said I didn't cause or procure, or didn't deal? So, to me, I think Neil McCann did nothing wrong but to me it is patently obvious if I dealt these shares which were not my shares they were DCC shares I think Neil McCann, Carl McCann, David McCann because they all knew that letter, they all supported that. I mean, they were more active in causing and procuring it can be reasonably, plausibly argued because of writing a letter encouraging further sales which I never did to Lotus Green, on these shares with the same information. What is the result of all of this? I am sitting here, reputation in tatters, DCC money down, DCC Executives distracted hugely, shareholders suffering as a result. Fyffes are sitting with cash in bank. I mean, I am sitting here thinking this is crazy."

**Question 254:** Was there any doubt in your mind they were the suitor, that the brokers were the ones coming looking rather than DCC?

**Answer:** “Oh, it was black and white that these offers were unsolicited, totally. I mean, Roy would confirm that to you totally.”

Mr. Flavin explained that once the first tranche of shares were sold on the 3<sup>rd</sup> he would have felt it was appropriate for him to offer his resignation but he did say to Neil McCann that he would go at a time that entirely suited Fyffes and if it suited for him to go at the AGM he’ll go at the AGM.

**Answer 269:** “Well, I wasn’t running out the door. Gosh there might be a profit warning and I want to get out of here.”

**Question 270:** Yes.

**Answer:** “I was very comfortable.”

**Question 272:** I am just wondering, now that you mention that, I take it that the board meeting of Fyffes before the AGM took the decision on the profit warning.

**Answer:** “That’s right.”

**Question 273:** And you were not part of that decision?

**Answer:** “No. Not at all, no.”

**Question 274:** “Had you been a part of that decision you would have been in a position to argue against it?”

**Answer:** “In a position, yes, but I certainly wouldn’t have. I mean absolutely not.”

**Question 276:** But let’s say you had gone to the March meeting and...a discussion arose about whether there should or should not be a profit warning?

**Answer:** “I would have had a very clear view there should be. I mean, the circumstances of the trading in February or March was such, it was very akin to 1997 actually were such



that things had moved on from being the unimportant first quarter to the very important months of February and March and (they were) very poor.”

**Question 277:** Just in that scenario, you have sold your stake and they are going to make a profit warning?

**Answer:** “Yes.”

**Question 278:** Now, had you been at the board meeting?

**Answer:** “Yes.”

**Question 279:** Discussing the making of a profit warning?

**Answer:** “Yes.”

**Question 280:** It couldn't have escaped your notice that a profit warning from Fyffes now is a terrible, terrible thing?

**Answer:** “Absolutely. But, sure, even without the board the day I went to the AGM and I heard about the profit warning, I was very concerned.”

**Question 281:** I am coming on to that, but I am trying to just... (Interjection).

**Answer:** “Of course I would have been, but I suppose it would have evolved into it because there were board meetings of Fyffes in between. There was one in February as well and...” (Interjection).

**Question 283:** Would you not have been able to, I mean, even if you came down in favour of the profit warning to say, ‘but listen here, you were aware that this stake was sold by DCC on the basis of information, you are going to have to make this perfectly clear that insofar as your announcement is concerned, what you are talking about is February and March’...in other words that the statement might have been worded to say ‘listen the first two months weren't of significance but the fourth and fifth are now of some significance’. Do you follow me?

**Answer:** “I do entirely but, with respect, Mr. Shipsey, no, because back to this thing about obligations to make a profit warning, I and, in fairness to the directors of Fyffes I think they were all very clear of what the obligations were, that you make an announcement just as soon as you believe there is changed expectations...No, I wouldn’t have been wanting to draw all those distinctions because it is the cumulative thing you are concerned about not...” (Interjection).

**Question 284:** Had you been on the board or, let’s say, you were drafting the Fyffes, I mean it was an announcement made at the AGM?

**Answer:** “Yes.”

**Question 285:** So I don’t know when the board meeting was before that?

**Answer:** “Sure.”

**Question 286:** Do we know when the board meeting was before the 20<sup>th</sup> March?

**Answer:** “There was one in February after that was it late February, I think.”

Mr. Flavin then explained that Fyffes set out for the Stock Exchange, the chronology of events leading up to why Fyffes issued a profit warning on the 20<sup>th</sup> March and why it was appropriate, what was the trigger for it, why that was appropriate at the time. It is a perfectly rational, reasoned thing. You know, it sets out very clearly and it is all about February and March and then their view, actually, including their preliminary views of April, even though the month hadn’t started but the outlook I suppose and forecast ...

**Question 290:** Yes.

**Answer:** “And it was sent to the Stock Exchange and they said the process started on the 10<sup>th</sup> March. That Frank Gannon, if my memory serves me right, for the first time due to some information he got from the Financial Controller of the banana division, the trading results were such that, gosh, we are now at a cumulative stage where we’ve got to start thinking about (a warning).”

**Question 292:** So you had no disagreement with that?

**Answer:** “No, no I think they did it very well. In fact it ended being pretty close to what we did in 1997, you know. I suppose they would have been conscious that I was, you couldn’t go rushing out making a profit warning when you have to be satisfied that if the scale is tipped, more likely than not you are not going to make and there is a real possibility that you are not going to make your market expectations. I mean, at any time of year, a company is always at risk that they won’t make market expectations if certain things go wrong.”

**Question 293:** Sure.

**Answer:** “But if you were in a position where you can forecast a reasonable – not probable, but even a real possibility that you are going to disappoint the market, you should caution them because, otherwise people are going to be trading on false premises, if you like.”

**Question 294:** Yes.

**Answer:** “That is something we took very seriously in DCC and indeed I said that in the High Court and somebody asked me, well, can you produce a process in DCC and whatever happened and, thankfully, I was able to produce a very good process.”

Mr. Flavin then said that he went to the Fyffes’ AGM on the 20<sup>th</sup> March both because they were still a preference shareholder but also out of respect for Neil McCann. I had been at the AGM for 20 years. I didn’t want to say ‘bang’ and then you weren’t there. I went, he explained that he went and sat beside Mary Finan who was DCC’s and Fyffes’ PR and she said to him ‘well, what do you think of the profit warning’ and I said ‘what’, she seemed to think I would know or something. You know, I was very surprised. But I was sort of shocked and I think instantly the penny dropped with me, oh God... (Interjection).

**Question 300:** This is going to look awful?

**Answer:** “Yes ...”

**Question 303:** Did you have any conversation with Neil McCann about it, about the profit warning?

**Answer:** “No, you see, this was busy AGM day. At the end of the meeting, actually, I went up and shook hands with him. There was a photograph of he and I in the Irish Times the next day, me shaking hands and talking to him at the end of the AGM...”

“In fact, I wanted to just go and say hello and I just stepped up on the platform and talked to him. There was a photograph of the two of us talking...I do not recall what I said.”

(**Answers 305 and 306:** Page 92).

When he returned to DCC House that afternoon he has a recollection of talking to Morgan Crowe who had his office next to his.

“I think I would have shared my concern with him, I just don’t know. At some point, and maybe it’s the next day, at some point I recalled my conversation with Alvin and rang him and wondered had he put any memo to file on this. The motivation for that was that I wanted to find out had he recorded the fact that I had considered this thing...” (**Answer 309:** Page 93).

**Question 310:** Sure.

**Answer:** “And had concluded it wasn’t price sensitive that I had reasons and what was in my state of mind at that time.”

**Question 311:** Sure.

**Answer:** “It was no more than that. In fact, when I was ringing him, I wasn’t expecting to hear that he had a memo to file or whatever. I was quite pleased. I remember him saying ‘oh yes’ in fact, I don’t believe I rang him to know did he have a memo to file. I think, I rang him to know did he recall, what did he recall of the conversation and I think he told me ‘I have a memo on that’. I think that is how that happened and I have sort of a recollection of being very pleased about that and asking him for it.”

**Question 312:** He sent you a copy I think, is that right?

**Answer:** “Yes.”

**Question 313:** You also arranged for Mr. Scholefield to get you a copy of the Fyffes’ Stock Exchange announcement from the AGM?

**Answer:** “Yes, I presume so.”

**Question 318:** So you were pleased that you had done this or that Alvin had a memo?

**Answer:** “I thought it was helpful yes.”

**Question 319:** Did you speak to Michael Scholefield about your conversation with him on the 1<sup>st</sup>?

**Answer:** “I’m sure I did, but I can’t remember.”

He then explained that there was a DCC board meeting on the 27<sup>th</sup> March and was asked was there anything in his Chief Executive’s report about his concern over the Fyffes’ profit announcement.

**Answer 325:** “I can’t recall but I don’t believe so. I think it was something dealt with verbally. I guess I would have talked – I think I would have had contact with some, certainly Alex Spain, after, I mean, I actually don’t recall this but I think it is very likely that I would have called Alex Spain.”

**Question 326:** How would that conversation have gone?

**Answer:** “I recall nothing of any content with the non-executives between the 20<sup>th</sup> and 21<sup>st</sup> and the 27<sup>th</sup>. I’m saying I think it is almost certain I would have called Alex Spain to discuss the thing.”

He explained that if he had a worry or concern it was a worry about the perception.

“... Newspaper articles started coming thick and fast, ‘Too clever by half. Flavin just gets out in the nick of time’, type of thing. I could see all of that. Interestingly, the press, the Irish Independent wrote an article about poor old Jim Flavin he sold out at €3.20 when he could have got (more).” (Answer 332: Page 97).

“How quickly they can turn. Then when there was a profit warning Jim Flavin goes from being poor old Jim Flavin selling out too soon to being too clever by half.” (Answer 333: Page 97)

Mr. Flavin was then referred to the Minutes of the meeting of the 27<sup>th</sup> of March and the typed version of Mr. Scholefield manuscript notes. Mr. Flavin said he recalled nothing of the discussion at the board meeting although having seen Mr. Scholefield’s notes he is absolutely confident that it was discussed, that he did have a concern and “I can confirm that I probably used the words ‘unfortunately there has been a profit warning’, or whatever.”

He said that Mr. Scholefield’s note was, he believes a fair summary of what he said and he believes it was entirely at his initiative. “I don’t think there was, I know this is in your mind Mr. Shipsey – it might seem surprising, I don’t think there was any concern by me or any member of the board that this could result in DCC, you know being found to have dealt or me or anybody to have dealt with inside information...It was that this is unfortunate...” (Answer 340: Page 99).

“... So to put it in context, it would have been readily understandable, I believe, to every director around that table that Fyffes would have issued a profit warning on the 20<sup>th</sup> March because there would have been a cumulative trading record which triggered it at a time which was very proximate to the date of the 20<sup>th</sup> March. It would have been known to everybody there something must have happened in the week before the 20<sup>th</sup> March. We actually have documentary evidence that it was ten days. It started on the 10<sup>th</sup> March...It would have instinctively been known by everybody that just because there is a profit warning then does not mean that I in any way implied that I had price sensitive

information back on the 3<sup>rd</sup> of (February) It would have been instinctively – and I can't labour this enough to you – absolutely obvious to them that the Stock Exchange announcement was triggered...had to be triggered by something that happened at a date very proximate to the 20<sup>th</sup> March.” (**Answer 341:** Page 100).

When asked if I was wrong to be surprised that there were no follow up questions from the directors Mr. Flavin said “it would be unfair to take a view that the directors of DCC should have immediately instigated some enquiry. I am saying it would have been completely understood without being said that this had to be triggered by information which was never in my possession. It had to be very recent information.” (**Answer 342:** Page 100).

**Question 343:** Is it a bit surprising and maybe it is not because it is so obvious, that the one thing that isn't there is you saying listen this had to be very recent?

**Answer:** “Well you know...it's such a given. It really is. And people who are dealing with public companies – I'm talking about the Tony Barrys – like it would just be known. Like, if a profit warning comes out it's because of something. It's because of new news. You are allowed a few days to responsibly conclude – actually I want to be careful here. It was ten days in Fyffes. It was...” (Interjection).

**Question 344:** It was pushing it?

**Answer:** “In my view, it's the limit, the limit.”

**Question 345:** Yes.

**Answer:** “I understand if, in fact, they weren't having their AGM on the 20<sup>th</sup> they might have done it a couple of days earlier.”

**Question 346:** I mean, there are a number of explanations for why people wouldn't follow it up, that it was so obvious, it may have been that you actually had had prior discussions with them and that they had asked the questions of you earlier – do you have any sense that that might have happened?

**Answer:** “I have no recall and I am saying if there was a concern, you know, a concern other than in PR terms, I think it would be captured. If anybody at the meeting had raised a concern...there would be something in Michael’s notes about it.” (**Answer 349:** Page 102)

He said “there wasn’t a concern that DCC or I could be found to have insider traded. I would have had a bet of 1000/1 that that wasn’t going to happen on that date if I was asked that view. I would have felt totally in the clear but I would have bet the other 1000/1 that this is going to cause us problems. Do you understand? I would have a concern in that sense, not a concern that we had been found (to be engaged) in insider dealing.”

Mr. Flavin confirmed that there was no formal Section 91 notification to the Stock Exchange in February 2000.

**(d) Mairead O’ Malley**

Mairead O’ Malley explained that she qualified with a B.A. in Accounting and Finance from DCU in 1991. She then went on to qualify as a Chartered Accountant and joined Coopers & Lybrand and did her final exams there in 1993. She did her exams for the Institute of Taxation in 1995. While in Coopers & Lybrand she would have been one of the people working on the DCC account. That was how she first came across DCC. They were then looking for a Tax Accountant and she applied for the position. She joined DCC in March 1997 as a Tax Accountant. She was working in DCC from the beginning under Fergal O’ Dwyer. In 1997 there would have been one person responsible for group accounts. There was her and she was responsible for taxation. There was a person working for treasury. Then there were maybe two people doing what were called corporate accounts for corporate subsidiaries so it was quite a small team of about five or six. It was a small closely knit team. Apart from Fergus they all worked in an open plan area.



She explained that when she had been with Coopers & Lybrand she had been responsible for the first tax return that Lotus Green had made in 1996 and when she came to DCC in 1997 she would have understood more operationally what it actually was. When she joined in 1997 she was the first full time tax person. Daphne Tease was then Deputy Group Secretary and it would have been Daphne who was dealing with in-house tax matters in DCC in terms of tax compliance. When she joined DCC Daphne was leaving and going on sabbatical. She explained that she took over the company secretarial work in relation to Lotus Green preparing the board papers, the packs, setting up the board Minutes and being the liaison person in DCC for the Dutch directors and ING who were dealing with the managerial aspects. They were dealing with the payments and transfers and they were appointed Company Secretary but obviously there were still aspects of Lotus Green that existed in Irish Law in terms of annual returns that were dealt with from Dublin.

She explained that she only once went to a Lotus Green meeting and that was in April 1998. It was the approval of the accounts meeting in April 1998. When asked why she went to that meeting she said she thought it was just Fergal wanting to introduce her to the personnel because at that stage she had been dealing with them on the phone. She confirmed that at a certain point in time she was preparing the board pack for the Lotus Green meetings. It was being done as a convenience matter. She explained that when she joined, she slightly changed the process after that meeting in 1998. Initially the Dutch board Minutes were being drafted in Holland and they were being sent over because Fergal wanted to have certain business in formal language and get the format of them absolutely right. She used to have to do a lot of “toing and froing” with faxes “... I suggested it to Fergal could I move to doing the Dutch papers in the same way as the UK Board papers were being done. As part of that I think he thought if I went with him in 1998 we could explain that changeover and it wouldn’t be putting anybody’s nose out of joint (in Holland) or anything.” (**Answer 21:** Page 12).

She explained that insofar as her relationship with Fergal O’ Dwyer was concerned she was on a need to know basis. “When I needed to get involved, if he needed specific

advice on a particular matter, he involved me. If there were potential acquisitions going on I generally didn't hear about them until they were probably more certain...Fergal involved me at the stage in the project when I needed to be involved, not before.” (Answer 77: Page 23).

Ms. O' Malley confirmed that she had no involvement in preparing the memorandum for the board meeting of Lotus Green on the 2<sup>nd</sup> and 3<sup>rd</sup> February 2000. Her principal involvement on the 3<sup>rd</sup> February was in response to a request from Fergal O' Dwyer for assistance in relation to the issue of the maintenance of the participation exemption if there was a partial sale of the shares. Eventually she explained that Fergal's worries came to nothing once Mr. van der Hoeven came back into the office that afternoon of the 3<sup>rd</sup> and advised them that even if you lost the participation exemption the cost was stepped up, you took the market value at the date you lost the participation exemption. It all became a bit of a non-issue after all. (Answer 165: page 44).

Ms. O' Malley recalled a conversation she had late on the 3<sup>rd</sup> of February when Mr. Flavin came to her desk and said “thank you for all your work”. And he just told her that the shares were sold and he said “half the shares were sold”. She said to him “how much?” and he said “3.20”. She also said she was requested to assist in relation to the Section 67 notice and Fergal told her “just because of the Lotus Green involvement talk to Michael...and get whatever advice in relation to the Section 67 Notice and the contract notes and talk to Terry (O'Driscoll) as well.” (Answer 173: Page 47).

**Question 174:** What did you know about Section 67 before?

**Answer:** “Nothing other than I had seen notifications DCC would have to do sometimes.”

**Question 175:** So you knew what Section 67 was?

**Answer:** “I just knew it was a notification of a change in shareholding, I didn't know anything else about it.”

**Question 176:** Why was Fergal involving you?

**Answer:** “Because of Lotus Green.”

**Question 177:** Why because of Lotus Green?

**Answer:** “Because Lotus Green’s name needed to be involved. I would have all the details for that. Simple mechanical things.”

She recalls very little of the conversation with Mr. Scholefield, Mr. Price and Mr. O’Driscoll and she didn’t know anything about the advice that was given in 1995 about not having to notify. Ms. O’ Malley had no sense of whether this was being driven from the Dutch as opposed to Fergal and Jim Flavin. She was just so focused on the tax thing. That is what she was doing. She drafted Tom Diepenhorst’s acceptance letter. She doesn’t remember her reaction to the profit warning issued by Fyffes on the 20<sup>th</sup> March 2000, other than she was probably thinking it was a pity that the preference shares hadn’t been sold as well. She doesn’t recall it being discussed or any talk around the office. She says she thinks even the DCC share price fell back around that time as well because they were linked in with the dotcom thing because of the Sercom involvement.

## **9.2.2 The Executive Directors**

### **e) Morgan Crowe**

Mr. Crowe was asked if Lotus Green was taken off the DCC plc board agenda after August 1995 and was now somebody else’s responsibility or whether it remained the responsibility of the board of DCC of which he was a member.

**Answer 339:** “My memory of those intervening years was that the emergence of Lotus Green as any kind of a current topic for conversation was in the context of the annual strategy review. The strategy was formulated that Fyffes was no longer core, that an opportunity would be taken at some time, unspecified, because it was unpredictable as to when it might happen, to dispose of, that the group should dispose of the interest in Fyffes when it was particularly opportune by virtue of something that would impact its value in a

favourable direction. Now what might have been anticipated at that time, or if anybody was asked at that time ‘well how might that occur?’”

**Question 340:** What was the likely scenario?

**Answer:** “The likely scenario would have been that there would have been a consolidation in the industry where one of the other big players would express an interest in Fyffes or vice versa and it might be anticipated that some synergies would flow from that and would have an impact on price and those other companies most typically would have been, most prominently I should say, would have been maybe Dole which was a US public company, United Brands which had the Chiquita banana business. So that would have been, that would have been, if you like, the expectation as to what might happen.”

He mentioned that there were other players in South America that might have come to the fore.

He was then asked on a hypothetical basis to forget what had happened in 1995. He agreed that if the transfer to Lotus Green had not taken place any decision to sell the Fyffes’ stake is something that Jim Flavin would have had to bring to the board of DCC. He explained that the limit on executive action with regard to acquisitions or disposals was at the time £3 million. He agreed that as a result of the transfer to Lotus Green the DCC plc board oversight or involvement in the ultimate disposal of the Fyffes’ stake was reduced.

**Answer 346:** “For as long as that structure remained in place.”

**Question 347:** Yes.

**Answer:** “It was reduced.”

He agreed that to that extent any decision taken to dispose of the stake and any implications in relation to that decision arose without the board of DCC plc having passed it’s collective eyes over it.

**Answer 348:** “Yes, to a degree. But if I can explain, for example, what went through my mind...”

**Answer 351:** “I mean that was clearly a significant step. Its consequence, I was very conscious at that time of the consequences of doing that. My view at the time would have been it seemed a pretty stable condition or frame of mind that this would remain an asset of the group, in relation to which there was a disposition to avail of an opportunity to sell when some event occurred to enhance its value, and that wasn’t going to change. There was a structure within Lotus Green that provided a fair amount of protection with the ‘A’ and ‘B’ director. Effectively there was a negative control, there was a veto possibility by the ‘A’ director. If there was a change of mind as to what the strategy should be in relation to Fyffes, let’s say for arguments sake that the strategic thinking emerged that would be desirable for Fyffes and DCC getting together for arguments sake, then it was always possible for DCC to take action to disassemble that structure, and you know, re-assert day to day active control. That possibility existed. Now the more likely event was that the strategy would remain unchanged, which, as I have described, I mean we were clear on that, no need to go through it again, but the purpose of doing that was to deal with a tax that would have arisen which was then a CGT rate of 40%.”

**Question 352:** Yes.

**Answer:** “So, it seemed very clear to me that any sub-optimisation that might occur in relation to a disposal in terms of room for negotiation that might have been better executed by somebody within DCC house for example, that was very heavily outweighed by the saving of a 40% Capital Gains Tax. So it seemed to me to be prudent to avail of this structure and that the downside of doing so wasn’t terribly significant, and if circumstances changed the structure could have been changed.”

It was then put to him that another way of viewing it was that the board selectively delegated their function and authority to dispose of the Fyffes’ stake to an entity largely comprised of persons who knew little or nothing about DCC and its operations. Mr. Crowe agreed with that.

**Question 355:** In circumstances where if there were major, let's say reputational issues for DCC, or legal implications for DCC, that you as a board member and as a board collectively were not going to have oversight or the opportunity to question or exert influence over that decision?

**Answer:** "Yes."

**Question 356:** Again you may say or it may well be that the tax advantage was great but I suppose what I'm getting at in a roundabout way is, and I will be asking you concerning it directly, but because of the desire to avail of the tax advantage you deprived yourself individually as a director and collectively as a board of asking questions at the time of the disposal.

**Answer:** "Yes."

**Question 357:** That might have prevented, I say might have, might have prevented the insider dealing issue, which not only arose but has caused enormous heartache and headache and financial cost and personal damage to individuals and to the DCC group. I would like your assistance in relation to the scenario that I have painted.

**Answer:** "Yes, and I will be delighted to give it to the best of my ability."

**Answer 359:** "I would make a few points – back to the frame of mind in making the decision, because at the root of your pattern of enquiry now is at the time of making that decision..." (Interjection).

**Question 360:** July 1995?

**Answer:** "Did we feel it was prudent? Was it properly considered and everything else? I would have made a very strong distinction between any prospective disposal of a publicly traded share and a disposal involving the shares of a private company because there are really only a couple of elements. There is offer and acceptance at a market related price and obviously there is the question of freedom to sell or otherwise. That is it."

He contrasted this with the sale of a private company where you have Share Purchase Agreements, warranties, indemnities, non-competition covenants and the due diligence process. In the latter scenario you “couldn’t expect a delegated body that didn’t have familiarity with the detail to be able to handle it as it might be desirable to handle it.” **(Part of Answer 362: Page 92).**

He also said that if at any stage it was thought not desirable to persist with that delegation you could have brought decision making back to DCC house and you could have sacrificed the benefit of the tax structure

Mr. Crowe was asked whether it crossed his radar in 1995 that in doing what they did they were going to be in a weaker position to protect DCC and Jim Flavin in terms of any future disposal.

“The honest answer is that it did not appear to be a risk about which we needed to be concerned at the time.” **(Answer 384: Page 97).**

**Answer 387:** “To suggest or to project a set of circumstances where shares would be sold in a dotcom bubble and that the company would be acting in the firm belief that the trade took place by Lotus Green and the decision was made by Lotus Green. For a court to come along and disagree with that and for that to happen in circumstances where the disposals have been encouraged by Fyffes who then turned around and took an action for the thing having been improperly executed by virtue of Jim Flavin holding insider information which they, as a board, an executive board, did not regard as inside information at the time would have been a bizarre set of circumstances to contemplate. So, that combination of circumstances is definitely something that would not have crossed my mind at the time. I didn’t contemplate a sale at a time when insider information would exist and would constitute a reason for making that sale in any way improper.”

A slightly different scenario was then presented to Mr. Crowe.

**Question 390 and 391:** ...Given that there is a finding of insider dealing, of a civil wrong being committed by Mr. Flavin and by DCC, did he not agree that if the Lotus Green transaction had not taken place and Jim Flavin had brought the matter to the DCC board suggesting that the time was right to sell, that he as a director or the board would not have just taken that on face value.

He agreed that they would not. He explained that he would have understood the context in which the decision was being taken and “it would have appeared to me at the time and I am about to ask a facile question but I will ask it anyway ‘is there any reason Jim why we shouldn’t sell? Any reason why we are constrained from selling’? It is not a price thing, it is not a related agreements thing. None of those things exist. It is not a due diligence thing, none of those things, market price, offer acceptance, is there any reason why we shouldn’t sell? Now the answer would have been I believe that ‘yeah, the first few months have been weak but Fyffes have had this before, first few months not particularly significant, the analysis and the expectations in the industry are that the back half of the year will be pretty buoyant. The supply and demand thing, it is going to more favourable to us...Not particularly significant the first couple of months of the year and those weak trading numbers. Definitely don’t constitute a reason for saying there is undisclosed price sensitive information’. That I believe is, that is what would have happened. Now I didn’t have, I didn’t have the trading information nor did any of the board have for the first few months but that would have been the outcome I have no doubt.” (**Answer 400:** Page 102).

Mr. Crowe was asked if he had any advance notice that the Fyffes’ stake was going to be sold in February 2000. He said he had some advance notice. “To the extent and so far as I had been on a trip to the Far East and I arrived back into the office to hear that the phones keep ringing with people wanting to buy our Fyffes’ stock.” (**Answer 405:** Page 105).

**Question 406:** When was that? When did you get back from the Far East?



**Answer:** “I haven’t checked my diary but it would have been within, I don’t know, two days of when the first sale took place or maybe the day before. Because it all happened very fast.”

**Question 408:** So you may have been back the 1<sup>st</sup> February or the 2<sup>nd</sup> February or something like that?

**Answer:** “I’m not sure because I didn’t consult the diary.”

**Question 412:** Was that an ‘on the grapevine’ type report?

**Answer:** “No, that wasn’t on the grapevine. Jim told me specifically...” (Interjection).

**Question 413:** Oh sorry you spoke to Jim. When you say you phoned into the office you phoned in and spoke to Jim?

**Answer:** “No I would have arrived in.”

**Question 414:** Okay.

**Answer:** “I would have arrived in from the airport and then he said the phone hasn’t stopped ringing – brokers want to buy DCC’s shareholding in Fyffes.”

**Question 415:** What was your response?

**Answer:** “Well, I think there was a – I can’t remember – I said that’s great and I looked at the price and, I mean, I had been a dotcom sceptic because I had had, just coincidentally, an approach from Fyffes to see would DCC wish to invest in a medical equivalent of worldoffruit.com and a couple of the Fyffes’ guy came in, one of which was Jimmy Tolan I think, who I knew and the other guy whose name I’ve forgotten but was directly involved in worldoffruit.com and they wished to explore whether or not DCC might be interested in investing in an equivalent of worldoffruit.com to address the medical sector. So we had a session and David McCann phoned me some days subsequent to that saying ‘well what do you think and is DCC going to invest’ and there was a proposition that we might put a million (into the venture).”

He explained that he was not convinced. He then went on to say that the words were passed, 'it's a matter for the Dutch'. He believes that was said by Jim Flavin but he, Mr. Crowe knew 'it was a matter for the Dutch' that had never escaped his consciousness. (Answer 416: Page 107)

**Question 419:** As far as you were concerned when you came back and when you say it was 'a matter for the Dutch' did you have any sense or did you have an understanding that the negotiation was being conducted by the Dutch?

**Answer:** "No I didn't have any sense of a negotiation at all."

**Question 420:** Right.

**Answer:** "I said that there is the market price and I mean it is moving and you know, who would know was it going to go further, was it going to collapse. One obviously didn't know."

**Question 421:** Did it ever cross your mind when you came back and knowing that it was a matter for the Dutch but knowing that you were also a director to say 'are we free to sell'?.

**Answer:** "No I didn't, because I mean, as we said before lunch and I think this is important to emphasise, that my perception at the time was that there were deliberate actions by Fyffes that said the market had been updated, the coast is clear if one wishes to buy or to sell."

Mr. Crowe was asked whether in order to take an informed decision in February would he not have needed to know what Jim Flavin knew at that point in time, not what he knew and the rest of the world knew on the 10<sup>th</sup> or 11<sup>th</sup> December?

"That's arguable, but I didn't have any doubt and I didn't question whether something significant in relation to the year as a whole has happened that would prevent the sale of these shares from outside the DCC group." (Answer 439: Page 112).

**Question 440:** The question might arise should you not have asked that? I mean, there was no formal board meeting. You know about it. You are a director and I'm just wondering should you not have asked Jim some questions even the sort of simple 'are we free to sell'.

**Answer:** "Yes, one could argue that but I think..." (Interjection).

**Question 441:** And, again, this may be unfair, and you can certainly tell me if you think it's unfair, did you ever afterwards think, I wish I'd asked some questions. Did that cross your mind subsequently?

**Answer:** "Not really because I mean, I accepted that the delegation had taken place and there didn't seem to be at that time, to be anything wrong with that and indeed nor has there since seemed to me to be anything wrong with that. I think that the judgment that Jim would have made about non price sensitivity at the time was in light of all the circumstances at that time. I think that that was a very recent and reasonable judgment."

**Question 442:** I suppose that comes to the question if it had come to the board do you think any... (Interjection).

**Answer:** "With the dissemination of information that that board wasn't entitled to have."

**Question 443:** Well

**Answer:** "According to Fyffes' view of the world. I only put that in as a qualifier, not to question your question."

He also explained that he wasn't privy to the conversations which took place between Jim Flavin and the brokers.

**Answer 451:** "But the corporate stance and the understanding of where we were was that the unsolicited offers came in and that Jim definitely was acting as a conduit to pass that information on to Lotus Green and it was perceived as being a no brainer for Lotus Green and there was no – I'm stating as a matter of fact – there was no concern, no active

concern on my part that there is something lurking under the surface here that constitutes a reason why these shares cannot be sold out of the DCC group.”

Mr. Crowe was reminded that the expression ‘conduit’ had not found great favour with Ms. Justice Laffoy.

**Question 453:** But did you consider it would be at all likely that Lotus Green would take a decision either to sell or not to sell, that was contrary to Jim Flavin’s wishes?

**Answer:** “I mean, first of all, if you knew that there was something strategic that said, this is what we are contemplating doing it is not compatible with DCC’s strategy I would think they would not do something that they saw as being contrary to...” (Interjection).

**Question 454:** I am just wondering and again I am just looking for your assistance. If Fergal O’ Dwyer went over looking for a decision from Lotus Green was there ever any realistic possibility that they would not agree to sell the shares?

**Answer 456:** “I would have thought that they wouldn’t do something that they understood to be contrary to the strategic outline that DCC had.”

**Question 457:** That’s fair. Did you know that Jim Flavin had discussed the issue about whether he might be or it might be subject to insider dealing concerning with Alvin Price or with Michael Scholefield?

**Answer:** “I didn’t know that. I learned that subsequently. But I didn’t know (at the time) that he had that conversation.”

**Question 458:** Knowing that he had that conversation with them, are you surprised or disappointed that he didn’t bring it to the board’s attention?

**Answer:** “No, because I think he reached a conclusion and it allowed him to keep faith with the constraints placed on him by Fyffes which had, I mean Fyffes some years ago, I can’t remember when, reacted negatively when they came to understand that the Fyffes’ management accounts were at that time incorporated in DCC management accounts and from that time on and I’m sure you would have read this or come across it, that only

publicly available information was allowed in relation to Fyffes, was allowed to enter the DCC accounts. So Jim, presumably having satisfied himself through the Compliance Officer and legal advice, satisfied himself of something in order to tick the box and not act solely, if you like, in uncorroborated assumptions on his part or un-reaffirmed assumptions that he did not then have to breach any constraint of confidentiality about the internal affairs of Fyffes by bringing the DCC board on board or disseminating that information about internal management accounts of Fyffes to the DCC board.”

**Question 459:** But I wonder if that can be so. If you hadn’t sold the shares to Lotus Green in 1995, when you came to sell them in 2000 he would have brought it to the board.

**Answer:** “Yes would he or wouldn’t he?”

**Question 460:** Well if he didn’t have authority above 7.5 million... (Interjection).

**Answer:** “But he didn’t have to bring that information to the board. The information he would have had bring to the board is we have an offer at that market price and there is or isn’t freedom to sell.”

**Question 461:** Yes, and if he had done and said that there’ is or isn’t freedom to sell’ you mean because of insider dealing or... (Interjection).

**Answer:** “Well for any reason.”

**Question 462:** But, in those circumstances it couldn’t have been impossible or wrongful for directors to ask questions about – I mean, your duty is not to Jim Flavin or to Fyffes?

**Answer:** “No, that is true but, I mean, there is information concerning Fyffes to which I am not entitled.”

Mr. Crowe was asked if he was involved in giving effect to the decision to sell any of the three tranches of shares in February 2000. “Not at all.” (**Answer 469:** Page 119).

**Question 470:** Did you discuss the sales with anyone or with... (Interjection).

**Answer:** “With nobody. I simply hoped and I did hope that the Lotus Green guys would see it that way and say this is a terrific opportunity, push the button, execute the sale.”

“He said after the sales he was aware that there was a ‘kind of closure’ conversation between Jim Flavin and Neil McCann and that they had parted on good terms.” (**Answer 475:** Page 120).

Mr. Crowe was then asked to explain the circumstances in which he heard about the profit warning and what his reaction was and who he discussed it with. “Well my reaction first of all, it was part of a conversation around a board meeting (27<sup>th</sup> March) and I know that the term has been used ‘unfortunate profit warning’. And...” (Interjection) (**Answer 484:** Page 120).

**Question 485:** Whose words were they?

**Answer:** “I can’t remember.”

**Question 486:** Or were they somebody’s words?

**Answer:** “Well, I know because it is written down. To say that I have a memory of what happened would be totally wrong all those years ago but I have seen it written down. I mean, I wouldn’t use the words ‘unfortunate’ because it seems to me to be a misnomer of non-specific no great meaning. Luck had nothing to do with it. The fact was it became necessary and I think the fact that it became necessary for Fyffes to issue a profit warning I think that the facts behind that were, it was undesirable that that should be the out-turn of events and it raised the question when did the need for this arise. When did they form the view that was contrary to view that they held when they signed off.”

**Question 487:** In December?

**Answer:** “Not only in December, but January, 31<sup>st</sup> January. At that stage, the Fyffes’ accounts were out. I would have seen the Chairman’s expression of the expectation for the year at the 31<sup>st</sup> of January.”

**Question 488:** What document are you referring to?

**Answer:** “The Fyffes’ annual report.”

**Question 489:** When did that come out?

**Answer:** “I believe it must have been very shortly after it was signed off. It was signed off on the 31<sup>st</sup> January, I think.”

**Question 505:** What do you recall of the discussion that took place at the (DCC) board meeting?

**Answer:** “I don’t. I mean, it wasn’t an agenda item. DCC’s involvement was history. It would be a bit like commenting on something in the news that everybody would have a shared interest in, rather than it being anything that was seen at the time, in my mind anyway at the time of being consequential in some material way or some concrete way.”

**Question 506:** I mean, is that your recollection or is that because nobody saw that there was any consequence?

**Answer:** “That is my recollection. There was no conversation of which the scenario that I have outlined and the frame of mind that I have outlined was the conclusion but there was an allusion to the fact that Fyffes had just issued a profit warning. Clearly, those handwritten notes by Michael Scholefield say that Jim used the words ‘unfortunate profit warning’ I remember the event and if I were to describe it I would say yes, disconcerting absolutely.”

Mr. Crowe did not remember the conversation at the board meeting.

**Question 510:** Yes but it must have dawned on you immediately that that could at least have tongues wagging about... (Interjection).

**Answer:** “Oh it did and that is why I say it was disconcerting that it would make tongues wag.”

**Question 513:** But are you saying that there was no questioning of him, of Jim Flavin on it?

**Answer:** “There was no detailed questioning. I would be pretty happy about that. Otherwise, I am concluding that I would have remembered if there were.”

**Question 516:** It would have been surprising if (the sale of the Fyffes’ shares) hadn’t been discussed?

**Answer:** “Yes, I think observed. I believe it was observed. I mean, the DCC board meetings were pretty focused. They ran according to the agenda.”

It was put to Mr. Crowe that the words used by Mr. Flavin at the meeting as recounted in Mr. Scholefield’s manuscript note looked like as if Jim Flavin was trying to reassure the board.

**Answer 524:** “Yes I think that’s...” (Interjection).

**Question 525:** But what I don’t have and what I’m trying to find out from you is if anyone asked him any questions on that or if he was sort of cross examined or if he was challenged at all on it or... (Interjection).

**Answer:** “I don’t believe so.”

**Question 527:** ...Is there anything you would have done differently as either...an executive or a director of the board of DCC?

**Answer:** “Without the application of hindsight the answer is ‘no’ I believe. I mean, with the application of hindsight I would have done a whole bunch different that would have prevented this ever happening. Without the benefit of hindsight and the application of hindsight I believe the honest answer to that is ‘no’.”

**Question 528:** Do you think it would have made any difference had it come to the board of DCC, if you had a board meeting on the 2<sup>nd</sup> February to say listen we are getting all these unsolicited offers from Goodbody’s and Davy’s and Fergal is gone over to Holland



for a decision from Lotus Green on it. What do you think? Do you think it would have been different?

**Answer:** “Had the board been informed of the adverse trading pattern in the first two months, let’s assume for a moment that if the board knew that, somebody might have said, well, let’s affirm that we are not in profit warning territory, there is no price sensitivity and I mean, how the board would have gone about affirming that is necessarily you know, a matter of some speculation, is necessarily you know a matter of some speculation. But if Lotus Green didn’t exist and if there was freedom to disseminate internal trading information of Fyffes to the board or to DCC in general, that question might have been asked. What steps might have been taken? I mean you couldn’t go through and procure the, you couldn’t procure the PWC Report or the IBI Report or any of those things that were relevant in the (Court) hearing. I think that your port of call would be to say, well, look, let us enquire of the executives just to be sure to be sure what significance this has in relation to price sensitivity and the outcome of trading for the year.”

**Question 529:** Enquire of the executives of Fyffes?

**Answer:** “If one was free to do so. They might have done that. Now I am speculating in order to give you an answer.”

**Question 530:** Yes, or even if Jim had.

**Answer:** “But I believe that the response to that would have been to get those assurances. I think the feedback would have been reassuring. Fyffes would be saying we have been through this before. We have the first few months be it positive or negative is not particularly instructive as to what the outcome is going to be, the influences that are coming to bear on the industry with regard to the rest of the year, the tightening of supplies, the consequent hardening of price and the good profitability.”

**Question 531:** Okay?

**Answer:** “That debate would have taken place. That debate would have taken place in the middle of December when they didn’t have December’s results.”

**(f) Tommy Breen**

Mr. Tommy Breen explained that between 1995 and 2000 he was running the IT division within DCC called DCC Circom. He said that apart from the short period of time in August 1995 when he was on the board of Lotus Green he had no further involvement with the company. Nor did he discuss the Fyffes' stake or the Lotus Green position with either Michael Scholefield, Fergal O' Dwyer or Jim Flavin in the period from August 1995 to February 2000.

Mr. Breen confirmed that he joined the board of DCC plc in February of 2000. When asked if he remembered much about his first board meeting on the 7<sup>th</sup> February 2000 he explained that in preparation for the interview he had looked at the Minutes of the meeting but apart from what is stated in the Minutes he remembers nothing about that board meeting. He said his main focus and attention at that meeting would have been on the presentation of the budget. He said he doesn't remember particularly about the sale of the Fyffes' stake or any discussion of it at the board meeting. He explained that the nature of his job at that time was that it wasn't a job sitting in the office of DCC, most of the IT businesses and the bigger part of our business was in the UK so we wouldn't have known anything about it, other than whenever the public announcement came. He doesn't remember discussing the disposal of the Fyffes' stake with anyone in DCC prior to the 3<sup>rd</sup> February 2000 and "cannot imagine I would have". (**Answer 20: Page 10**).

He explained that Jim Flavin wouldn't have been seeking his view on the merits or otherwise of disposing of the Fyffes' stake. "The rules were very clear and Jim would have made you very clear in relation to any information that you had that was confidential." He explained that Michael Scholefield and Fergal O' Dwyer would have respected that.

The only discussion or conversation he remembers around the time of the sale of the shares was a passing conversation with Jim Flavin talking about worldoffruit.com and saying "we may look stupid, we may have sold these shares far too cheaply". He

confirmed he had no involvement in any of the three disposals on the 3<sup>rd</sup> the 8<sup>th</sup> or the 14<sup>th</sup> February.

When asked about his recollection of the board meeting on the 27<sup>th</sup> March he said “I don’t remember it coming up for consideration as such but obviously from the notes there must have been some discussion about it at that meeting.” (**Answer 24:** Page 12).

When asked if he remembers where he was when he heard about the Fyffes’ profit warning or what he remembered about he said “no, honestly, I just don’t remember. Obviously I became aware that, and it may seem strange to you but it wasn’t a big issue because in terms of any implications for DCC I should say my position, I cannot speak for other people, but you know a couple of things about the circumstances. Jim first of all, I don’t want to keep on using the word, we as a team, but I would have been very clear that first of all, in the context of an Irish public markets arena Jim’s knowledge and understanding of markets would have been extremely high. In terms of his judgment if there was anything around the time of the disposals we would have had the highest of confidence in Jim’s ability. There was nobody better able to make a judgment about whether he was in possession of price sensitive information. Jim just was extremely experienced. I often remember in London when we would be going around investor meetings after announcements of results, which we did every six months, a number of senior fund managers in London, we would get to the end of the meeting and they would have been seeking Jim’s views. He was just highly respected, he had a good feel for markets and all that sort of thing. The second thing to remember is that by 2000 I had worked for Jim for DCC for 15 years, at that stage, and again was absolutely clear in terms of all of my dealings with Jim that if he had suspected that there was any information at all that may have been relevant he just wouldn’t have taken any chance around it. So when this came out we were very clear that what was driving the Fyffes’ share price was worldoffruit.com. We wouldn’t have thought for a moment that that was particularly going to have any implications for DCC that ultimately it clearly did have. When asked if he made any connection between the decline in the Fyffes’ share price in March and DCC’s good fortune in getting out in February or whether there was any reaction like ‘we were lucky’ or ‘didn’t we time that right’.” (**Answer 26:** Page 13).

“I can’t remember that. I am sure at some stage when the share price went or where it did go I am sure we did say weren’t we lucky. I am sure I did think that. But it is difficult looking at it from now. That was a very strange time. I remember, at that time and I mean, personally I would have been more focused and we were disposing of an IT business at that time, a small IT business that was loss making and had been loss making in DCC for two or three years. It was a very difficult situation. It was getting worse and we tried to sell it and we were very lucky. We could only get one party interested in it. It was a small UK listed company which was an IT company and was benefiting from the dotcom thing. They hadn’t the money to buy the business. They had to do a placing to raise the money and they had to get it underwritten and we were very fortunate in that that company did that placing. My recollection, I can’t be sure of the date but the 9<sup>th</sup> or 10<sup>th</sup> of March was the key date when the NASDAQ really started to fall and the bubble burst and we were very fortunate that they raised their money a day or two beforehand. Two days later, nothing had changed in that company’s business...” (Answer 30: Page 15).

“But two days later they couldn’t have raised the money. Now it wasn’t big it was Sterling £20 million or something. So that was a very strange time in terms of, there was complete turmoil, really, in markets.” (Answer 31: Page 15).

Mr. Breen was asked if he had seen Mr. Scholefield’s handwritten manuscript notes from the March 27<sup>th</sup> board meeting to which he answered “I did”. Apart from what he has seen on the note Mr. Breen said he had “no recollection of any part of that board meeting. I just don’t have any recollection of that discussion.” (Answer 34: Page 16).

**Question 36:** I mean, there is obviously any number of reasons why people don’t recollect things, apart from the ones that affect you as you get a little bit older, it is harder to recollect. But is it not a bit surprising that you wouldn’t recollect something about this? Even reading the Minutes and the notes of Mr. Scholefield or does it surprise you that you don’t?

**Answer:** “It doesn’t particularly. If it was an issue that had been concern and particular angst within DCC and there had been a substantial conversation around it well then, maybe there is some chance that I might have remembered. But I can’t remember to be honest. But I don’t think that that was the case.”

When asked if the fact that he didn’t recall anything was indicative of a board that wasn’t as searching or as questioning of its Chief Executive as it might have been perhaps “too trusting” he answered “well, just first of all, to sort of parse the question, I wouldn’t have known whether, just because there was little discussion at that meeting about it, if that was the case, then as I say Jim spoke to Alex Spain, Tony Barry and Paddy Gallagher and Jim would have spoken to them on occasion outside the board meeting. So, whether he had had discussion outside of the board meeting about that in advance of the board meeting I wouldn’t have known but I would have known that he did talk to them. Secondly it comes back to the point that I certainly don’t think, and knowing each of the three gentlemen involved that if they had any reason to believe that there was anything untoward, I think they would have had the same views as I have just expressed to you about Jim and his knowledge and understanding of markets and indeed the best word I can think of ‘integrity’ just wouldn’t have got himself into that kind of situation. So wouldn’t have and again looking at things back nine years and knowing what happened in 2007 in the Supreme Court but we never would have dreamt back in March 2000, that that was going to be the issue that it became because of the circumstances. If you can put yourself in March 2000 and all that was going on in the world in financial markets and Jim Flavin who was the person, this wasn’t somebody who was naive in financial markets. This wasn’t somebody who, you know, didn’t have a track record of integrity over his career.”

**Question 39:** Just from what you have said there, though, in terms of referring to the non-executive directors was there (and perhaps understandably) a greater reluctance or a difficulty on behalf of the executive directors to challenge Jim Flavin at board meetings?

**Answer:** “No, I don’t think there was a reluctance but at the end of the day you know there was a difference.”

**Question 40:** Yes.

**Answer:** “The executive directors reported to Jim. He was my boss and the other guy’s boss. So, it would have been perhaps less likely that you would have challenged Jim openly if you had an issue. I’m not saying that we wouldn’t have talked to Jim if we disagreed with something or had some concerns but it would be a pretty unusual thing for an executive director to challenge his boss at a board meeting unless it was something that they had fundamental concern about.”

**Question 41:** Right. I suppose that is an understandable dynamic and probably applies to the other executive directors on your board with you now?

**Answer:** “I don’t think there is anything unusual in DCC about that. We all have our own integrity to consider. If there was a matter of serious concern but I would have to say, very honestly, that there was never a matter that I felt it necessary to challenge Jim Flavin about in my period on the board. There just wasn’t. It didn’t arise.”

When asked when he first became aware that there might be a problem, he says he believes it was when a letter came from the Stock Exchange later in 2000.

When asked what the DCC reaction to the letter was he said “I would say shock and horror would probably be the best way and some disbelief that this could be an issue to be honest”. (**Answer 43:** Page 20).

**Question 44:** Was it taken seriously?

**Answer:** “Yes, it was taken seriously. I would not have been involved in that. I mean at all stages and again it was something Jim was very clear about that it ultimately became a huge issue and one that was taken with great seriousness obviously, but it was one that Jim very much tried to ring fence, in the sense, that the big risk in this and it is something that Jim did very well but more than the ultimate 50 million, it was the distraction from the day to day business that this could have caused because you just can’t underestimate what distraction it was and I think it is a credit to him that he was very clear that the people running the business just didn’t get sucked in. So, I wouldn’t have been involved in that ‘taking it seriously’ but I would have known clearly that it was being taken seriously.”

Mr. Breen was asked then for his view as to how the board of DCC responded to the Supreme Court decision when it was handed down in July 2007.

“You know the day of the Supreme Court decision is a ‘JFK moment’. That is one I won’t forget and I remember being on the telephone and we were actually not in our own offices at the time. We were getting some renovations done and we were in other temporary offices at the time and I remember Jim coming in and I know obviously the Supreme Court decision was due and I remember him putting his head in, he had obviously got a phone call, he wasn’t there for that and he said ‘we lost 5 – 0’. I was actually on the phone. I can’t remember who I was on the phone to, but I was on the phone at the time and it was total shock. Clearly, whenever you are in this world, you know there is risk around any decision like that but we just didn’t really contemplate that that was something, that was something that realistically could happen or sorry would happen. So that was the initial response, there was just, and I’d say at a senior level we were all pretty discommoded that day. That was sometime mid-morning. There was a board meeting convened for some time that afternoon and I suppose the focus in the board meeting was really around a couple of things but around trying to get information out because here our first responsibility is to shareholders and getting some sort of statement out reassuring shareholders about the extent of this and what the implications of it financially and otherwise which was all very difficult. But in relation to handling the thing and Jim did, and I can’t remember, I haven’t particularly researched this to be honest for coming in here today but you know Jim did leave the room at some stage during that meeting and allowed the board to decide whether they wanted to consider his position or whatever. But, the state of mind at that time and I think probably remained that there were two things clear. We had to act at all times as a plc director in the interests of shareholders, what was in the interest of DCC and there was a fundamental view that Jim Flavin had never intentionally done anything wrong and secondly that the nature of Jim Flavin’s track record in DCC and the nature of the business which I would bore you about forever, we are an unusual business with an unusual structure because of diversity of the business and we maintain the view that the best answer for DCC was that Jim Flavin should stay as

Chief Executive of the business. So, there was two things together that he hadn't intentionally done anything wrong and the right answer for the business and for shareholders was that Jim Flavin stay as Chief Executive and we received almost unanimous support from shareholders for that.” (Answer 47: Page 22).

He went on to explain that from all the investor meetings he was attending post the Supreme Court decision there was no pressure from shareholders that they should have made a different decision.

He was then asked to explain the circumstances from his perspective in which the decision by Jim Flavin to step down occurred in May 2008 and whether it was a matter that surprised him or was welcomed by him.

“No it certainly wasn't welcomed by me and maybe somewhat naively, again I suppose you've got to put it in the context of somebody who had worked with Jim for whatever it was then at that stage, 22 ½ years, and again in terms of the value that Jim brought to DCC in the context of we never having had any differing views, that Jim never did anything intentionally wrong and again speaking maybe emotionally rather than anything else I thought it was an incredibly unfair outcome, but clearly knew the circumstances that were going on over that period of time with the IAIM and then the Director of Corporate Enforcement. But right until very close to the end and I am talking about the last day or two before Jim resigned, maybe naively but as somebody in the particular circumstances that I was in and having worked with him very closely and having a loyalty built up it came as a shock. I didn't think it was ever going to happen. Maybe some people externally might think that that was naive but that was the position, very honestly.” (Answer 50: Page 24).

Mr. Breen was asked if he had a view as to how all of this might have been prevented.

“I don't know have I given a lot of thought to it...clearly if the shares had never been sold it wouldn't have happened, but I think in the context of everything that happened, and it is a view coming from one side of the house that it was just bizarre that we ended up, unfair,



and I just don't think it should have ever have ended up where it is. Going back and saying there was an incorrect decision taken, I find it difficult because I have a particular view as to that information and how Jim behaved and everything else but I don't believe it really practically speaking and pragmatically speaking could have been avoided.” (Answer 51: Page 26).

“I think at the end of the day Jim made the decision clearly when he had approaches for the shares, to take that opportunity.” (Answer 52: Page 26).

Mr. Breen was asked if he wished that he had asked some questions at the board meeting on the 7<sup>th</sup> of February “are we free to sell Jim”, or “is this all right Jim”?

“No, I don't think it would have occurred to me to ask Jim that question because of the confidence. Again going back to it and I may be boring about it, but the confidence that I would have had about Jim's ability (a) to make that judgment better than mine and (b) that having made that judgment he would take the right decision and if there was any concern about it.” (Answer 54: Page 27).

**Question 56:** I'm just wondering do you have any sense in which you were blind sighted by the tax structure or blinded in a sense by loyalty to Jim?

**Answer:** “Neither. Absolutely. I don't think it would have made a whit of difference in terms of tax structures or if Lotus Green tax structures hadn't been there. Let's just say 1995 had never happened and it comes back to the fundamental thing. I suppose at the end of the day, who is best positioned to come to a view, whether the information that was there at the time of the sale of the shares was price sensitive? In my view, the executives in Fyffes first of all, were in the best position and fundamentally all the evidence points to the fact that they apparently didn't believe that information was price sensitive. Jim Flavin was on the board and Jim Flavin was not you know ‘Joe public’. Jim Flavin, I keep on saying it, I would go so far as to say that there was probably, and if you sought opinions, if you could wind the clock back to 2000, there was probably very few people who had the experience of public markets that Jim had. You have got to remember again where we came from as a company and having acted as an issuing house for companies

going public, having gone through all of that, Jim having been Chairman and non-executive director of a number of public companies and his knowledge to make that judgment was probably better than possibly anybody else in the country to make that decision. Then secondly, the non-executives I mean Alex Spain hadn't come on the board in the last 12 months and didn't really know Jim Flavin, or I hadn't come along, you've obviously spoken to Jim at length on a number of occasions but I have scars and everything else on my back from having worked, mainly scars that have all healed up but knowing this individual as to what the risk was that if he had the slightest doubt that there was a problem because, at the end of the day, let's keep it in context. Of course it was a big profit that we made but in terms of the risks involved in getting this wrong if he had any doubt about that it just wouldn't have made any sense to, I can't remember the words you used earlier, but to have this tension or this conflict in terms of whether it was right or wrong. So, I didn't feel that in any sense so I don't feel I would have behaved any differently. They (the other directors) can speak for themselves but I can't believe that the three non-executive directors would have behaved any differently if the circumstances of Lotus Green had been different or if it hadn't existed."

Finally Mr. Breen emphasised how convinced he was that Jim Flavin would have acted, knowing the man for as long as he knew him and having worked with him, the way the mindset worked about doing things properly and the concept of risk management that ran through the business the integrity of the individual and the compliance that he brought into DCC, really that was very important not just in terms of how the executives or he as an executive would have perceived all of this but the non-executive directors as well. "I don't know what that is worth but I feel it strongly." (**Answer 57: Page 31**).

**(g) Kevin Murray**

Mr. Murray confirmed that he became a director of DCC at the meeting of the 7<sup>th</sup> February 2000. He came on to the board of DCC at the same time as Mr. Tommy Breen and Mr.

Fergal O' Dwyer. He confirmed that he knew that the first of the three tranches of Fyffes' shares was sold on the 3<sup>rd</sup> February.

**Question 5:** Can I ask you whether you had any involvement in the sale of the shares on the 3<sup>rd</sup> February?

**Answer:** "No."

**Question 6:** Did you have any discussions with anybody within DCC in relation to the sale of those shares?

**Answer:** "No."

**Question 7:** Would you have been expecting to have any discussion with anybody about the sale of those shares?

**Answer:** "No."

Mr. Murray then explained what he was doing in late January and early February of 2000 within DCC. His title was Managing Director of the Energy and Food business. At the particular time they were looking at a transaction with a Finnish company based out of the UK called "Poulik." He explained that he would have been spending most of his time at that stage in the UK on that transaction. He explained that Fyffes didn't fall under the "food division." He said it was reported as part of the food division results but the management or interaction with Fyffes was exclusively handled by Jim Flavin. He explained that in Fyffes they had a 10 or 11% shareholding while in the other companies they were wholly owned subsidiaries.

He explained that on the 7<sup>th</sup> February he was appointed to the board. He explained that he was proposed as a director on the 7<sup>th</sup> February and attended his first board meeting on the 27<sup>th</sup> March. He explained that he understood that the long term strategy of DCC was that it would dispose of its Fyffes' shares and in February of 2000 it had disposed of some of them "at a very acceptable price." (**Answer 16 Page 6**).

**Question 17:** What does “acceptable” price mean?

**Answer:** “I mean, the price was.”

**Question 18 :** Well it was between €3.20 and €3.90 but what makes that “acceptable”?

**Answer:** “Well I think in general at the time there were a lot of companies that had very high valuations relative to their profitability on the back of the dotcom era that existed. Therefore, I suppose by standard measures, it would have been regarded as a very good price.”

He does not recall having discussions about the sale of the Fyffes’ stake with anybody between the 7<sup>th</sup> February and the board meeting on the 27<sup>th</sup> March. Nor would he have been expecting to have those discussions. The first formal meeting he came to as a director was on the 27<sup>th</sup> March. He confirmed that he got his papers in advance of that meeting. He doesn’t recall whether those papers included any reference to the sale of the Fyffes’ stake. He explained that prior to the meeting he would have heard about the sale of the Fyffes’ shares because the norm was that Stock Exchange announcements that were issued by DCC were sent to Managing Directors of subsidiary companies.

**Question 24:** Okay do you remember any discussion about it at the board which was your first formal meeting?

**Answer:** “I don’t. Obviously I have been given a set of Minutes and Michael’s notes at the time. In the absence of seeing those notes if you had asked me did I recollect anything, I didn’t.”

He was asked if seeing the Minutes and Michael Scholefield’s notes if that brought anything back to him.

**Answer 25:** “No I mean it seems to list a number of items sequentially or whatever and it sounds that something that was reported on and documented. I don’t remember any major discussion on the issue.”

He was asked about the reference to “unfortunate profit warning” and what could be viewed as a defensive reaction by Jim Flavin explaining what he did to provide reassurance to the other board members that there was nothing to worry about. He was asked if he recalled any follow up questions.

**Answer 29:** “I don’t recall there being any great discussion one way or another. It was an event and as you say, it was reported on and there was an explanation given and I don’t recall any.”

**Question 30:** Do you remember the lead up to that when there was a profit warning given, a Fyffes’ profit warning?

**Answer:**– “Sorry the only recollection I have is that I think Jim went to the Fyffes’ AGM at which the profit warning was given and I recollect him coming back into the office and again saying that there had been a profit warning given.”

**Question 31:** What was his reaction.

**Answer:** “I mean I don’t think any different than what is documented there.”

**Question 32:** Did he come back livid, annoyed, disappointed or could you tell?

**Answer:** “Well it wasn’t livid or annoyed buy you know other than that I couldn’t ... I suppose disappointed or whatever.”

**Question 33:** Did it ever impinge upon you that this profit warning following closely upon the disposal by DCC could have implications for DCC?

**Answer:** “Yes well I suppose as any share disposal you know the word that is used is ‘unfortunate’ and it’s right and you would prefer if there wasn’t a profit warning so I suppose yes is the answer.”

**Question 34:** If it is yes, then the follow up question that would occur to me is why didn’t, and it may be that people did ask follow up questions and you cant recall it, but can you

recall whether anybody said “Well Jim, do we need to be worried about this, is there anything we can do about this, what does this mean for us?”

**Answer:** “No I don’t. Again I think the culture in DCC would have been compliance and doing things correctly and I would have been confident that if a disposal had occurred there wasn’t any reason why I should be worried.”

He was then asked if he had any involvement with Lotus Green or with the question of the Fyffes’ shares between 1995 and 2000 to which he answered “no.”

When asked if there was any way that this could have been avoided he said “well at the end of the day I suppose the only way that one could have avoided it was not to have disposed of the shares.” **(Answer 44 – Page 12).**

He explained that in his view the value of Fyffes’ shares at the point in time when they were sold was driven by factors other than the day to day performance of the business. “There are many companies like Baltimore who had massive valuations and no revenues, not to mind no profits. I was trying to think of an analogy. It seems to me that it is like somebody saying that if a buyer of a hotel in Ballsbridge recently was told that the dining room was trading less well, they mightn’t have paid the same price for the hotel. I mean, the reality of it is that they didn’t buy a hotel, they bought a site and they bought something at the time and in retrospect it seems...” **(Answer 51)** It seems amazing that they did it. My feeling about the transaction was that. It was a dotcom boom at the time and people bought companies and valuations that they wouldn’t have done at all in the normal run of events... DCC got bid for the stock, DCC sold the shares and Jim made a judgment or came to a conclusion that he wasn’t in possession of price sensitive information and I would respect his decision.” **(Answer 52)** “Albeit I realise that others have come to a different view.”

### 9.2.3 The Non-Executive Directors

#### (h) Alex Spain

At the outset of the interview with Mr. Spain it was pointed out to him that one of the reasons cited by the Director of Corporate Enforcement in seeking the appointment of Inspectors was that a number of key people on the DCC side had not given evidence in the High Court litigation between **Fyffes v DCC and Others**. It was explained to him that I intended to enquire into what he knew about the sale of the Fyffes' shares in February 2000; what he was told and by whom; what enquiries, if any, he made prior to the sale or subsequent to it, and what the board of DCC discussed or didn't discuss around that time.

Mr. Spain explained firstly that he was aware that the Board of DCC had decided to transfer the beneficial interest of the Fyffes' shares to Lotus Green in 1995. "I made and we made at the board various enquiries about why this was prudent and we were satisfied with both the structure and with the individuals who were to be directors of Lotus Green. That they were likely to do sensible things, that they were experienced." (**Answer 7: Page 7**).

The decision taken in 1995 to transfer the beneficial interest to Lotus Green was on the basis of the advice that the board obtained and his being happy with the structure, which was largely a tax driven structure, and also his confidence and trust in the people who were going to be directors of Lotus Green.

After that decision was taken by the Board of DCC in 1995 it did not discuss the Fyffes stake in any great detail save for the annual strategy review which took place around March of every year.

In late January or early February 2000 he explained that Mr. Flavin telephoned him to inform him that there had been a number of unsolicited approaches made to him from brokers who wanted to buy the Fyffes' shares. Mr. Spain doesn't recall precisely when he was contacted by Mr. Flavin but he believes that it was shortly before the first sale took

place on the 3<sup>rd</sup> February. Mr. Spain said he wouldn't have known the exact share price of Fyffes at that time, but would have known that they had risen in the six weeks prior to that. Mr. Spain explained that they had taken the decision in 1995 that they would sell the Fyffes' stake as soon as there was a favourable price and "that was the instruction to Lotus Green". (**Answer 19:** Page 9).

**Question 20:** Right?

**Answer:** "That we would transfer to Lotus Green on the basis that they would be sold when there was a suitable price."

**Question 21:** Yes.

**Answer:** "I was aware that the price was now very attractive."

**Question 22:** When you say that there was a decision made, is it possible for you to pinpoint when that decision was made, and articulated in the way that you have indicated it? My understanding from your evidence (and indeed from all the directors' evidence on the last occasion) was that from the time that DCC became a public company in 1994 the stake that it had in Fyffes was no longer... (Interjection).

**Answer:** "Appropriate."

**Question 23:** Well I think everyone used the term that it was "anomalous" and that over a period, I think it was rather prophetic at the time, that they wouldn't be surprised that if, within five years, it was sold there wouldn't be any surprise?

**Answer:** "No."

Mr. Spain said that in the period following 1995 the share price remained obdurately low. (**Answer 24:** Page 10).



He explained that the expectation in DCC was that there might be a takeover bid for Fyffes, by maybe, an American company and if that were to happen there would be a premium paid. (**Answers 26 to 28:** Page 10).

When asked if the question of the ownership of the Fyffes' stake by the DCC group came up regularly for discussion at DCC plc., board level he said, "other than in the annual strategy statement it didn't come up specifically for discussion". He explained that the annual strategy statement was discussed around March or April of every year at the Board level of DCC.

**Question 33:** Apart from that, however, was there any board discussion of the holding in Fyffes?

**Answer:** "No there wasn't any board discussion."

**Question 34:** Do you recall any discussion between you and any of the Executive Directors (Mr. Flavin or any of the other Executive Directors) in the period between 1995 and the beginning of 2000 about the Fyffes' stake?

**Answer:** "No, I don't recall that."

Mr. Spain explained again that they were satisfied with the structure that they had set up in 1995 and with the individuals. "We were patiently waiting for something to happen." (**Answer 37:** Page 12).

**Question 38:** Yes, so you were going to react to something happening in relation to the Fyffes' shares is that correct?

**Answer:** "Yes."

**Answer 39:** "Well, it was decided and the instructions to Lotus Green were to sell as soon as there was an appropriate price."

**Question 40:** Yes.

**Answer:** "An attractive price."

**Question 41:** You say that there was an instruction given to Lotus Green. Can you help by pinpointing when that instruction was given or how that instruction was given?

**Answer:** “I don’t know how it was done, but we made the decision on that basis.”

**Question 42:** Is that a decision that was, in a sense, an open decision or was it something that DCC reviewed on an annual basis, I will put it to you like this. Let us say that there had been a 15% or 20% rise in the Fyffes’ share price in 1996, the year afterwards, the year after you transferred the beneficial interest to Lotus Green and you had showed up at a DCC board meeting and you were told that the board of Lotus Green had sold the Fyffes’ stake, would that have come as a surprise to you?

**Answer:** “No it wouldn’t.”

**Question 43:** ...Was it your understanding, therefore, that Lotus Green had the power, I don’t mean in any sort of formal sense, they clearly had the beneficial interest, but the decision as to whether the Fyffes’ stake would be sold rested with Lotus Green?

**Answer:** “Yes, that was fundamental to the structure.”

**Question 44:** Yes.

**Answer:** “We had been advised.”

**Question 45:** Yes, fundamental to the tax structure, clearly?

**Answer:** “Yes.”

**Question 46:** But I think you stated on one occasion on the last occasion that you were much more a ‘substance over form’ person. I don’t know what familiarity you have with Ms. Justice Laffoy’s decision but insofar as she was concerned, the decision to sell the Fyffes’ stake was more a DCC decision than a Lotus Green decision, even though it may have been put into effect by Lotus Green, but as it were, the substance of the decision was taken in DCC?

**Answer:** “No, that’s not true.”

**Question 47:** You think that is not true?

**Answer:** “No, because if DCC were making that decision there would have been a board meeting of DCC to make the decision, because all disposals and acquisitions of substance were the subject of board decisions in DCC.”

**Question 48:** Yes.

**Answer:** “So, if DCC were making the decision, there would have been a board meeting.”

**Question 49:** Is it possible, insofar as DCC was concerned, that Mr. Flavin was taking that decision, and not involving the DCC board?

**Answer:** “No, because that wasn’t the pattern of acquisitions and disposals. The pattern was always that he brought it for a board decision, he brought the transactions, and the board made all acquisition and disposal decisions.”

**Question 50:** ...If that was your understanding Mr. Spain it suggests that the Board of Lotus Green had very considerable power and discretion in relation to the stake that it owned?

**Answer:** “Yes and we went into that at the time that it was transferred to them in 1995. We were satisfied that we had ultimate control because we would always change the system if we didn’t like what they were doing.”

**Question 51:** When you say you had ultimate control, it was a wholly owned subsidiary of another wholly owned subsidiary?

**Answer:** “Yes, shareholder controlled.”

**Question 52:** Therefore, anyone who served on the Board of (Lotus Green) served at the pleasure of DCC?

**Answer:** “Absolutely.”

**Question 53:** To that extent, I am just a little bit puzzled by your assertion that DCC (that is DCC plc) didn’t control the decision making of Lotus Green?

**Answer:** “Well, they didn’t because it was for the board of Lotus Green to make a decision.”

**Question 54:** Did you know that there were ‘A’ directors and ‘B’ directors?

**Answer:** “Yes.”

**Question 55:** What was your understanding of how that operated?

**Answer:** “Well, it was explained to us at the time the structure was set up and I understand that it required an ‘A’ director and a ‘B’ director before a resolution could be passed.”

Mr. Spain was then asked if he thought in reality the Dutch directors were ever likely to take a decision about the disposal of Fyffes without reference to what they either knew or understood DCC to want in relation to those shares. He answered, “well DCC’s position was I think very clearly set out, whenever there was an attractive price that they should be sold”. (**Answer 67:** Page 16).

**Question 68:** Who determined, to your understanding what an attractive price was? I mean how did they...? (Interjection).

**Answer:** “I think it was fairly obvious at that time, at least in the spring of 2000, in early February 2000, it was fairly obvious that the price was now attractive.”

**Question 69:** Yes.

**Answer:** “To any sensible person...on the back of dotcom.”

**Question 71:** On the back of worldoffruit.com, as you suggest. But is it your understanding and was it your understanding as the Chairman of this substantial public company, that the directors in Holland called the shots on the disposal of what was 15% of the DCC’s worth?

**Answer:** “Absolutely. And we had transferred it to them on that basis.”

Mr. Spain stated that the only person he was in contact with at around the time of the share sales in February 2000 was Mr. Flavin.

**Answer 80:** “I didn’t discuss it with anybody else.”

**Question 81:** Just explain to me how formal or informal that would have been?

**Answer:** “It would have been very informal, by telephone.”

**Question 82:** If you can just to the best of your recollection, and I don’t want it sort of word-for-word, but what was the form as it were?

**Answer:** “Well I knew that the market price was attractive.”

**Question 83:** Yes.

**Answer:** “And I knew that the brokers were making approaches.”

**Question 84:** Yes.

**Answer:** “Therefore, I expected that there would be an attractive offer which would be very easy to make a decision on.”

He confirmed that he had no dealings with the Lotus Green directors between 1995 and 2000 other than through Mr. O’ Dwyer. When asked what his understanding of Mr. Flavin’s involvement was with the brokers who had expressed some interest in acquiring the Fyffes’ shares Mr. Spain said, ‘it would be normal for the executives to do the negotiation before bringing it to the board for a decision. But in this case I wasn’t anticipating much negotiation, if any, because the market really fixed the price’. (**Answer 91:** Page 21).

**Question 92:** But when you say the executives would negotiate it, who was negotiating with the executives?

**Answer:** “Well, I don’t think anyone was negotiating with the brokers. The brokers were to make an offer.”

**Question 93:** Yes.

**Answer:** “And the market. That would have to be the market price so the market would fix the price.”

**Question 94:** But are you aware or were you aware at the time that there were discussions at least on the phone between Mr. Flavin and Mr. McLaughlin and some of the representatives from Goodbody’s Stockbrokers?

**Answer:** “No. Mr. Flavin rang me and told me after the shares had been sold.”

**Question 96:** But weren’t you informed of the discussions that took place between Mr. Flavin and any of the stockbroker firms?

**Answer:** “No.”

Mr. Spain said that his recollection of being told about the interest from brokers was before the sale of any shares but he was ‘unworried’ by it because he knew there was an attractive price in the market. (**Answer 103:** Page 23).

**Question 104:** But you also knew that Mr. Flavin was on the board of Fyffes?

**Answer:** “I did, yes.”

**Question 105:** Did you make any enquiry of Mr. Flavin as to whether, by virtue of his being on the board of Fyffes, there was any problem with the disposal by Lotus Green by the shares?

**Answer:** “No, I didn’t make any enquiry of Mr. Flavin. Maybe that is because I was used to him doing everything correctly.”

**Question 106:** Yes.

**Answer:** “He was always very tight lipped about what was going on in Fyffes.”

**Question 107:** Yes. That is what you would hope and what you would certainly expect but here was a situation in which the disposal of the DCC stake, if you just take Lotus Green as being part of the DCC group. But the DCC group were at least receptive to offers to buy its stake in Fyffes and I am just wondering did it ever occur to you or cross your mind, ‘well we better make sure that our Chief Executive, who was also on the board of Fyffes, does not have any information which will or could impact upon...’ (Interjection).

**Answer:** “No, I didn’t do that because I was satisfied that Jim Flavin always did everything very correctly.”

**Question 108:** And you made no enquiries of him?

**Answer:** “No.”

**Question 109:** Because back in 1995 you had taken some or at least the company had taken some advice and had considered some advice from Alvin Price about insider dealing. I take it you knew, you mightn’t have had chapter and verse, but you knew it was unlawful or would have been unlawful for DCC. ...To deal in the Fyffes’ shares at a time when Mr. Flavin had price sensitive information?

**Answer:** “Yes. I would have been aware of that but I was satisfied that Mr. Flavin wouldn’t deal or that there would be no dealings if he were in possession of price sensitive information.”

**Question 110:** Do I understand you correctly in saying that you were satisfied with that without making any enquiries?

**Answer:** “Yes.”

**Question 111:** You trusted Mr. Flavin. Is it the case you felt you wouldn’t even have to ask that question or how did your confidence arise? The reason I say it is this. If that confidence proved unfounded and if Mr. Flavin, as the combination of the High Court and the Supreme Court have found (and you may have a view in relation to that), but they found that he was in possession of price sensitive information and they have held that DCC and Lotus Green and S & L and Mr. Flavin dealt in the shares and as a result DCC (not only Lotus Green but DCC) has had an obligation to make recompense to Fyffes but

for the profit that it made. Now if that was always a possibility, I am just wondering why you didn't take any steps to enquire about that at the time when this was being contemplated.

**Answer:** "Oh well, I had high confidence in Mr. Flavin's integrity and knowledge."

**Question 112:** Even in circumstances where, as it were, the pain would be suffered by the company, of which you were Chair, you didn't feel the need to go any further or not so much to go any further but to make any enquiries about it?

**Answer:** "No, I didn't feel the need."

**Question 113:** Yes.

**Answer:** "My experience with Jim Flavin is that he always acted very correctly and he was a virtual clam as far as Fyffes was concerned."

**Question 114:** It is not that he would have had to disclose to you the details of any information but if you had asked him for example 'Jim are you in receipt of any information or do you know anything about Fyffes that might be price sensitive?' Now he wouldn't have to tell you what that was but that enquiry at least would have, you would have thought, caused Mr. Flavin to... (Interjection).

**Answer:** "I didn't feel the need to make that enquiry."

**Question 115:** I suppose what I am trying to find out is why?

**Answer:** "Because of my experience with Mr. Flavin."

**Question 116:** Yes.

**Answer:** "And his knowledge of the law and his knowledge of dealing in company shares."

**Question 117:** Insofar as his knowledge of dealing in company shares is concerned, though, would I be right in saying that this was the first occasion in which DCC were selling a stake in a private company, of which Mr. Flavin was also a director?



**Answer:** “Of a public company, sorry?”

**Question 118:** Of a public company of which Mr. Flavin was a director?

**Answer:** “Yes I think so. I don’t know whether there are any other examples.”

**Question 120:** When you express confidence, therefore, in his knowledge of the law and in his experience of dealing in shares, I am just wondering where did that confidence come from?

**Answer:** “Well, over the years, my confidence in Jim Flavin’s knowledge had certainly solidified over the period of the years that I was associated with him.”

Mr. Spain was then asked whether it was likely that the disposal of the Fyffes’ stake by its subsidiary Lotus Green would have assumed greater prominence at the board of DCC but for the tax implications and the tax structure that was put in place. He explained that if DCC had not transferred the shares to Lotus Green, the beneficial interest in the shares... there would have been a board meeting of DCC to make the decision. (**Answers 121 and 122:** Page 27 and 28).

When asked if there was a discussion at a board meeting about the proposal the...imminent proposal to...dispose of the Fyffes’ shares Mr. Spain answered “no, there wasn’t a discussion at the DCC board”. (**Answer 123:** Page 28).

Mr. Spain was referred to a discussion which did take place about the proposal to acquire a UK IT company for between 20 or 30 million around the 20<sup>th</sup> January where there was a discussion at the board level and said, “which would be normal”. (**Answer 124:** Page 28).

**Question 125:** That was an acquisition which was only a fraction of the amount that would be realised from the sale of Fyffes?

**Answer** “Yes but we had set up this structure for the sale of Fyffes.”

**Question 126:** No I fully understand that the structure was there.

**Answer:** “We were satisfied with the structure.”

**Question 127:** To that extent, are you saying that as Chair of DCC once you set up that structure you and the board of DCC had no further role?

**Answer:** “No role in the disposal of Fyffes’ shares.”

**Question 128:** And you really believe and believed that at the time?

**Answer:** “Absolutely, because that is what we had set out to do.”

**Question 129:** Yes.

**Answer:** “And we made a lot of enquiries at the time and we were satisfied with the structure and with the individuals.”

Mr. Spain said he was not aware that Mr. Flavin had had a discussion with Mr. Price and with Mr. Scholefield in relation to the enquiries that were being received in late January/early February of 2000 and also expressed the view that it would be normal for him not to discuss it with him.

**Question 146:** Why would that be normal?

**Answer:** “Unless he had a problem that he suspected that there was price sensitive information, in which case, he would probably discuss it with me or inform me that that was so.”

When asked if he thought it was desirable for it to have happened he answered ‘I don’t think Jim regarded it as necessary’. (**Answer 149:** Page 33).

**Question 150:** You trusted him and trusted his judgment?

**Answer:** “Yes, I trusted his integrity and his knowledge.”

**Question 151:** But there is also judgment, isn’t there?

**Answer:** “Yes.”

**Question 152:** I mean, you can be full of integrity and get it wrong. You can blind yourself to what objectively might be the most blatant example of price sensitive information. It does require a bit of judgment as well.

**Answer:** “Well I trusted his judgment.”

Mr. Spain was insistent that “if there was something he required to discuss with me that he would discuss it”. (**Answer 154:** Page 34).

Mr. Spain was then asked about the role that he played as Chair and a non-executive director and explained that Mr. Flavin didn’t have to come to him because of the tax structure that was set up and the decision was for the subsidiary. He was also satisfied that Mr. Flavin had also behaved “very correctly” in relation to information about Fyffes. (**Answer 160:** Page 35).

He agreed that in hindsight it might have been a good idea for Mr. Flavin to bring it to the board’s attention “but it obviously appeared to Mr. Flavin at that stage that he didn’t have price sensitive information”. (**Answer 165:** Page 37).

Mr. Spain agreed that Lotus Green would be expected to follow the policy which was dictated by its parent. “As a subsidiary it would be expected to follow the policy of the parent.” (**Answer 198:** Page 47).

He did not however accept that the Fyffes’ stake could be sold by Lotus Green without Mr. Flavin’s say so. Mr. Spain was referred to the minute of the board meeting of DCC in May 1998 where it was stated “Mr. Flavin noted that the board of Lotus Green, a Dutch subsidiary of the group was currently reviewing its strategy in relation to its interest in Fyffes.”

Mr. Spain said that his understanding was that “if there was no change in the strategy of the parent there would have been no authority to review or decide something different”.  
(**Answer 206:** Page 50).

**Question 207:** Yes, so when it says that Lotus Green was currently reviewing its strategy if DCC hadn't changed its position that was a fairly meaningless phrase is that correct?

**Answer:** “Yes that is correct.”

He did not know why it was put in there if there had been no change in the DCC position. Mr. Spain was then referred to the minute of the board meeting of the 7<sup>th</sup> February 2000 where it was noted “during a discussion on DCC's fruit division it was noted that the board of Lotus Green (a Dutch subsidiary of the group) had recently reviewed its strategy in relation to its interest in Fyffes and had, on the 3<sup>rd</sup> of February 2000, disposed of 17.9 million ordinary shares in Fyffes realising for the group proceeds of €57.3 million a profit on cost of €45 million and a profit on book value of €40 million”. He was asked if he remembered the context of that discussion. He said he did not but it was simply recording what happened which he presumed most people were aware of. “Certainly I was aware of it.” (**Answer 210:** Page 51).

He was then taken to the minutes of the board meeting of March 27<sup>th</sup> 2000. He did not remember anything of a discussion about a profit warning that Fyffes had issued some days prior to the DCC board meeting of the 27<sup>th</sup> March. He was asked would it not have been of very material interest to him in the context of any potential suggestion of insider dealing to which he answered, “we didn't advert to any potential question of insider dealing”. (**Answer 225:** Page 54).

He was then referred to Mr. Scholefield's manuscript notes referring to the “unfortunate profit warning”.

Mr. Spain was asked why he would be describing a profit warning as being unfortunate in the context of DCC having disposed of its stake in Fyffes unless there was some concern about the implications?

**Answer 227:** “Well, I suppose Jim felt that the directors might have some concern.”

**Question 228:** What concern might the directors have?

**Answer:** “Well, that in fact Fyffes were anticipating reduced profits. But the annual report of Fyffes had been circulated where Mr. McCann expressed confidence of continued rise in profits.”

**Question 229:** Yes.

**Answer:** “So I suppose that Jim was worried that some people might misinterpret this profit warning.”

**Question 230:** Well, how would that have any bearing on DCC?

**Answer:** “Well, because shares were sold in February and some people might interpret that Fyffes were aware that their profitability was going to be down at an earlier point but that wasn’t the case.”

**Question 231:** Yes, but presumably, what Fyffes knew or didn’t know was not of any material bearing. It could only be of a material bearing if Mr. Flavin knew about it?

**Answer:** “That is right.”

**Question 232:** Again, insofar as the reference to ‘unfortunate profit warning’ did anyone ask any questions of Mr. Flavin as to what he meant by ‘unfortunate profit warning’?

**Answer:** “I don’t know that that happened. I don’t recall it happening.”

It was put to Mr. Spain that the note of Mr. Scholefield certainly suggested that there was a discussion about it. It was also suggested to him that it must immediately have twigged with the board that there could be a problem, at least a perception problem, where there was a much heralded disposal of the DCC stake at a considerable profit and then a month later there was a profit warning by Fyffes.

**Question 233:** Were there not red flags being raised at board level?

**Answer:** “I don’t recall that.”

**Question 234:** Is that not surprising, Mr. Spain, in view of the, I don’t know, something of the order of 80 million profit?

**Answer:** “People didn’t realise that those shares had been held, I don’t know how long, but nearly 20 years some of them, so it is not such a huge profit in that context.”

**Question 235:** It is a huge profit compared to what the price was, let’s say, at the end of November 1999, so as you have said in the space of about 5 or 6 weeks the share price had, if not more than, certainly almost doubled isn’t that right?

**Answer:** “Yes.”

**Question 236:** ...The perception could have been that DCC had managed to sell in February 2000 a month before a profit warning which... (Interjection).

**Answer:** “Yes, but I think everybody was influenced by the fact that the share price had nothing to do with Fyffes trading, it was all based on the dotcom situation.”

**Question 237:** Let’s just test that for a moment.

**Answer:** “The dotcom bubble burst in March 2000.”

**Question 238:** That might have been the reason for it to rise, but if there had been an awareness of bad trading in the first two months of the year in October and November, that might have tempered the rise in the Fyffes’ stock if people had known about the poor trading.

**Answer:** “You are surmising that. I don’t have a view.”

**Question 239:** Okay.

**Answer:** “Mr. McCann was still making very public noises about the next year when making the report which is dated 31<sup>st</sup> January. I think it is fair to say that Jim was as much

surprised by that profit warning as anybody else because he didn't have any information which would have indicated that."

**Question 240:** He had the December and the November 1999 management accounts?

**Answer:** "Yes but they weren't particularly unusual in that various good years had started off with a couple of months of bad trading and the company was still making very bullish noises about the next year."

**Question 241:** Are you saying that the board meeting of the 27<sup>th</sup> March, that the board of directors were not concerned unduly about this unfortunate profit warning?

**Answer:** "Yes, that is what I am saying."

**Question 242:** Do you remember how long the discussion took place

**Answer:** "I don't remember but it wasn't a big issue."

Mr. Spain then confirmed that he retired from the board of DCC on the 13<sup>th</sup> of June 2007 before the Supreme Court decision.

**Question 251:** In terms of good corporate governance and in terms of your role as Chair, a non-executive Chair, did you have any sense in which the power and the authority of the Chief Executive was such in DCC that you in retrospect didn't scrutinise the exercise of power by the Chief Executive to the extent that you ought to have?

**Answer:** "I wouldn't say that. Some of the non-executives were very experienced and very strong and always examined everything in great detail."

**Question 252:** You were there as the Chairperson. You have a long personal association with Mr. Flavin going back to 1976, and in terms of good corporate governance, do you think that that friendship, the association that you had with him, in a sense, may have blindsighted you to an extent that you didn't ask the questions you might have asked?

**Answer:** "No. We always had strong non-executive directors."

**Question 253:** Including yourself?

**Answer:** “Yes.”

**Question 254:** Yet nobody seems to have asked or got the opportunity to ask any questions before the Fyffes’ stake was sold other than the Compliance Officer who is the Company Secretary and the company solicitor?

**Answer:** “Yes that’s right.”

**Question 255:** Do you have any view as to whether that, as it were, state of affairs is a good one or demonstrates that the board was functioning properly because as a result of the High Court and the Supreme Court decision, there is a finding of insider dealing that affects Mr. Flavin, DCC, S & L and Lotus Green Limited and resulted in a large amount of money (having to be repaid). You weren’t on the board at the time, so I will have to ask others, but a large amount of money being paid to or being paid back to Fyffes. Does that experience or what you now know make you regret not asking questions or not doing more in terms of the time when the Fyffes stake was being sold?

**Answer:** “I don’t think anything would have been different.”

**Question 256:** So why do you say nothing would have been different?

**Answer:** “Because we had high confidence in Jim and his explanations. If we were aware of the content of what he discussed with Michael Scholefield and Alvin Price I believe we would have come to the same conclusions as them.”

**Question 257:** None of us will ever know, Mr. Spain, because it didn’t happen but Mr. Price is the lawyer, Mr. Scholefield is the Secretary and Compliance Officer. They are not the same as the board of directors because the Chief Executive is answerable to the board of directors in a way he is not answerable to the solicitor or to the Company Secretary. I am just wondering if you feel there was a failing, a collective failing of the board in not subjecting the decision to sell the Fyffes’ stake to closer scrutiny when you knew at the very least that Mr. Flavin was on the board of Fyffes?

**Answer:** “No, I don’t have that view.”



**(i) Tony Barry**

Mr. Barry was asked if he had any advance warning that the shares in Fyffes were going to be sold in 2000 to which he answered “no”. Nor did he receive any communication from anyone in DCC that this was likely to happen. He agreed that when they took the decision in July 1995 to transfer the beneficial interest of the shares to Lotus Green that they gave up a degree of control over the Fyffes shares in so doing. He agreed that there was a benefit and a price to be paid. They were giving up control but they were creating the possibility, if not the certainty, that they would save 40% tax once they existed which would benefit the DCC group. He said he was conscious of that decision when he was part of making it in 1995. He said at the time he clearly understood that when the shares came to be sold he wouldn’t have any say in the matter.

**Question 562:** What was your understanding...as to who would have the say?

**Answer:** “Lotus Green.”

**Question 568:** Do you think it was likely or possible that – I will start with possible. Do you think it was possible that Lotus Green could have sold the Fyffes’ stake without reference to DCC?

**Answer:** “With the structure in place. I don’t think so.”

**Question 569:** Do you think it was conceivable that the board would have done other than what they understood the DCC bidding was in relation to that stake?

**Answer:** “No.”

He agreed that the board of Lotus Green would take their overall strategic direction from Dublin even if they were the ones who ultimately took the decision to sell or not to sell. (Answers 572 and 573: Page 144).

**Question 574:** You would expect that before taking a decision as to whether they would sell or not sell they would ascertain what the views of their owners were?

**Answer:** “Yes. I think the structure gave them that access by virtue of DCC having its financial officer on the board.”

**Question 575:** Yes, gave it access. But again in taking the decision you took in July 1995 and the checks and balances that were built in, you didn’t ever think that Lotus Green could ‘go rogue’ as it were?

**Answer:** “No.”

**Question 576:** I mean you never contemplated a fall off in the Fyffes’ share price and Lotus Green deciding to offload them at a substantial loss?

**Answer:** “No.”

Mr. Barry agreed that the non-executive directors were not there to rubber stamp executive policy or the executives’ decision. “Quite correct.” (**Answer 584:** Page 146).

He agreed that non-executives have and are meant to have an independent view and be able to stand back from the executives and not merely go along with what the executives want because the executives want it. (**Answer 589:** Page 147).

He agreed that if he were an independent director there is a requirement and an expectation that you would be expected to stand up to the Chief Executive. (**Answer 592:** Page 147).

When asked if it worried him that the ultimate decision about the sale of the Fyffes’ shares was something that might never come before him and his fellow board members he answered “no, not in the circumstances that prevailed”.

**Question 595:** When you say that prevailed, what do you mean by prevailed?

**Answer:** “Well, it was a shareholding in a public company where shares were quoted.”

**Question 596:** Yes.

**Answer:** “If one is used to dealing in shares and you know what price you bought them at, you know the extent to which you own the shareholding of the company in which they are

in, which was fairly considerable, 10%, and you know that it is a business that really isn't in line with your strategy, it makes eminent good sense to dispose of them at the right time."

**Question 597:** Yes.

**Answer:** "The right time, you know isn't a huge scientific work as to – if you can dispose of them at a time when you will have, if you like more than satisfied yourself that they are worth that in relation to the future profits of the company and you make a profit from it then that is a fairly straightforward decision."

He agreed that the decision taken in July 1995 was a decision in principle but that they were not taking the ultimate decision or a decision about the price at which they would ultimately sell or how much of a profit was enough profit before they could sell. (**Answer 601:** Page 149).

He agreed that the ramifications of insider dealing were a live issue for him and for the other board members because they considered it in 1995. (**Answer 604:** Page 150).

**Question 606:** So there was a risk with any disposal that an issue of insider dealing might arise?

**Answer:** "That risk had to be there, yes."

**Question 607:** Yes. I was just wondering when you carefully considered it in 1995 and accepted the advice of Alvin Price, did you not have a worry that when ultimately the shares were coming to be sold that they may be done at a time when Jim Flavin was in receipt of, or in possession of information that could constitute price sensitive information?

**Answer:** "I would have to be honest and say that I never consciously said 'we have to be absolutely careful here and check on Jim at every turn and corner.'"

**Question 608:** Yes.

**Answer:** “I would have assumed that both he and the people in Fyffes were responsible plc directors and would be aware of their responsibilities when it came to insider information.”

**Question 612:** ...Do you think that you should have or that there should have been some mechanism built into the structure that you created in 1995 to ensure that there was DCC board supervision of any ultimate sale?

**Answer:** “Well I would have assumed that the structure that was set up, and you said it earlier, if you like, the DCC board forewent some of its powers by handing over and setting up the structure in Lotus Green. I would have considered the checks and balances inherent in that structure would have protected DCC.”

**Question 613:** Yes, what checks and balances in particular would have protected DCC from insider trading?

**Answer:** “Well, if there was insider trading the only person who really had access to information which might have constituted insider information was Jim Flavin.”

**Question 614:** Yes.

**Answer:** “He wasn’t on the board of Lotus Green.”

**Question 615:** Right. Did you think that was sufficient protection?

**Answer:** “Yes.”

**Question 616:** For DCC and for Lotus Green?

**Answer:** “Yes I did.”

**Question 617:** Yes.

**Answer:** “Now if you ask me did I ask myself that question, write it down, no I had no inherent fears that the structure wouldn’t work.”

**Question 618:** ...Any decision by Lotus Green to dispose of the shareholding was a decision it was going to take informed by the view of DCC?

**Answer:** “Yes.”

**Question 619:** ...Insofar as there was a DCC view, it wasn't going to be your view or the board's view because it wasn't going to come back to you, it was going to have to be the view of the, well collectively the executives, but most likely the Chief Executive of DCC?

**Answer:** “Yes.”

**Question 620:** Now that being so, if the decision, if as it were the green light for a decision to sell the Fyffes' shares was going to be taken by Jim Flavin did it not worry you that that might implicate DCC, even though the ultimate decision, as it were, the legal giving effect to that green light, was going to be taken and would be taken by Lotus Green?

**Answer:** “No, it didn't worry me.”

**Answer 622:** “I was conscious fully of the structure of Lotus Green and the powers we had conceded to Lotus Green. You see, if Jim Flavin as Chief Executive, he was the one that was going to exercise all the influence. That is kind of generally true of the CEO, but when you come to a public company, whose shares are traded in the market it is clearly known to the executive and to the market, what price those shares were bought at. It is clearly known what kind of conditions should prevail when the shares were sold that would enhance DCC's position and give a good profit. It is not one of those cases where the CEO has unique wisdom in the matter. It is pretty obvious to most of the senior executives ...”

**Question 623:** Do you think it was conceivable that Lotus Green would take a decision or took a decision to sell the shares in Fyffes against the wishes of Jim Flavin?

**Answer:** “That they did?”

**Question 624:** Yes.

**Answer:** “No.”

**Question 625:** That being so, was there not an exposure for DCC in relation to insider dealing because it was left solely to Jim Flavin, who was the insider, to decide whether he had or had not inside information in relation to the sale of the Fyffes' shares?

**Answer:** "Well, I wouldn't have considered it being so much Jim Flavin. In my, I mean in my view the board had conceded powers to Lotus Green and it was Lotus Green made the decision to sell."

**Question 627:** ...but how free were Lotus Green in relation to taking that decision?

**Answer:** "They were free within the checks and balances in the system."

**Question 628:** Yes but did you, you agreed with me a little earlier that it was unlikely if not inconceivable that they would have sold against the wishes of DCC?

**Answer:** "Yes, on kind of common sense grounds."

He agreed that it was only ever going to come to Lotus Green's board for their consideration if somebody from Dublin brought it. He also agreed that it would have been inconceivable for Mr. O' Dwyer to bring the matter to Holland for consideration if Jim Flavin was opposed to him doing so.

**Answer 632:** "In this instance I would have thought it inconceivable that he would have done it, because if Jim Flavin thought it was entirely wrong and entirely inappropriate."

**Question 633:** Or that the time was wrong or that you should wait?

**Answer:** "Yes, yes. I don't think he would have any difficulty. I think Fergal O' Dwyer could have judged that quite easily himself."

**Question 634:** So he would have overridden Mr. Flavin?

**Answer:** "No, he wouldn't. I don't see any circumstances whereby they would have had a difference because it was so transparent and simple."

Mr. Barry said he heard about the sale of the Fyffes' shares after the first tranche were sold. (**Answer 638:** Page 157).

He explained that he received a telephone call from Jim Flavin on the 3<sup>rd</sup> or 4<sup>th</sup> February 2000.

**Question 642:** What do you remember of that conversation?

**Answer:** “I just remember him ringing me up and he saying ‘there is good news on Fyffes. You know the share prices have been very high’ which I did and he said ‘the demand is insatiable and we have sold this number’ and we had a general discussion around it and we even discussed the reaction of the McCann Family and Jim told me that the McCanns were extremely happy about the idea and they actually had shared a bottle of champagne or some such thing.”

**Question 647:** Did you ask any questions about knowledge that Jim had at the time that first tranche were sold?

**Answer:** “No, I was absolutely 100% convinced that the share prices in Fyffes were driven by a chimaera, if you want to use that expression, by something that wasn’t real. If the market wants to do that and wants to buy the shares then you would be a fool not to sell them.”

**Question 650:** Why didn’t you ask, when you asked questions or when questions were asked about insider trading in 1995 why didn’t you ask ‘were we free to sell Jim’ in 2000?

**Answer:** “It never occurred to me.”

**Question 651:** Why was it an issue in 1995 and wasn’t for you in 2000?

**Answer:** “Well I think it was an issue in 1995 if when you were putting a proposition like that to a board you have got to cover all the angles.”

**Question 652:** Yes.

**Answer:** “At the time I was told of the share sale and given the whole, if you like atmosphere around the selling of the shares, the rise in the share price, I didn’t think for one moment that there was any question of any insider information.”

**Question 653:** No, but surely Mr. Barry, the rise in the share price can have nothing to do, has no connection to what information Jim Flavin may or may not have had. The rise in the share price is separate and apart... (Interjection).

**Answer:** “Independent, yes.”

**Question 654:** And independent of any information? Without asking any questions how could you, as a non-executive director – well firstly how, without it coming back to you as a member of the board, how could you take any steps to safeguard DCC’s position?

**Answer:** “Well, I would have to say that I have, in a matter like that, full trust in Jim Flavin in that if he felt that he had insider information I think he would have put it on the table that has been his form.”

**Question 655:** Yes.

**Answer:** “I wouldn’t have – frankly it wouldn’t have occurred to me given the circumstances surrounding the sale, that there was anything other than what the market said was in it.”

**Question 656:** Yes. Did you know that he had spoken to the company’s solicitor about insider dealing?

**Answer:** “No, not at that point in time.”

**Question 657:** Did you know he had spoken to the Compliance Officer?

**Answer:** “No, not at that time”.

**Question 658:** When did you find out that he had spoken to both of them?

**Answer:** “Much later on. I don’t recall when.”

**Question 659:** When you found out that he had spoken to both of them, did you ever ask them or did it ever occur to you “well Jim, why didn’t you raise that with the board. We might have asked some questions or we might have got you to ring up Neil McCann”.



**Answer:** “Well, I think, if I remember rightly and this is you know a number of discussions and meeting at the time that that was explored the circumstances within Fyffes and whether there was insider information or not, was thrashed out at the same time.”

**Question 660:** With whom?

**Answer:** “So in other words in general discussions around the board table Jim said, you know ‘this is what I knew at the time the share sale was done, and okay there was a weak few trading months but they weren’t critical months and that had happened it before’. He gave an explanation as to why he didn’t deem...” (Interjection).

**Question 661:** Yes, but that was on the 27<sup>th</sup> March?

**Answer:** “Yes.”

**Question 662:** Isn’t that right?

**Answer:** “Yes, but at that stage...” (Interjection).

**Question 663:** The horse had bolted?

**Answer:** “Well, not quite.”

**Question 664:** Well you had sold all the shares?

**Answer:** “Yes, but nothing had arisen about insider information at that stage.”

**Question 665:** I know, but you had no ability to exert any influence over the decision to sell or not?

**Answer:** “No.”

**Question 666:** But if, for example, you had a board meeting on the 20<sup>th</sup> January, if Jim Flavin had said ‘I am starting to get – there are starting to be phone calls enquiring about the Fyffes’ shares’, at that meeting if it had arisen, you could have asked questions or got an explanation from him as to what he knew or didn’t know. Because any sale by DCC of

the stake was going to be, as long as Jim was on the board of Fyffes, was going to have the question asked and answered 'are we free to sell'. Isn't that right?

**Answer:** "Yes."

**Question 667:** Normally the persons who ask those questions and are scrutinising, so that you protect the company, are the board of directors. You didn't get to ask them at a time when you could have done anything about it in this instance?

**Answer:** "Well, frankly as far as the board were concerned the decision to sell had been transferred to Lotus Green. There was no reason why they should have had any access to insider information."

**Question 670:** The Chief Executive of DCC would have been expected to have influence over Lotus Green, even if he didn't sit on the board of Lotus Green?

**Answer:** "Some."

**Question 672:** It existed for the purpose of holding shares and selling them at the right time, isn't that right?

**Answer:** "Yes."

**Question 673:** Selling them at the right time as far as DCC was concerned, not Lotus Green?

**Answer:** "Yes."

**Question 674:** Lotus Green will take a decision and take an informed decision but it was when DCC considered it right?

**Answer:** "Yes, it would have been perfectly obvious to all of the directors in Lotus Green that the time was right."

**Question 680:** "Lotus Green was there legally to do the bidding of DCC in relation to Fyffes?"

**Answer:** "Yes."

**Question 681:** So it was going to come from DCC to Lotus Green?

**Answer:** “Yes.”

**Question 682:** Just in terms of calling a spade a spade Mr. Barry, it was a legal vehicle, it was a legal construction?

**Answer:** “Yes.”

**Question 683:** To avail of a more favourable tax regime?

**Answer:** “Nothing else.”

**Question 684:** There is nothing legally wrong with that, and nothing other than that. Therefore I am just wondering how you can be, or appear to be so confident about Lotus Green taking a decision without Jim Flavin on the board and yet there not being a risk for DCC that that might constitute insider dealing? How the mere fact that transferring the beneficial interest removed the risk of insider dealing.

**Answer:** “It didn’t remove the risk of insider dealing.”

**Question 686:** Yes.

**Answer:** “He was perfectly au fait with market trend, demands, certainly with Jim’s frame of mind, because that is the way CEOs and Financial Directors work.”

**Question 687:** But he (Fergal O’Dwyer) was subordinate to him?

**Answer:** “He was. But that doesn’t mean he couldn’t act in his role in Lotus Green in an appropriate way and he was not party to insider information to my knowledge.”

**Question 688:** But you were there as a non-executive director to exercise some control over the executives. If it is only being left to Fergal O’ Dwyer to protect DCC there is a weakness in that because you are leaving it to an executive to try and exercise control over his Chief Executive. I mean control in the sense of seeking to ascertain whether he, Fergal

O' Dwyer should be going to try to set things in train in Holland in circumstances which were safe or unsafe for DCC.

**Answer:** "Well, I would have thought and I think that Fergal O' Dwyer would have felt absolutely clear in his own mind that if Jim Flavin was never there that it was perfectly safe to go ahead with the deal by Lotus Green."

**Question 689:** What do you mean if Jim Flavin was never there?

**Answer:** "In terms of judgment of the market. The fact that Jim Flavin was a non-executive director of Fyffes was a matter for Jim Flavin."

**Question 690:** Was it?

**Answer:** "In the sense that he is the only one who could have access to insider information."

**Question 691:** That is true, but the implications were implications not just for Jim Flavin, they were implications for DCC.

**Answer:** "Yes."

**Question 692:** Because it was DCC, or the DCC group that was selling its shares?

**Answer:** "Yes."

**Question 693:** The person who could be picking up the tab would be DCC, isn't that right?

**Answer:** "Yes."

**Question 694:** I suppose my only point is that because of what was done in 1995, you didn't get a chance to scrutinise what happened in 2000 and do you accept that there was a weakness, that there was a lacuna or something?

**Answer:** "Well in retrospect."

**Question 695:** Yes.

**Answer:** “Yes, I take your point but I think within the normal bounds of reason, of the way companies work and people behave, I think the process that was put in place in 1995 worked and the fact that it went against us, that happens in life.”

**Question 696:** Yes.

**Answer:** “I don’t think that there was any – I think Jim Flavin was perfectly entitled to take the view on the facts that there was no question of insider information.”

**Question 697:** Yes.

**Answer:** “Now I know the Supreme Court says differently, but that just happens to be my point.”

**Question 698:** Do you think if it had come to the board of DCC, let’s say a special meeting was convened on the 2<sup>nd</sup> of February to say ‘there is an avalanche of interest in Fyffes’ shares. I am beating brokers back who want it on behalf of clients’, do you think if the board had convened and there had been a laying bare of all that Jim knew at that time and there had been questioning of him by the board, do you think DCC could have been better protected or would have been better protected?

**Answer:** “Well I don’t mean it in – it is a hypothetical question.”

**Question 699:** Of course it is yes.

**Answer:** “I am pretty sure, it is hard to say how a board meeting would have went under those circumstances but I think you could almost certainly say that the people around the table, myself included would have said ‘this seems like manna from heaven. Is there any reason why we shouldn’t take it?’”

**Question 700:** Yes, my question is, it was certainly manna from heaven but sometimes manna can come tainted and it can have a bad aftertaste?

**Answer:** “Yes, but I presume that that kind of question should have elicited a response. Now one can only say this you know as conjecture.”

**Question 701:** Sure, yes.

**Answer:** “One would have assumed that any words that were put like that, that if Jim Flavin had any significant reservations, any reservations that he would have said ‘well you can take a decision but I must exclude myself’ or ‘I must tell you that there are reasons why I believe I cannot be involved’. Which would have given a board I presume pause for thought. But this in conjecture. Who knows?”

**Question 706:** Did you at any stage ask him any questions about any insider trading concern?

**Answer:** “No.”

When asked how he felt after the shares were sold Mr. Barry said he was relieved. “Because going back to the original strategy I didn’t think an interest in Fyffes was really appropriate for DCC at that stage of its development.” (**Answer 709:** Page 168).

**Question 710:** Yes.

**Answer:** “Actually while we owned it, it paid a steady dividend all the time. But the availability of that money in the balance sheet of DCC, as cash, gave it powers that it wouldn’t have had otherwise.”

He qualified that by saying however that DCC was never short of cash or had weaknesses in its balance sheet.

Mr. Barry was then asked if he recalled learning of the Fyffes’ profit warning.

**Answer 715:** “I can’t remember exactly where I was when I read of it.”

**Question 716:** Or your reaction?

**Answer:** “All I know is – well in some ways not totally surprised. I say that now because you sometimes attribute thoughts to yourself which you mightn’t have had at the time, but which seem logical in retrospect.”

**Question 717:** What do you mean by that?

**Answer:** “Well, what I really mean was that Fyffes’ share price had been in free fall for two weeks before they gave the profit warning, because the world of fruit – the whole dotcom bubble had burst and Fyffes were hit at least ten days or a fortnight before they gave the profit warning and I think I would have taken the view, as I always had the view and I would have shared it with Jim Flavin, that I could not see any means whereby worldoffruit.com could possibly add the kind of value to Fyffes’ prospects that the market said it was going to add. I could see no circumstances where it could do it.”

**Question 718:** Yes.

**Answer:** “When it burst, and it wasn’t the only company in the dotcom business which had this kind of false floor on it, I wasn’t hugely surprised. I felt that people are coming to their senses at long last. Money cannot be made just as simply as that. You’ve got to do more. When they gave a profit warning – would I be surprised? Well I wouldn’t have been shocked by it. I would have maybe taken the view that ‘well if things are going badly don’t drag it out forever. If you have anything more to say get it into the market and let it go’.”

**Question 719:** Yes. When, if at all, did it first impinge on you that this might have an implication for DCC?

**Answer:** “Not certainly in March. It only impinged on me that the implications for DCC was, I think we got a letter, I think there was some correspondence with, I don’t know was it Fyffes or the Stock Exchange.”

He was then asked about the board meeting of DCC on the 27<sup>th</sup> March, six days after the Fyffes’ profit warning, and whether he recalled a discussion about the profit warning at that board meeting.

**Answer 720:** “Not of any significance, I can’t recall much being said about it.

He was then taken to the minute of that meeting and also to Mr. Scholefield’s notes of his jottings where there was reference to ‘unfortunate profit warning’ and a discussion which followed.”

Mr. Barry said he had no specific memory of that discussion and had no specific memory of feeling uncomfortable about the profit warning nor did he have a clear memory that the words ‘unfortunate’ were used. “They could well have been used.”

He doesn’t recall any of the directors asking any questions of Mr. Flavin and wasn’t surprised that they had not.

When asked what he would say to the suggestion that the failure of the board to ask any questions demonstrates a lack of concern or a lack of care on the part of the board of directors to the issue of insider dealing that it demonstrated too great an acceptance of what Mr. Flavin had to say.

**Answer 729:** “That point can be made. I think what it really demonstrates though is that the board knew very well why the share price went up and knew very well why the share prices came down, and didn’t really say that ‘it is the profit warning that is solely responsible for this’. The profit warning was almost a matter, if they had made it three weeks prior it mightn’t have made any difference to the share price.”

**Question 730:** Yes.

**Answer:** “I mean Fyffes at the time was outselling worldoffruit.com and selling the prospects of the company in a serious and public way.”

**(j) Patrick Gallagher**

It was explained to Mr. Gallagher that what I wished to do was to explore with him his recollection of the period around the share sales in February 2000 and what he knew



before the share sales that took place, between the 3<sup>rd</sup> and 14<sup>th</sup> February, what he knew afterwards and what his general understanding was.

I explained that the reason I wanted to start with the non-executives and particularly himself and Mr. Spain is that Mr. Barry had given evidence in the High Court and he and Mr. Spain hadn't. (The order in which the interviews occur in this Report is not the order in which the interviews actually took place.)

I explained that I was trying to look at things from the perspective of the persons involved, who did what, why they did it and what the consequences of it were.

I started by asking him what he knew of what became of a decision to sell the Fyffes' stake held by the DCC group in February 2000, when he knew it and how he knew it and how he came to know it.

“I knew of it after the first transaction had taken place by way of a telephone conversation, a call from Jim Flavin to me which I think would have been around the same time as the Stock Exchange would have been notified of the sale.” (**Answer 262:** Page 65).

Prior to that he said he had no knowledge of an impending sale of the Fyffes' stake “none whatever”. (**Answer 265:** Page 65).

When asked to give a summary of his involvement in discussions at board level of the Fyffes' stake owned by the DCC group between July 1995 and his call from Mr. Flavin on the 4<sup>th</sup> February 2000 Mr. Gallagher said “in 1995 at the board meeting when the decision was made for tax reasons to transfer the control, the ultimate ability to sell the shares to Lotus Green, and we were advised at that time that the outcome of that and what we had to take on board was that the board of DCC would not be involved in the disposal of these shares, that would be a matter for Lotus Green so that the tax status of the arrangement would be preserved. Therefore, from 1995, from the time that decision was made, I would

have no expectation of being involved in any way in the decision to dispose of Fyffes. From memory, we would have looked at, or the word Fyffes would have been mentioned as part of a strategy review meeting that took place each year when we would have had the opportunity, I suppose as a board to reverse the strategy. In other words, we could have obviously unwound everything and decided to keep the Fyffes' shareholding forever but that was never brought forward as an issue. By way of endorsing the strategy and by not changing the strategy from 1995 onwards, the strategy and disposal of Fyffes at a price that was sensible and reasonable in value was continued...We would never have had access – Jim was extremely careful about this, he would never give information about Fyffes, other than information that he was obliged to give us which was public so that we could actually role it into the accounts because we were responsible for producing accounts for DCC which met all requirements. That process, it was a very detached process over that period of time.” (**Answer 266:** Page 66).

Mr. Gallagher was asked whether he had a view as to whether the board of Lotus Green had formal and substantive power over the disposal of the Fyffes' stake at any time.

“I believe they had full formal and substantive control over the sale of the Fyffes' shares.” (**Answer 276:** Page 69).

He said he would not have been surprised if he had arrived at a board meeting any time between July 1995 and the 4<sup>th</sup> February 2000 to be told that the board of Lotus Green had sold the stake in Fyffes.

**Question 278:** That is regardless of what the share price was?

**Answer:** “Correct. Remember that we had representation on the board from DCC in the shape of Fergal O' Dwyer as he was the Financial Director.”

**Question 279:** When you talk about “we have representation”, Lotus Green was owned by DCC?

**Answer:** “Yes, but I’m just saying that the composition of the board was of people who were likely to act in the best interests of DCC.”

**Question 280:** Is that not understating it a little bit. I am just wondering?

**Answer:** “In what way, sorry?”

**Question 282:** Is it conceivable that the board of Lotus Green would have acted other than in accordance with the wishes of DCC?

**Answer:** “I think it would have been inconceivable, yes.”

When asked if the reality was that Lotus Green was at all times controlled from Dublin Mr. Gallagher answered “in a sense that the shareholding was owned or was part of the DCC group. On the other hand in relation to the business that it had to do, it had to do it as Lotus Green.” (**Answer 291:** Page 71).

**Question 293:** Do you think from your perspective that Lotus Green could have or would have taken a decision to sell the Fyffes’ stake in February 2000 against the wishes of Mr. Flavin?

**Answer:** “I think that it could have done, yes.”

**Question 294:** Do you think it would have done it?

**Answer:** “I don’t know is the answer. I just don’t know but it could have done, yes...”

**Question 296:** ... I am just wondering whether you maintain that that decision to sell was taken by the board of Lotus Green or it was taken by Mr. Flavin.

**Answer:** “In my view it was made by the board of Lotus Green and I believe that Mr. Flavin would have understood that and I think he would have made reference to it throughout, because the contact, understandably in my view, came to him from the brokers and I believe that he passed the ball as it were, having satisfied himself that there was real interest in the shares, so he passed them all on to Lotus Green for a decision. That is my understanding and I believe that was correct and I believe that is what he would have wanted to do.”

**Question 297:** Let me just go a step further. Do you think that there was any influence brought to bear on the board of Lotus Green by Mr. Flavin?

**Answer:** “I don’t think so. I don’t think it would have been necessary. Because the price of the Fyffes shares was very, very excellent, was very full, to my mind, it would have had almost a takeover premium in it.”

Mr. Gallagher agreed that in the context of anything that DCC owned the first port of call for brokers would have been Jim Flavin. (**Answer 317:** Page 75).

Mr. Gallagher agreed that the Lotus Green structure was only set up to avail of the tax saving. He also agreed that one of the consequences of same was that they had to do everything to ensure that that wasn’t lost. He had an appreciation that if decisions were taken in Dublin that could have or would have put at risk the tax structure.

“In the advice that we were given at the time, in 1995 and our understanding of it at the time, and the stress that was put on the fact that we would not as a board see this matter again, that we would hear of and be told of the disposal but that we would not be in any part of the process of disposal.” (**Answer 323:** Page 76).

**Question 324:** When were you told that?

**Answer:** “Back in 1995.”

**Question 325:** Where is that documented?

**Answer:** “It was told. board Minutes tend to be an extremely tight summary of what can sometimes be quite lengthy discussions. I absolutely have a total recollection of that and I wasn’t informed by the court case and I would have understood it in 1995. I was aware of similar Dutch schemes myself from my own business experience so I was aware of what needed to be done. I was aware of how they operated and I was aware of the need to have the board meetings in Holland. That was not new to me as a way of doing business. So, I

was comfortable with something coming forward on tax advice and legal advice so there was nothing new about it to me.”

**Question 326:** Mr. Flavin was never a director of Lotus Green?

**Answer:** “Not as I understand it, no.”

**Question 327:** And never attended any of their board meetings?

**Answer:** “Again as I understand it, no. I would have been surprised if he did, given that he was a director of Fyffes throughout the process.”

**Question 328:** Why would that...? (Interjection)

**Answer:** “It would be unusual, it wouldn’t seem sensible to me for him to have been on the board of Lotus Green.”

**Question 329:** Sorry until 1995 he had been a director of DCC and a director of Fyffes?

**Answer:** “Correct.”

**Question 330:** From 1981, so what... (Interjection).

**Answer:** “We were not in a disposal situation. We were now...” (Interjection).

**Question 331:** They could have been disposed at any time between 1981 and 1995?

**Answer:** “Could have been.”

**Question 332:** I am just wondering why you think... (Interjection).

**Answer:** “I suppose the answer is that we were moving the shares and distancing them from the point of view of disposal from DCC, and it made sense to me for Jim not to be on that. It is the first time I have been asked the question and I haven’t given it any thought, but I think I would have been a little bit surprised at the time if Jim had said ‘well, I am going on the board of Lotus Green as well’. I would have said ‘well why would you need to be’, but I don’t know, I am only surmising.”

Mr. Gallagher did not remember any policy report coming through from the board of Lotus Green to DCC. He didn't believe that Lotus Green would have a policy different to the policy from DCC. (**Answers 341 and 342:** Page 79 and 80).

“The policy was to dispose of the shares at a reasonable price.” (**Answer 342:** Page 80).

He explained that considerable reliance was placed by him on the fact that Fergal O' Dwyer was on the board of Lotus Green. “Fergal O' Dwyer was an ‘A’ director on the board of Lotus Green. He understood the Irish market and he would have been aware like anybody else that he was a senior executive of DCC. So it wasn't as if we were passing it entirely to a group of strangers to do it on a whim. Fergal had the possibility of blocking a whim decision by three Dutch people who were on a solo run to sell it for half nothing. He would have been able to say ‘sorry I don't agree’, and that would have been it. That is not the sort of people that were appointed. They were responsible and serious business people with quite a pedigree in Holland, that is my recollection of that being spelt out in the 1995 meeting and we knew Fergal well. So we didn't believe that we had handed it to a bunch of people who were going to make a foolish decision.” (**Answer 344:** Page 81).

Mr. Gallagher didn't give evidence in the High Court and he was referred to Ms. Justice Laffoy's Judgment where she concluded that the decision to dispose of the stake had what she called the ‘informal express approval’ of the board of DCC. He said “I think she was wrong in that. I think that was an incorrect statement of fact.”

**Question 347:** Right.

**Answer:** “To my certain knowledge that is not a correct statement.”

**Question 350:** Even if the decision was Lotus Green's you didn't tacitly approve of that decision? You can approve it without taking the decision?

**Answer:** “Sorry are you asking me did I agree with that decision after the event. Yes, I did. Is that tacit? I don't think it is. I think tacit means you have to know in advance that

the sale was being contemplated. That you had been told about it and being told of what was likely to happen and did nothing further to stop it. I think that would be tacit approval. That is not the situation that happened.”

**Question 351:** You were not told or consulted?

**Answer:** “I was neither told nor consulted. Therefore, I couldn’t give express or tacit approval because I didn’t have the knowledge of an intended sale.”

**Question 352:** Yes.

**Answer:** “And I didn’t expect to.”

Mr. Gallagher was then referred to Mr. Price and Mr. Scholefield’s memorandums on the 31<sup>st</sup> of January and the 1<sup>st</sup> of February. Mr. Gallagher agreed that it was a reasonable interpretation from the memorandum that Mr. Flavin believed that DCC was selling the shares and that he needed to be advised in relation to that because he Mr. Flavin was on the board of Fyffes. “That is a reasonable interpretation.” (**Answer 374:** Page 86).

**Question 375:** If that is correct that wouldn’t have accorded with your understanding of what was happening or of his position?

**Answer:** “It doesn’t accord with my understanding of what was agreed that would happen on a disposal, nothing was going to stop somebody ringing Jim Flavin and saying ‘hey we are interested in buying some or all of the Fyffes’ stake’, nothing would have stopped that. As I said to you it would have been an almost certain view that is where it would start. None of it would suggest that Jim Flavin, knowing more even than I did about the arrangement that we had in place with Lotus Green, that it was inevitable that he would pass that process to Lotus Green at the appropriate time, nothing would have occurred to me that would have suggested that.”

**Question 376:** Clearly even in that scenario, Mr. Flavin had to make a mental decision that he viewed it as a right time to sell.

**Answer:** “Indeed and that is what I would expect.”

**Question 377:** In so doing he was perhaps implicitly, if not expressly, giving his endorsement. Would that be fair or unfair?

**Answer:** “I suppose the short answer is that if, and this is a market, the price was not being set by Mr. Flavin...I think the answer is ‘yes’ and I think that inherently given that, as you quite rightly said, Jim Flavin could have hung the phone up and done nothing and just sat with his hands and did nothing and continued to do nothing, what I would like to think would have happened is that Fergal, who is just as conscious of what is happening to the share price in the market, and his colleagues would have acted without any contact. In other words, the fact that Jim referred it on meant you could interpret and I would interpret him saying ‘by the very fact I am handing it on I don’t think this is a bad idea, I think this is probably a good idea’, I think the very fact if he didn’t pass it on would indicate to me in arrears that he wasn’t interested and that he thought it was a dud thing. I think you can probably read too much into the fact of him passing it on to Lotus Green as that being ‘and you fellows had better bloody sell’, I think that would be too harsh.”

Mr. Gallagher agreed that for Mr. Flavin to speak to Mr. Price and Mr. Scholefield the issue of whether he had price sensitive information was clearly on his mind.

**Answer 387:** “Well, clearly, he said by reflecting the note there, yes, it had to mean that Jim had or was trying to, and he was very meticulous, he would have gone almost over the top on anything to do with compliance to get it to be sure to be sure. So it would be in line with my understanding of Jim and the way he would work which is to be extremely careful and cautious in anything that he did.”

Mr. Gallagher confirmed that he had not seen either of the Alvin Price or Michael Scholefield’s memorandums at the time.

**Question 389:** ...In light of the concern that Mr. Flavin expresses at least to the solicitor and to the Compliance Office are you at all surprised that he didn’t bring his concern to individual members of the board or to the board as a whole?



**Answer:** “No, I think that Jim was meticulous in going through the process and when he had gone through a process and if he had satisfied himself that there was no issue to be raised with the board he wouldn’t have done so. I am not surprised, no.”

**Question 390:** You see in terms of satisfying himself, one of the duties of a non-executive director is to act as a check to ensure that there is a check on the executive and you, better than most, understand that in the various non-executive roles that you have performed, but if it is not brought to you, it is very hard for you to provide any oversight or assistance to the Chief Executive?

**Answer:** “Correct. That is true yes.”

**Question 391:** Obviously we can speculate as to what might have happened, but if this was brought to the board, it is brought to those who have the responsibility – I mean, the Chief Executive is answerable to the board?

**Answer:** “Correct.”

**Question 392:** The Compliance Officer is not?

**Answer:** “Is not, well, in part yes, okay.”

**Question 393:** Well not so much as the board, but the Chief Executive, the solicitor is not answerable to the Chief Executive or the Chief Executive is not answerable to the solicitor, it is a different relationship?

**Answer:** “I understand.”

**Question 394:** The Compliance Officer’s relationship with the Chief Executive, the Compliance Officer’s duty would, I would have thought, be more to the board than to the Chief Executive.

**Answer:** “Certainly this Compliance Officer would have reported directly to the board at least once a year.”

**Question 401:** But in a way you have described it in terms of what happened and what your understanding of what should happen is, you had a situation where the stake was being sold in circumstances where the Chief Executive of DCC was a director of the company whose stake was being sold and yet there was absolutely no board oversight of the decision or the process by which that took place.

**Answer:** “I suppose, to me, that is not the way it was in the sense that all of the board, including the Chief Executive made the decision in 1995 to do a certain thing and to make plans for what would happen when, because we didn’t think or it wasn’t ‘if’, it was ‘when’ these shares would be sold.”

**Question 402:** Yes.

**Answer:** “We made a plan, if you like, a structured plan which involved quite a lot of advice and structure. So each individual director was equally involved in the briefing and being briefed on that. So therefore, the understanding of all of us was common to what would happen in the event of a sale. So that, therefore, there was no doubt in my mind, and I don’t believe that there will be any doubt in any other directors’ mind (including Jim Flavin’s mind) that when this came to be sold that the final and absolute decision in the sale would be made in Holland by a company which we were setting up as you said earlier, and for that reason and that reason only so why would you then...” (Interjection).

**Question 403:** Well here is the reason.

**Answer:** “Okay, sorry.”

**Question 404:** Let’s say you hadn’t put the structure in place, let’s say in July 1995 the board met to consider selling the stake in Fyffes and that would have been a decision for the board of DCC?

**Answer:** “Correct. Absolutely.”

**Question 405:** At such a board meeting, you would expect, would you not, the board members, you and Mr. Spain and Mr. Barry particularly, the non-executives to be interrogating the executives about the sale both in terms of its financial wisdom?

**Answer:** “Sure.”

**Question 406:** But in the context of the knowledge that Jim Flavin was on the board of Fyffes.

**Answer:** “Yes, that’s right. I think so. yes.”

**Question 407:** You would expect and you would have expected there to be questions raised about insider dealing. In fact not only do you expect it but even in the context of what I might call, the in-house sale extensive advice was taken in relation to insider dealing.

**Answer:** “Yes.”

**Question 408:** Yet when the DCC group are deciding to sell out of the DCC family, as it were, there is no board oversight whatsoever in relation to insider dealing. Is that not true?

**Answer:** “Well, how would it arise? I mean, what was contemplated was that the decision would be made by a board which was comprised of individuals, three of whom were Dutch and had no connection with DCC other than the connection as paid directors and professional directors of Lotus Green, and one other director who was an executive and eventually a director of DCC but was not an executive or a director of Fyffes. So you know the need for oversight of that didn’t suggest itself.”

**Question 409:** I know you are saying that, but really in a sense do you feel that by doing what you did in 1995, you were as it were absolving the board of any responsibility for the Chief Executive’s involvement in any future sale?

**Answer:** “Well, I think I have already said to you that I believe that the approach would come to the Chief Executive. I mean, I believed that any logical person would suggest that if an outsider was coming to DCC in relation to any of its properties or major assets that the first port of call would be to the Chief Executive.”

**Question 410:** Well, it goes further than that here and maybe we have already addressed that. Nobody knew about Lotus Green?

**Answer:** “No, but I am just saying that even if they did, my belief would be that they would still have come to the Chief Executive. I believe that that is the way things happen and I think that that is the way it would happen.”

Mr. Gallagher emphasised that he had huge trust in Jim Flavin. “I had found him and I had known him only as a director of DCC and my only contact with him in that period of time would have been as a director, I found him to be extremely careful, prudent, seeking and looking for advice to the point...as much as I would have expected from any Chief Executive. I believe him to be an extremely trustworthy person and I believe him to be extremely honourable and extremely forthright. He was always very open and forthright with the board and so on. I would have no doubt that he would have done what was agreed to have been done and that he would have done it, in his opinion, by the book.”

**(Answer 414: Page 97)**

Although he disagreed with the conclusion of Ms. Justice Laffoy (that Jim Flavin ‘dealt’) he understood why she came to that conclusion. “I would disagree in that what I would call the ‘business reality’ is that Jim didn’t think and I don’t think that he dealt, but I understand how Ms. Justice Laffoy would come to a different decision when it was analysed down in extremely fine point. You know I don’t think Jim would have opened up the Companies Act and read the definition of dealing around that time. I think he would have said ‘I am not dealing because I am passing the issue to the board (Lotus Green) which has the right to deal and let them get on with it’. I believe that is, in summary, where I think it would be and we can ask him now and I am sure you will.”

**(Answer 415: Page 98).**

Mr. Gallagher agreed that reading the two memoranda you would get the sense that he was asking the solicitor for advice about the sale of the shares by the company of which he was Chief Executive. Mr. Gallagher was then asked if the tax consideration blinded him and the rest of the board to the oversight responsibility that they had over their Chief Executive.

“I don’t think so and I don’t understand what we could have done because we would have been second guessing what way the sale was going to take place, because it would have happened and it was more than likely to happen, in my view, and it still is my view that it was most likely to happen as part of a move in the market to acquire all of the share capital of Fyffes.” (Answer 421: Page 99).

**Question 423:** But so what?

**Answer:** “So what? I mean therefore all that would have happened is that there would have been an offer made to the board of Fyffes to take over the company. They would either reject it or accept it but the offer would be made anyway whether they liked it or not and it would then be a matter and an issue for the board of Lotus Green to accept or to reject and if it was successful...even if we had been against it we probably would have been acquired by the purchaser anyway, all the other 90%.”

**Question 424:** Where does that relate to a concern about insider dealing?

**Answer:** “There would have been no issue.”

**Question 425:** Yes.

**Answer:** “There would have been absolutely no issue.”

**Question 426:** If all the company was sold?

**Answer:** “Correct.”

**Question 427:** But that is not what happened?

**Answer:** “No, but I am just saying, I mean if you were asking what structures we have put in place...” (Interjection).

**Question 428:** But you didn’t, you put the structure in place for a tax reason. The 1995 structure was in place for tax?

**Answer:** “We put that mechanism in place so that when we exited from the company that we would exit beneficially tax wise, yes.”

**Question 429:** But it wasn't put in place, even if you believed it was likely that the exit would take place in the context of a takeover of Fyffes, it wasn't dependant upon Dole or Chiquita coming in and taking over Fyffes?

**Answer:** "No it wasn't. Of course it wasn't. It was never stated to be so even though that might have been the conjecture."

**Question 430:** Again just let's say this tax structure hadn't (been there)?

**Answer:** "Hadn't been there, okay yes."

**Question 434:** And there was consideration given to DCC and S & L selling their legal and beneficial interest?

**Answer:** "We would have had to have been consulted as a board then because of the limits which we placed on acquisitions and disposals."

**Question 435:** By the Chief Executive?

**Answer:** "By the board, we had it in us, beyond which the Chief Executive had to come to the board on sales or purchases. That was around about 3 or 4 million from memory at that time. So, willy-nilly the Chief Executive would not have been able to validly sell the shares without consultation with the board, without the approval of the board."

**Question 436:** Did you not see it or did nobody see at any stage that by setting up the structure, that you had set up for the legitimate tax reasons, that you had, that you were allowing the Chief Executive, arguably, to bypass the control that the board would normally exercise over it. Let's just say the worst possible situation, let's say there was information in relation to Fyffes that Mr. Flavin knew about.

**Answer:** "Okay."

**Question 437:** A takeover or the collapse of the Honduran banana harvest, something that was going to have major... (Interjection).

**Answer:** "A factual disaster or whatever that hadn't gone into the public domain, yes."

**Question 438:** That hadn't gone into the public domain, and let us say that he procured the sale of the Fyffes' stake and... (Interjection).

**Answer:** "And we approved it."

**Question 439:** No, no, you didn't approve it but you directed Lotus Green to accept it or directed Mr. O' Dwyer to say that, 'this is my wish and if you don't...' I am giving you an extreme example 'if you don't do it, you are all off the board'.

**Answer:** "Or you will never be on it!"

**Question 440:** "So you do it or else." Now, in the scenario that we have, which is the beneficial interest having been transferred to Lotus Green, the board of DCC, which is the company which will ultimately benefit, or lose out if it is insider dealing?

**Answer:** "All right, sure yes."

**Question 441:** Doesn't get to scrutinise the Chief Executive in that situation because of the tax structure that you have put in place?

**Answer:** "But isn't the reality the same either which way, I mean, in the sense that a lot of what happens in business and a lot of what happens in DCC in relation to this, this is an issue of trust, isn't it, because if we had not parted, if the shares were held within DCC and there never was a Lotus Green and Jim bought a proposal to sell the shares before the board and said that there was no issue of which he was aware which would impugn the sale, or get to the root of it, it would be interesting how you would second guess that."

**Question 422:** Well yes, this is... (Interjection).

**Answer:** "I don't think you could. Just pushing it out, as you are trying to push it out, if he lied to the board at the time about something that he was absolutely aware of and we didn't have any way, because how could you, of checking that lie because we are not on the board of Fyffes and we haven't had the telephone call from Honduras or whatever, we would validly endorse it. So, in other words, what you had put in to stop it. You wouldn't. So, there is an element of trust in business."

**Question 443:** Of course there is, but let's say the Chief Executive comes to you and says 'this is a poor trading result for November and December', and that information is put to you as a non-executive director, well the next question is 'how poor'.

**Answer:** "Right, okay."

**Question 444:** I mean, clearly if the Chief Executive comes to you and says 'we want to sell the stake in Fyffes and there is nothing to be concerned about', I can better understand your position to say well you know if you had to ask the question it indicates that you don't trust your Chief Executive, now query whether you are doing your duty if you are not even asking some questions about it, but let's say that you are told that there are poor trading (results) for November/December would you suggest that as a non-executive director you would be fulfilling your duty to the company and the shareholders by not asking any follow up questions?

**Answer:** "Of course you would, and if you think about it we had to ask. We had to review after the event the trading. I mean it took a long time before there was any action."

**Question 445:** But we will come to after the action.

**Answer:** "Okay, I think the answer is that any big arrangements like that you would kick the tyres as hard as you could and ask the relevant question. You would like to think you would yes and I believe we would."

**Question 446:** You would certainly hope that non-executive directors, I mean, if a non-executive director is doing what a non-executive director is meant to do, maybe kicking the tyres very hard and harder. I mean, this is not just the commercial decision as to whether you acquire or not acquire. This is a decision which because of the special relationship of the Chief Executive with the other company, is subject to a whole different regime. It is not for example an acquisition which somebody has overvalued and you buy it and you find well, it is actually only worth €20 million instead of €25 million. This is one which if you got it wrong, and again we are all great with hindsight, but as a result of



the High Court and the Supreme Court this is one that Jim Flavin did get wrong as held by the Supreme Court in that there was a finding of insider dealing.

**Answer:** “Yes, they said his judgment that the information that he had, the judgment was that the information would have affected the price of Fyffes’ shares in the market at that time. His judgment was one way and the Supreme Court took a different view of that judgment.”

**Question 447:** Yes, well again... (Interjection).

**Answer:** “No, but in layman’s terms that is what happened.”

**Question 448:** In layman’s terms, there was a finding that the information that he had in relation to trading in November and December was price sensitive.

**Answer:** “Correct, and that his judgment, that it wasn’t was incorrect.”

**Question 449:** Yes. Now there was no board scrutiny of that judgment.

**Answer:** “No. Correct.”

**Question 450:** The reason there was no board scrutiny was that Mr. Flavin didn’t bring it to the board?

**Answer:** “Because he was, if you like, prevented by virtue of the arrangement which was put in place.”

**Question 451:** Why was he prevented? Why did the board of DCC? What was legally preventing the board of DCC from discussing it?

**Answer:** “Okay sorry. What it would have been prevented from doing was making the decision to sell.”

**Question 452:** No, but in terms of discussing whether... (Interjection).

**Answer:** “I am just saying. It is not for me.”

**Question 453:** The board of Lotus Green was not going to interrogate (nor could they) because Mr. Flavin had no relationship either as an officer or as an employee of Lotus Green?

**Answer:** “I don’t know what the board, I don’t know what the board of Lotus Green could have done or whether they could have interrogated Mr. Flavin, but why they think they would have had to satisfy themselves is that they had no information which in fact would impede the sale or make the sale by them invalid and they didn’t have. I mean, they had no information on Fyffes. The only person that I know of who knew of the trading were the Fyffes directors, one of which was Jim. All of the Fyffes’ directors including Jim had the same information as Jim.”

**Question 454:** Well the Compliance Officer of DCC had it?

**Answer:** “That’s right, because Jim chose to share that with him.”

**Question 456:** At worst and in terms of the way that the structure was set up there was no opportunity given to the board of DCC to kick the tyres?

**Answer:** “Correct.”

**Question 457:** You would agree, or just tell me how hard would the board have kicked the tyres, I mean, you had a Chief Executive who was a very powerful Chief Executive, had been Chief Executive from the beginning and was the founder of the company. How hard did you, as non-executive directors kick the tyres?

**Answer:** “Sorry, we didn’t kick them. The issue didn’t arise.”

**Question 458:** No, no, but in terms of other matters that were brought to the board?

**Answer:** “Not to do with this?”

**Question 459:** Not to do with this?

**Answer:** “I believe that every major decision that required board approval was seriously tyre kicked. In some cases, Jim would have had to go back and clarify and indeed you know come back to the board having clarified issues that hadn’t been dealt with and that

he couldn't deal with. The board was not 'thanks very much that's it, it is over and done with'."

**Question 460:** It wasn't 'yes men'.

**Answer:** "I don't believe so. I certainly would not categorise myself as a 'yes man' and Tony Barry for sure would not have characterised himself. The answer is that we did query decisions seriously in relation to, and because it wasn't always about acquisitions you know, because in terms of sales you know it was easier. But we did within the limits that we had, we also authorised sales of interests in companies consistently so. It was much easier to make a decision to sell by definition of, you know, forgetting about Fyffes than it was to make a decision about going to buy a new company particularly a company say in a new environment like Distrilogie in France. It would have been the first acquisition in France. We would have wanted to know a good bit about that...in other words did we fully understand as a non-executive what was involved in making that takeover bid. It was not just 'there is the paper, it is done, away you go'."

When asked what he would have done if he was interrogating Mr. Flavin about the proposed sale he said "... I think we would have asked the ordinary and prudent question of are we free to sell' I mean, I think we would have looked for strong reassurance that in fact, there was nothing that would have prevented the legal sale. I don't know is the answer, I haven't addressed that, I wouldn't have addressed it as quickly as I am addressing it now, but I would like to think that we would have asked the questions, the same ones here because Jim was quite up front here in the way that that note was written by saying that there had been two indifferent trading months. He was on that board for a long time and he knew that two indifferent trading months in Fyffes in the past did not in any way tell what the outcome for the year would be. In fact, I think he insisted on a profit warning one time within Fyffes when in fact he was embarrassed out of his mind because the company had a fantastic year afterwards and all the other directors said to him 'ah yes, now look at what you did. You made us issue a profit warning and we had a great old year. You don't know the business as well as we do'. I just would like to think that we would have got..." (Interjection) (**Answer 461:** Page 109).

**Question 462:** You haven't told me yet what questions you would have asked?

**Answer:** "I don't know is the answer. I would have to have a little bit of time to think of what questions because whatever I would say to you now and the nature of it is going to be hypothetical but to be part of a group of non-executive directors whom I would like to think, would have asked varying and different questions and supplementary questions but the gist of it would be was the Chief Executive and was therefore DCC free to sell them."

**Question 463:** Yes, I appreciate you haven't had a lot of warning in relation to this because you haven't seen this Memo before. But let us say I am chairing a DCC board meeting and we are convened to discuss the proposal to sell the Fyffes' stake in DCC hearing about Lotus Green and I say to you 'board I am a little bit concerned, as you know I am on the board of Fyffes and I have seen their November and December trading results and they are poor' or whatever the expression is here 'not all that wonderful'.

**Answer:** "I would have been asking what were Fyffes' executive team saying about Fyffes at that time. I would have been asking what was their view of the prospects for Fyffes. So, I would be looking for a lot of information about the people who ran the company and were paid to run the company, what they were saying about Fyffes about their prospects with them and in to the future. I would have been looking at the Chairman's statement which would have been issued around that time and before that and I would have been taking – all the information that was public from the Fyffes' executive team, not from Jim Flavin who had nothing to do with it other than as a non-executive director, I would have been looking for and getting a lot of comfort from what they were saying about their prospects in the future."

**Question 464:** Why would you be getting comfort?

**Answer:** "Because the short answer is you would be looking to see, well, like how the two months and different trading results were seen by the executive team in Fyffes who were skilled and experienced for years in this whole business with bananas and fruit and they were not in any way fussed about two poor trading months. They were saying in fact everything to the contrary. They were saying 'this is brilliant, we are going to have a

brilliant year and what is more worldoffruit.com is going to be the greatest thing since the sliced pan’.”

**Question 465:** When you were considering that, let’s say in January you didn’t know what the trading results for January or February or March were going to be?

**Answer:** “No, but neither did the directors of Fyffes.”

**Question 466:** But the decision to sell is being taken with what information you have?

**Answer:** “Correct, which was, as I say, information which was the two months which Jim had and also very positive statements coming out of the Chairman and the board of Fyffes.”

**Question 467:** But you are giving me all the reasons for (perhaps), or all the answers with respect Mr. Gallagher that Mr. Flavin may have come back to you on. I am asking what you, as a non-executive director, would have done to interrogate, to challenge the Chief Executive...either you say nothing and you don’t ask him, for example do you say ‘well how bad are the results’.

**Answer:** “Sorry, he would have said how bad they were.”

**Question 468:** Well, no, he didn’t?

**Answer:** “Sorry, if he was coming to the board with it he would have come with the facts. He would have come and said, he would have laid it out. He would have said there is whatever, November, there is the December.”

**Question 469:** How could he have done that?

**Answer:** “He had them, hadn’t he?”

**Question 470:** No, I know he had them.

**Answer:** “Are you saying that he is going to consult with us? Surely he is going to share that with us. Surely.”

**Question 471:** I don't know if there is any suggestion that he showed Mr. Price or Mr. Scholefield the November or December... (Interjection).

**Answer:** "I don't know either but I think you asked me the question that if he came and told us..." (Interjection).

**Question 472:** No, I am saying if he told you what he had said here that the results or the trading had not been all that wonderful'?

**Answer:** "Well, Jim Flavin would not have come to the board without sharing with them the results. I mean, he would have shared the information. I mean, why would he have been holding it to his chest? I don't know. That was the man."

**Question 473:** There was a huge potential profit for DCC with the sale.

**Answer:** "Yes, but that was not as I would understand the man. Jim was not a hider of information from his board."

**Question 474:** To suggest that they had 'not been all that wonderful' doesn't give you any sense?

**Answer:** "Sorry I didn't write the notes. I didn't have the conversation. I don't know what it meant. All I know from reading this today is that Jim consulted with Alvin Price whom he would have trusted and whom he would have had, you know..." (Interjection).

**Question 475:** But he was a lawyer.

**Answer:** "He was a commercial lawyer. He is an intelligent, sensible man who works closely with business for most of his career. Also from the other one, he would have talked to Michael Scholefield, who was a very highly qualified Accountant, a good person at interpreting accounts and all of that. So he consulted with two very sensible people one of whom, the Compliance Officer had an additional role."

**Answer 478:** "...I would have wanted to be satisfied in the light of the totality of the information around that this would not go the root of the validity of the sale."

**Question 480:** If you interrogate you are at least at the end able to make a decision, an informed decision?

**Answer:** “Yes, I accept that, I understand that.”

**Question 481:** To say, well, listen the risk for DCC here is that we sell and there is a profit warning made which happened?

**Answer:** “Which could have been made the next day.”

**Question 483:** That is absolutely true, but in terms of that, and Ms. Justice Laffoy I know, had a view in relation to that, but what is being scrutinised is your stewardship and your role as a non-executive director.

**Answer:** “I understand.”

**Question 484:** What I am just suggesting to you as a result of that, the non-execs could have come to the view “well maybe it is all right but look at the downside for us. Look as it turned out, what if we were held to have been guilty of insider dealing as a company and we have to pay all this money back and all the costs and publicity that attended – wouldn’t it be prudent, let’s just wait a while in relation to this because we have held these shares since 1981. Let’s do it after there is an announcement made and then we will be...” (Interjection).

**Answer** “I don’t know. I mean, the answer is you can guess anything. I mean, if you put me into the guessing game, you know, I might have guessed that the Supreme Court would have endorsed Justice Laffoy’s judgment. You know, I might have guessed that and I might have guessed that with prudence. I might have guessed that with having thought a lot about it. I might have guessed that kicking the tyres hard. So, I think I have to be careful about guessing in the opposite direction.”

**Question 485:** You are absolutely right in relation to that although what I am trying to get is what the process might have involved but also to try and get a sense from you as to whether now, looking back on it, you think it would have been prudent or right for the board to be asked for their view on it?

**Answer:** "... If the decision was to be a board decision, I believe we would have come to the same conclusion as Jim, that he did not have information which if it were in the public domain would have affected the price and that the overwhelming impact in Fyffes' shares at the time was worldoffruit.com."

Mr. Gallagher went on to explain that he was extremely sceptical of the dotcom boom.

"So you asked me could you wait for months or weeks or years to decide whether this was a good thing or a bad thing or not. I don't believe so. I do believe that there was probably a perception, which Jim certainly had, that this was a relatively short situation, that the dotcom situation was probably too good to be true, in his judgment. Fyffes would have violently disagreed with that because they were trying to sell the system to us, to use on our medical and healthcare side. He said Fyffes believed they thought they had a fantastic system. "Lots of people believed that at the time. This was the way to go. That, this was the whole future way to go. That the whole future lay in this." (**Answer 486:** Page 118).

Mr. Gallagher also explained that there was a negative analyst report in relation to the fruit business around that time and he referenced an ABN-Amro report which referred to the fact that Dole and anybody in the banana business were in some degree of trouble over the price of bananas, over the price of sterling versus the dollar and all the rest of it "so the market knew that there was bad trading news going to happen to Fyffes. What the market said is that is as may well be, but because they have discovered this portal and this way of doing business that is why we are buying into it." (**Answer 487:** Page 119).

He explained that in relation to the lack of belief in the dotcom business "that is the judgment that Jim Flavin had. That is the judgment that I have. That is the judgment Ms. Justice Laffoy had but it was not shared by the Supreme Court judges. Do I think they were wrong? I do, but there is nothing I can do." (**Answer 488:** Page 119).

"In the final analysis when the referee blows the whistle in the last game of the match and orders the penalty that is scored, the game is over, the match is over, the game is set and



match and that is it. You may argue for years as to whether the penalty should have been awarded. It doesn't do you any good. Your team has lost.” (**Answer 489:** Page 119).

“... I'm just trying to explain how I felt then and how I feel now.” (**Answer 491:** Page 119).

Mr. Gallagher also explained that both he and Tony Barry remained on the board of Fyffes a bit longer than would have been intended. Mr. Gallagher was asked as to whether he agreed that DCC ran the risk in trying to preserve the sanctity of the tax scheme that they were allowing themselves to be blind to other concerns that might arise “certainly not consciously.” (**Answer 504:** Page 122).

He was then asked if it did not strike him as being extraordinary that 15% of DCC could be sold without the board considering it.

“No. I mean, I think about how we thought about how we were going to exit from a publicly quoted company. We set up a system. The price was not going to be dictated by negotiation. It never would be. It was going to be dictated by the market. Whether that was by way of a takeover of Fyffes or whether it was by way of a World of Fruit type situation, which frankly, I never thought would happen and I don't think any of my other colleagues would have thought. That that was something that came in from left wing somewhat surprisingly. So there was never going to be a need for a serious rationale worrying saying ‘oh God, how are we going to do it. Is that a fair price’? There was always going to be a market transaction and therefore in a sense it would be different than a holding in a private company which would be open to huge discussion and debate as to what was a fair value.” (**Answer 507:** Page 123).

**Question 508:** Yes, albeit and I expect that it is going to be a market price, but somebody is going to have to take a decision?

**Answer:** “Right. But it is much easier to take it in relation to publicly quoted shares.”

**Question 509:** Of course the decision is easier but somebody has to make the decision.”

**Answer:** “Yes and we believed that the people we had delegated to it were intelligent and sensible people. I mean, I still believe they are. I know Fergal O’ Dwyer a lot better than the others but I believe that Fergal was well clued into the market and was well capable along with his other colleagues on the board, but he himself I would have had great trust in his ability to make a sensible decision. I have no doubt at all about that. As I said before I don’t believe that Justice Laffoy was correct in that there was a tacit or express decision by the DCC board to enable Jim Flavin to make the sale. I don’t believe that. I mean, that is interpreted against me perhaps.”

Mr. Gallagher was then referred to the Minutes of the meeting of the 27<sup>nd</sup> of March and was asked if he remembered the discussion about the Fyffes’ profit warning.

“I don’t remember the detail but I certainly would remember that he would have advised the board that a profit warning had been issued as a result of Fyffes continuing to have trading difficulties.” (**Answer 561:** Page 136).

**Question 568:** What discussion if any was there around the profit warning?

**Answer:** “There would have been no discussion on it. Jim would have explained because he was no longer on the board of Fyffes, he would just have said ‘Fyffes have issued a profit warning in the light of ...’ and that would have been public knowledge. I think I would have known it anyway because that would have been published in the newspapers and that would have gone to the Stock Exchange.”

**Question 579:** What was your reaction?

**Answer:** “What should my reaction be?”

**Question 580:** Fyffes’ share price had had an impact and there started to be an impact already on the Fyffes’ share price isn’t that right?

**Answer:** “I think that a lot of things were having an impact on it. The dotcom bubble had just burst.”

**Question 581:** A little bit later?

**Answer:** “No, no, it had burst then. There were some hairy stories at that time and again this, was not unique. There were some massive falls in value. One that comes to mind because it was published here is a chap who had a company in a system that used to trade on the American market. He sold it for 400 to 500 million and two weeks later in March it was worth 90 million. So there were massive changes in the value that happened on dotcom companies. Legitimate dotcom companies.”

**Question 582:** ...Did you have any...view, did you make any connection between ‘we have sold, there has been a profit warning’. Did you come to the meeting thinking anything?

**Answer:** “No more than if you like – well I don’t remember coming to the meeting with any view on it. I was interested in that we would not have wanted to wish Fyffes other than...and I was probably disappointed that Fyffes had continued to run into and were continuing to have problems in their trading.”

**Question 583:** Would you not have had an understandable human concern maybe, or maybe not concern, maybe human reaction that ‘phew weren’t we lucky to sell when we did’.

**Answer:** “I think at the time we sold I thought that was a very sensible thing to do because I didn’t believe that the dotcom situation was going to be long-term. I didn’t think it would burst so quickly...It was extraordinarily sudden as it happens. I am sure the evidence was before Ms. Justice Laffoy from the experts that it did burst desperately quickly and savagely quickly and probably the worst that was going to happen happened in a period of about six weeks.”

**Question 586:** ...Did you not have a sense of relief that you had as it were got out the gate before the bubble burst.

**Answer:** “Relief is a funny word, an emotive word. I believe that it was an extremely sensible decision to have sold at the time we did yes.”

Mr. Gallagher was asked if he remembered Mr. Flavin using the expression “unfortunate profit warning”. He said that he didn’t.

**Question 602:** For example did anyone ask ‘Jim are we in any trouble over this’.

**Answer:** “I don’t know.”

**Question 603:** We have sold now. The share price in Fyffes is falling. You were, up until the end of February, a director. It wouldn’t take much putting two and two together to say ‘listen somebody has got out in time here’ and I am just wondering in the context of the unfortunate profit warning did any of the directors raise it or ask any questions about it.

**Answer:** “I don’t remember. There is no point in me trying to guess but I would have been aware that the executive directors of Fyffes were quite comfortable with the sale and could have stopped it by having a profit warning the next morning on the 4<sup>th</sup> and stopped any further sales. But they were encouraging a further disposal by DCC and felt it was good for Fyffes. That it was good that these extra shares were in the market for other people. In other words there was no indication of any sort from insiders within Fyffes that there was anything untoward or anything unfortunate or anything other than that ...”

**Answer 611:** “I didn’t pick up any anxiety and I didn’t have any anxiety myself in what I was aware of around about the sale of the shares.”

When asked if it was not surprising that the non-executives would not have wanted to interrogate the Chief Executive about this now that they had a risk issue. He said, “why would you until the issue crystallized?” (**Answer 612:** Page 147).

**Question 613:** ...You can be aware of a risk before anybody finds out about it?

**Answer:** “I understand that.”

**Question 616:** Did anyone at this meeting say ‘Jim why didn’t you tell us this in January’?

**Answer:** “I don’t remember that. I certainly didn’t and I suspect it wasn’t asked. I suspect it wasn’t asked because there was nothing but good vibes around the sale of the shares in early to mid-February. There were no negatives coming through from the company where the shares were sold and there was no negatives coming through from the market. In fact the market is still divided as to whether or not the information that Jim had was sensitive or not. The market is still divided, the Supreme Courts isn’t divided, but in talking to my friends in the market even last week very strong opinions on both sides still, very strong opinions, very forcibly expressed ...”

Mr. Gallagher was asked if there was any discussion at board level about the notification issue or obligation in 2000. “No. That notification was done before when I was told that the Stock Exchange would be notified but I would have expected them to be told, yes.” (Answer 650: Page 157).

#### **9.2.4 The Dutch Directors**

##### **(k) Gerard Venneboer**

Mr. Venneboer explained that after August 1995 meetings of Lotus Green took place in Amsterdam three or four times a year. He explained that at that time there was himself, Mr. Diepenhorst, and Mr. Roskam who were the Dutch directors and then Mr. O’ Dwyer who was the Irish director.

He explained that at the board meetings they discussed what was publicly available on Fyffes which was supplied to them by Fergal O’ Dwyer and of course the financial figures of Lotus Green itself. (Answer 5: Page 6).

**Question 6:** Yes, the financial figures of Lotus Green, though, were entirely to do with the dividend income it obtained from Fyffes.

**Answer:** “Yes.”

**Question 7:** And in terms of its expenditure it was the interest it was paying on its loans to another DCC company is that correct?

**Answer:** “Yes.”

Mr. Venneboer was asked about the general thrust of the discussion about when it would be right to sell the Fyffes’ shares or what circumstances would give rise to a decision to sell the shares in Fyffes.

“Well, it was determined by the stock price of course, of Fyffes.” (**Answer 11:** Page 7).

**Question 12:** Yes.

**Answer:** “As long as the stock price of Fyffes didn’t move or didn’t go up there was no discussion about disposing of the shares.”

**Question 13:** How active were you in relation to monitoring the Fyffes’ stock price, I mean I imagine it didn’t appear in the Dagblad?

**Answer:** “It appears in the financial Dagblad in Holland. There are a few stocks quoted in Dublin, Fyffes amongst others. Not DCC but Fyffes is in there so I was following it. Actually I think I am the only one following it every day, seeing the stock price, yes.”

Mr. Venneboer was then referred to the board meeting of Lotus Green of July 1998 which had been convened for the purpose of discussing whether the time was right for disposing of the Fyffes’ shares. He was asked if he remembered that. “In a general sense I remember that, yes.” (**Answer 18:** Page 9).

**Question 19:** I know it’s eleven years ago.

**Answer:** “I remember we came to the conclusion that we actually had missed the boat.”

**Question 20:** Right.

**Answer:** “So we wanted to avoid that that was going to happen again at that moment.”

Mr. Venneboer was then asked whether it would be fair or unfair to suggest that Mr. O' Dwyer was the most proactive of the directors in terms of bringing information to the board and in terms of initiating that which had to be initiated. "Logically, yes." (**Answer 21:** Page 9).

**Question 22:** That was logically so because Lotus Green was a 100% subsidiary (of DCC). It wasn't even that you had a couple of percentage shares or Mr. Diepenhorst or Mr. Raskam, you were there as professional directors doing a professional job in Holland for the convenience of Lotus Green and also for the convenience of DCC as the parent and you relied upon and again no criticism of you, but you relied upon the information that was provided by Mr. O' Dwyer. Would that be correct?

**Answer:** "That's correct."

He explained that the preparation of the accounts of Lotus Green was something that was prepared in the first instance in Dublin and then it would be worked out between Price Waterhouse in Holland and Price Waterhouse in Ireland. Mr. Venneboer was asked if either he or Mr. Roskam or Mr. Diepenhorst ever got on the phone to Fergal O' Dwyer to say "Fergal, I think now is the time to be selling". "No, that has not happened." (**Answer 25:** Page 10).

**Question 26:** In a sense it would be somewhat surprising, maybe I am wrong to say it would be somewhat surprising, but the expectation would have been or what would have been logical would be that the initiative would come from Ireland as opposed to Holland?

**Answer:** "That's correct."

**Question 27:** You still had to bring your own consideration to the discussion on it, but the initiative for bringing that discussion was logically and in all probability always that it came from Dublin?

**Answer:** "Yes."

**Question 28:** That's what happened in 1998 because I think in the spring and into the summer of 1998 there was a run up in the...

**Answer:** "Stock price."

**Question 29:** Stock price of Fyffes and I think Fergal O' Dwyer had a paper prepared for the board of Lotus Green which could be discussed at the Lotus Green board meeting but by the time that paper was completed and by the time you held the meeting the price had gone back down again. Now, in a sense, that missing of the boat must have been somewhat unfortunate. I mean, there must have been some disappointment expressed that you had missed the boat because nobody likes missing a boat?

**Answer:** "Well, never look back in life."

**Question 30:** "Because there is another boat, is that right?"

**Answer:** "Yes. I have been a commodity trader all my life since I started my career. I know you don't look to today, you look forward, you don't look back. With the knowledge of today I could have done so many things if I had known it a year ago."

**Question 31:** Sure. Would I be right in thinking, though, that in looking forward, as I am sure you do and did, that you were informed by what had happened and realised that if there was a run up in the share price in future you might want to accelerate the time between...

**Answer:** "Absolutely."

**Question 32:** the run up in the price and the convening of the board.

**Answer:** "Absolutely."

**Question 33:** You wouldn't necessarily wait 5 or 6 weeks or whatever it was to consider it?

**Answer:** "No, absolutely."



**Question 34:** That did inform you in relation to what might happen in future?

**Answer:** “Yes.”

Mr. Venneboer agreed that the options that Lotus Green had at any point in time were “hold or sell”.

**Answer 47:** “Depending on the stock price.”

**Question 48:** You were always going to sell. I mean not always, but the likelihood was that if there was a run up in the share price that you would be a seller at some point?

**Answer:** “Yes.”

**Question 49:** As far as you understood, Lotus Green didn’t have a strategic interest in being a 10% shareholder of Fyffes forever?

**Answer:** “No.”

“Well, we all were aware that it was a non-strategic investment of Lotus Green so when the opportunity would be there to sell, to dispose of the shares at a certain moment, at an appropriate time, it would be done. The only discussion was when is the right time, when is the stock price interesting enough for us to dispose of it? And that’s it.” (**Answer 52:** page 16).

Mr. Venneboer was told that there was no yardstick given for how much the share price would have to rise before they were going to sell. In 1998 the bottom line was a price of IR£2.00.

“That would be the bottom at which we at that moment set the level but it never got to that level.” (**Answer 59:** Page 17).

**Question 60:** That discussion ended.

**Answer:** “Later on, we will probably come to that, when in 2000 the market moved up quickly it was an easy decision.”

**Question 61:** Okay, can I ask you whether at any point there was any discussion about the freedom of Lotus Green to sell its stake in Fyffes having regard to Lotus Green’s connection with DCC, DCC’s connection with its Chief Executive, Mr. Flavin and his position on the board of Fyffes. I mean you all knew I take it that Mr. Flavin was on the board of Fyffes?

**Answer:** “Yes.”

**Question 62:** And you knew he was Chief Executive of DCC?

**Answer:** “Yes.”

**Question 63:** And he was Mr. O’ Dwyer’s colleague, but boss as well in that Mr. O’ Dwyer was the Finance Director. Do you recall it ever registering or there ever being any discussion about the implications of that for Lotus Green’s freedom to sell?

**Answer:** “No. First of all, we depended fully on Fergal’s flow of information about Fyffes which was all publicly available information, nothing else. I never had any information from Fergal around that basis. It was for us such a clear cut thing. There was no light between the position of Fergal and say DCC and us. We were all aiming at getting at a time where we could dispose of the shares at a reasonable price.”

**Question 64:** Yes. I suppose what I am getting at is this. If a discussion about a possible sale of the Fyffes’ stake was to arise it was Fergal who was going to start that process?

**Answer:** “It happened to be that way. It could have been different but it happened that way.”

**Question 65:** When you say it could have been different, you mean any of the rest of you could have initiated it, is it?

**Answer:** “We could have suggested it.”

**Question 66:** Yes, but it didn’t happen that way?

**Answer:** “It didn’t happen that way.”

**Question 67:** Insofar as it did happen through the intervention of Fergal or Fergal doing something, putting something in train, you knew and your fellow Dutch directors must have known that Fergal would be likely to discuss that with his Chief Executive?

**Answer:** “I presume so, yes.”

**Question 68:** What I am wondering then is knowing that and knowing that the Chief Executive was also on the board of Fyffes did it ever cross your mind or was it ever discussed that there may be an issue around this if the Chief Executive Mr. Flavin had information that wasn’t publicly available?

**Answer:** “No.”

**Question 69:** I may have asked you on the last occasion, is there, I imagine that there is, insider dealing legislation in Holland to protect against persons ...

**Answer:** “Absolutely, I am the Chairman of a listed company in Holland so I am fully aware of the rules and regulations here in Holland.”

**Question 70:** Just without wanting to become an expert on Dutch law in relation to this, you would know, for example, as a director of a listed company, what you could and could not do in terms of your own personal shareholding but also if you were a director of another company that had a stake in that listed company?

**Answer:** “Absolutely.”

**Question 71:** You would know what you would do?

**Answer:** “Yes.”

Mr. Venneboer said that they took it for granted that Fergal would have regard to whether they were free or not free to dispose of the stake. Mr. Venneboer said he presumed that Ireland had insider dealing legislation.

**Question 81:** Insofar as Fyffes was concerned you knew that Mr. Flavin was at all times a director of Fyffes and I am just wondering was it ever even discussed for example, ‘what about Jim Flavin’?

**Answer:** “No.”

**Question 82:** Just from your experience as a director of the Dutch listed company, in what circumstances would you expect that to arise for there to be a discussion or how do you protect against insider dealing as a director, even if in your case as a director of another Dutch listed company, if one of your colleagues was Managing Director of a company that had a stake, what would you be expected to do?

**Answer:** “I can only act for myself.”

**Question 83:** Yes.

**Answer:** “I know what information I am getting, where I am getting it from, is it publicly available, I can act on it. Is it not publicly available, is it because of my ties to another company that I know more. I can’t use it. I presume anybody else, if I have fellow directors that they act the same way. I am not aware of the knowledge or information that fellow directors may have.”

**Question 84:** That’s very true, but if you don’t ask any questions about it – let’s say they do have knowledge that they don’t share with you, that poses a risk for you and for the company.

**Answer:** “I trust my fellow directors, otherwise I can’t work with them together. I have confidence in them in that they act as I would act myself.”

**Question 85:** Right. I mean are you aware of any process or checks to ensure that the company cannot be exposed by virtue of somebody either forgetting, through inadvertence, or through lack of understanding of their obligations?

**Answer:** “How could I check that? That’s impossible.”

**Question 86:** Let’s say you have a Compliance Officer?

**Answer:** “I have it with the listed company too, there is a Compliance Officer. The Compliance Officer warns everybody the times when you can trade and not trade etc., but that’s all. If someone receives information I cannot check that. I trust the people who are around me. I know them and I know how they function in life so I trust them completely.”

**Question 87:** Yes.

**Answer:** “There is no way in checking that.”

**Question 88:** Yes, does Mr. O’ Dwyer fall into that category then of somebody you trusted?

**Answer:** “Absolutely.”

**Question 89:** Did you know Mr. Flavin?

**Answer:** “I met him in 1995.”

**Question 90:** Yes.

**Answer:** “I met him briefly at a party in Dublin, an anniversary in Dublin, I think 1997 or 1996, after that I never, I have never seen or spoken to him.”

**Question 91:** He is not somebody you had dealings with or had a business relationship with?

**Answer:** “No.”

**Question 92:** Your point of contact with DCC in Dublin was through Fergal?

**Answer:** “Fergal.”

**Question 95:** Lotus Green didn’t have a Compliance Officer?

**Answer:** “No.”

**Question 96:** Lotus Green was going to be at some point taking a decision about disposing of its Fyffes’ shareholding?

**Answer:** “Yes.”

**Question 97:** I'm just wondering what protections were built in, or what consideration did you give to protecting that decision from any legal infirmity there may exist by virtue of Mr. Flavin's connection to Fyffes?

**Answer:** "I don't understand, say that again please."

**Question 98:** The ultimate decision to sell the Fyffes stake would be a Lotus Green decision?

**Answer:** "Yes."

**Question 99:** Firstly, did you realise that that was a decision that could have implications for Lotus Green and for Lotus Green's parent under insider dealing legislation?

**Answer:** "No."

**Question 100:** It just never crossed your mind and the reason it didn't cross your mind was, can you assist me now as to why it never crossed your mind?

**Answer:** "Because again the people whom we work with in the board including a director, I trust him completely. So if anything like that kind would have come up it would have come up from those people."

**Question 101:** In other words you didn't have to, as far as you were concerned you felt you didn't have to ask Fergal 'are we free to sell'.

**Answer:** "No."

**Question 102:** Your expectation was that if there was an issue

**Answer:** "Yes."

**Question 103:** That Fergal would bring it to you?

**Answer:** "That's exactly it."

**Question 104:** Your position. That was true whether it was 1995 or 2000?

**Answer:** "Yes."

Mr. Venneboer was then referred to the Lotus Green meeting of December 1999. From the Minutes of that meeting it was clear that a discussion took place but it doesn't seem as if any consideration was given at that meeting to selling the stake.

"I don't remember but I presume so." (**Answer 105:** Page 25).

**Question 108:** Is it likely, therefore, that the board did not give any consideration to selling the stake at its meeting in December of 1999?

**Answer:** "That's correct."

**Question 109:** And hadn't given any consideration to it from July of 1998 until that point in time?

**Answer:** "No."

Mr. Venneboer was asked whether he made any contact with Mr. O' Dwyer during December or January before Mr. O' Dwyer contacted him in late January or early February of 2000.

**Answer 111:** "No I didn't."

**Question 114:** ... Your expectation was that the signal would come from Fergal if DCC in Dublin decided now is the time.

**Answer:** "Yes."

Mr. Venneboer was then shown the letter that Mr. Roskam had sent to Mr. O' Dwyer on the 31<sup>st</sup> January 2000. He said he remembered that Fergal O' Dwyer had requested Mr. Roskam to write this letter. He agreed that it was somewhat contrived coming from Mr. Roskam. It was not something that Mr. Roskam thought of on his own initiative but something Mr. O' Dwyer understandably wanted him to write. He confirmed that the memo of the 2<sup>nd</sup> February from himself and Mr. Roskam was drafted by Fergal O' Dwyer.

After it was drafted they discussed it in his office. Fergal presented it in his office and they discussed it. (**Answers 129 and 130:** Page 29).

Mr. Venneboer doesn't make any changes to the draft or any amendments to it. He agreed that this memorandum was prepared rather more quickly. "Quickly. Just not to miss the boat again." (**Answer 135:** Page 30).

**Question 136:** Yes, when this was prepared and was being discussed was Mr. O' Dwyer in Holland or was he discussing it from Dublin?

**Answer:** "This was discussed in Holland."

Mr. Venneboer then recalled that there was a meeting of the board of directors of Lotus Green on the next morning at 7.45 a.m. on the 3<sup>rd</sup> February in his office.

**Question 145:** What level of discussion had taken place on the previous evening?

**Answer:** "There was not much discussion, it was so clear. The price was up. We have shares which we want to sell at an appropriate time at a good price. The price was very attractive, 3 upwards, so this is the chance to dispose of our shares. The reason they didn't take the decision on the evening of the 2<sup>nd</sup> was because Mr. Diepenhorst was not there. If he had been around they would have taken the decision that evening when the three Dutch directors and Mr. O' Dwyer were present."

**Question 150:** What decision was taken on the next day?

**Answer:** "That we would dispose of the shares if an opportunity arose, if someone would offer us a price for the shares."

**Question 151:** What price?

**Answer:** "€3.00 upwards."

**Question 152:** Okay. Did you discuss how long that would remain open for? Was it open ended that you would take €3.00 for as long...

**Answer:** "Until further notice."



He said that he knew that the price on that day was €3.30 or €3.20.

**Question 155:** Why then if the price was at €3.20 or 30 would you be agreeing to sell at anything above 3?

**Answer:** “That’s a logical question but it’s also logical to put a bottom on it which is attractive because you know it’s a volatile market. If you have quite a lot of shares to sell you don’t know where you are going to end up and one is going to take a bit if it’s going to €3.90 if you say a bottom of €3.30 and the market moves to €3.90 you have to come back again as a board and decide so you have to give some room. 3 was attractive. €3.20 is even more attractive.”

**Question 156:** €3.80 and whatever?

**Answer:** “Fantastic.”

**Question 159:** Would I be correct in thinking that no consideration was given to the freedom to sell the shares?

**Answer:** “No.”

**Question 160:** It was assumed and presumed?

**Answer:** “Absolutely.”

**Question 161:** There was nothing niggling in your mind saying ‘I wonder are we free’?

**Answer:** “No.”

**Question 162:** It didn’t arise at any time?

**Answer:** “No, not at all.”

He said that he would expect Mr. O’ Dwyer to bring it to their attention if there was a concern and he trusted him and trusted that there was no impediment.

**Question 164:** If there were any compliance issues or anything that had to be done under Irish law such as reporting the sale or anything of that nature, how were you going to protect your position as a director of an Irish company albeit resident in Holland?

**Answer:** “That occasion didn’t happen so I haven’t given that any thought.”

**Question 165:** You may recall on the last occasion we discussed, or maybe I didn’t discuss with you, that if you dispose of a certain percentage of shares there is a reporting obligation. You have got to notify the company?

**Answer:** “Yes, but that’s up to DCC then or up to Fergal to make sure that it happens.”

**Question 166:** That was my question. So you wouldn’t have said ‘Fergal, what about Section 67 of the Companies Act’?

**Answer:** “No.”

**Question 167:** If anything like that had to be done you would expect the secretariat of the company to do that?

**Answer:** “Correct.”

**Question 168:** That would not be the Dutch secretariat, that wouldn’t be ING at the time?

**Answer:** “That would be the Irish part.”

He was then asked what his expectation was on foot of the decision that they had taken and who was going to handle the receipt of the offers if offers were to be made.

“That I don’t know but I presume that Fergal or DCC would have been approached by brokers whether they were interested in disposing of the shares at the current market levels.” (**Answer 170:** Page 35).

**Question 171:** Sure.

**Answer:** “That Fergal then would act and would tell us about it.”

**Question 172:** On the 2<sup>nd</sup> or the 3<sup>rd</sup> did Fergal mention anything about the likelihood of that occurring or expressions of interest having been received?

**Answer:** “I don’t remember.”

**Question 173:** Therefore, the decision that you made or that you voted on to sell at 3 or greater was to the best of your recollection not conditional on or influenced by the fact that there were expressions of interest?

**Answer:** “No.”

**Question 174:** Okay, your expectation was that a broker would contact somebody in DCC in Dublin?

**Answer:** “Probably.”

**Question 175:** Again, did you have any idea who that somebody would be or who that somebody was likely to be?

**Answer:** “Not before, not at that time, no.”

**Question 176:** Right, but it would have to be somebody senior in DCC, I mean the broker would not get on – it had to be somebody with authority in DCC.

**Answer:** “Of course.”

**Question 177:** Perhaps Fergal, perhaps Jim Flavin?

**Answer:** “Probably.”

**Question 178:** Somebody of that stature?

**Answer:** “Yes.”

Mr. Venneboer was then asked what else he remembered about any further involvement in the sale of the Fyffes’ shares on the 3<sup>rd</sup> February.

“I remember during the day the offer was being received or that Fergal phoned us or Tom that an offer was being received by a broker and that we had discussed who was going to take the call and to accept the offer eventually and it was according to availability, Tom Diepenhorst was available and he took the call later that afternoon.” (**Answer 183:** Page 36).

**Question 184:** But it could have been you if you had been available?

**Answer:** “Absolutely. I wasn’t available at the time and we discussed who was available. Tom was available.”

**Question 186:** What you learned was that there was likely to be broker interest.

**Answer:** “Yes.”

**Question 187:** And the decision to accept any offer would be a decision taken by one of the board of Lotus Green?

**Answer:** “Yes.”

**Question 188:** Why not Fergal in Dublin, do you recall? Again was this for optical reasons? There was no reason he couldn’t. He was a full director?

**Answer:** “I don’t remember.”

**Question 189:** But optically from the tax perspective it might look better if it was a Dutch person taking it?

**Answer:** “It’s a possibility, I don’t remember.”

**Question 190:** There is no suggestion that Fergal wasn’t available to do it so either he suggested it or you agreed that it was better that it was Mr. Diepenhorst or yourself if you were available?

**Answer:** “It’s likely that your presumption is right.”

Mr. Venneboer confirmed that he did not take any calls from Irish brokers. He doesn't remember any discussion as to what was to be said to these brokers other than that Tom was going to accept an offer anything above the €3.00.

**Question 195:** For what percentage of shareholding or for any?

**Answer:** "Anything. That was not discussed. Not to my knowledge."

**Question 196:** ... Is it likely that the board of Lotus Green including Mr. O' Dwyer would have taken a decision to sell, a decision in principle to sell its shareholding in Fyffes above €3.00 if he knew that DCC were opposed to you selling at that level?

**Answer:** "We were fully relying on Fergal also to represent the philosophy and strategy of DCC."

**Question 197:** Okay.

**Answer:** "So by Fergal endorsing a sale at that price it was for us obvious that this was also DCC's view."

**Question 198:** Okay you didn't have to enquire further and say what did the DCC board say?

**Answer:** "No."

**Question 199:** Or what does Mr. Flavin say? Once Fergal was saying it you assumed and presumed that he wasn't, I think what we would say in Ireland 'he wasn't on a flier' he wasn't doing this on his own initiative?

**Answer:** "No."

**Question 200:** Would that be normal in your experience that you would rely on that?

**Answer:** "Sure. He is the CFO of the company. He is aware of the strategy of the company. He is the representative of the company as a director so he would be reflecting the position of DCC."

**Question 201:** I think that's fair, Mr. Venneboer, that you would not have been even taking the decision if it didn't have Fergal's endorsement?

**Answer:** "True."

**Question 202:** How likely was it that you would have taken a decision to go against what you understood to be the DCC philosophy?

**Answer:** "It was so obvious. €3.00."

**Question 203:** Yes. Let's say, I don't know, you had a view that worldoffruit.com was going to be... (Interjection).

**Answer:** "We are traders. I am a trader. Take your profit and run. While everybody is philosophising about World of Fruit or whatever, other circumstances, no."

**Question 204:** So it was very obvious to you, and it had the added advantage that you understood that the people in DCC shared the view?

**Answer:** "Yes."

**Question 205:** Did you regard, however, yourself as being free to vote no?

**Answer:** "Actually not, of course. 100% shareholder was appointing me. If I opposed and they still go ahead then ..."

**Question 206:** You have got to go?

**Answer:** "You step down."

**Question 207:** That's fair. After the first tranche was it Mr. Diepenhorst I think who took the further calls?

**Answer:** "Yes."

Mr. Venneboer said that after all the shares were gone it was not a cause for celebration it was just a matter of business.

**Answer 210:** “Business as usual.”

When asked what was to become of Lotus Green after the shares were sold Mr. Venneboer said ‘it’s logical that it would disappear at a certain moment’. (**Answer 211:** Page 40).

Mr. Venneboer does not recall when he first learned that there may have been a problem in relation to the sale of the Fyffes’ stake. He says it was “much later I think. It was quite late actually”. (**Answer 214:** Page 41).

**Question 215:** Was there a discussion at any stage subsequently at a Lotus Green meeting about the decision you had taken and the implications for DCC?

**Answer:** “No.”

**Question 216:** Did you ever discuss it as a board?

**Answer:** “No.”

**(l) Godfried Diepenhorst**

Mr. Diepenhorst was asked what he recalled of the discussions that took place in the period after August 1995 at the meetings of Lotus Green.

“Well there was always one important item on the agenda being the stake we held in Fyffes. Discussions and updates were there on the value of the stake and how business developed within the Fyffes’ company.” (**Answer 217:** Page 43).

**Question 218:** Yes.

**Answer:** “Or companies, group. Then there were a number of technicalities you had to deal with typically in a Dutch registered company at board meetings.”

**Question 219:** The income that the company had was the dividend from Fyffes?

**Answer:** “The income was the dividend from Fyffes.”

**Question 220:** The expenditure was the interest you were paying

**Answer:** “On the loan. Yes. We had to finance the shares.”

**Question 221:** Yes, as far as your particular role was concerned the meetings record that you were appointed as secretary of the meeting even though the company secretarial work was not being done by you or was it?

**Answer:** “Well, I think that reflects the different roles we had in ING Trust, Netherlands. The system was that a board member of ING Trust Netherlands was allowed to be as you say a director in client companies so from ING’s perspective I would be on the board of Lotus Green.”

**Question 222:** Yes.

**Answer:** “I was also a signatory of ING Trust being I think at that time the corporate secretary so there was always one of the legal account managers from ING Trust.”

**Question 223:** Present?

**Answer:** “Present in the meetings. Your question is why was ING Trust not the corporate secretary?”

**Question 224:** I am just saying as a matter of fact you are recorded as a Secretary of the meetings even though I think formally speaking ING was the Company Secretary. There was a corporate and you were I suppose the nominee or the personal nominee of ING to attend the meetings. Is that correct?

**Answer:** “Yes.”

He also said there was a Ms. van Sytzama who was an employee of ING – an Accounts Manager and she attended the meetings as far as ING Trust was concerned. Originally the Minutes and documents for the board meetings were prepared in Holland either by Ms.



van Sytzama or somebody else but he explained that that had changed and from about 1998 onwards they were prepared in Dublin.

“The reason why it changed is apparently the Irish English and the Dutch English are not identical in this sense. The knowledge of the language was better in Ireland than in the Netherlands reflecting technical decisions, data and things like that.” (**Answer 228:** Page 44).

Mr. Diepenhorst was asked if he remembered the meeting in July 1998 at which consideration was given to selling the Fyffes’ stake.

He said “to be honest I don’t have a particular remembrance to that meeting. It is ten years.” (**Answer 231:** Page 45).

He did remember that they had a discussion about the sale based upon a board paper. His recollection was not very clear of this discussion. He explained that he was a director of a number of foreign companies at around that time, somewhere in the region of 30. They were all Dutch BVs – not “migrated foreign companies but Dutch BVs set up by foreign clients”. (**Answer 241:** Page 47).

**Question 242:** Lotus Green was different in that it was an Irish company but was domiciled in Holland?

**Answer:** “Yes.”

**Question 243:** How many of those were you a director of?

**Answer:** “I think we had three or four at that time – from Canada and England.”

**Question 244:** In your role as Company Secretary, when I say your role I mean ING Trust, and your personal role, did you ever consider that it was part of your duty to be proactive about a decision to sell or not to sell the Fyffes’ stake. I mean did you ever see a

situation where you would pick up the phone to Fergal and say ‘Fergal I think the price is right’?

**Answer:** “I didn’t see that as my role. Absolutely not.”

He agreed that the initiation of the discussion for a decision to be made would have had to come from somebody else.

**Question 248:** Was it conceivable to you that you as a director of Lotus Green would ever come to take a decision to sell the Fyffes’ shares without the approval of DCC?

**Answer:** “Was it conceivable? How shall I word it? DCC was present in the meeting by the presence of Fergal O’ Dwyer.”

**Question 249:** That’s right.

**Answer:** “So we didn’t make that distinction at the time.”

**Question 250:** I appreciate that. Let us say Mr. O’ Dwyer was against a certain course of action to sell or not to sell the Fyffes’ stake was it conceivable that you and the other directors would vote against the wishes of Mr. O’ Dwyer at the meeting?

**Answer:** “Technically we could do that.”

**Question 251:** Yes.

**Answer:** “Legally speaking.”

**Question 252:** Practically?

**Answer:** “Practically, I would like to hear his arguments why not to sell.”

**Question 253:** Yes.

**Answer:** “But technically it’s good. Let’s be realistic. How shall I compare it? ING Trust was a company 100% owned in ING but we had as a board our own responsibilities.”

**Question 254:** Yes.

**Answer:** “For certain things, items, decisions you would like to make within ING Trust. We kept very well in mind what was the major view of ING.”

**Question 255:** Of course.

**Answer:** “So maybe the comparison is not 100% correct that there is a major 100% shareholding.”

**Question 256:** Again, I am not criticising you, I am just trying to get to what is the reality or what was the reality of the situation. I take it that if you had voted against what were the wishes of DCC you could have expected not to remain.

**Answer:** “Shareholders.”

**Question 257:** As a director or a secretary?

**Answer:** “We were appointed by the shareholders as a board.”

**Question 258:** Yes, therefore you would want as a director to get a sense of what the DCC view was in relation to any decisions that you were taking?

**Answer:** “We were affirmed on that view.”

**Question 259:** Who communicated that view to the board?

**Answer:** “That came through Fergal.”

**Question 260:** And nobody else?

**Answer:** “No.”

The only other person they had dealings with in DCC was in relation to the technicalities regarding documents and that was Mairead O’ Malley. They had also met Michael Scholefield.

Mr. Diepenhorst explained that he was protecting the interests of Lotus Green insofar as the Dutch authorities were concerned. He did not have any role in terms of filing returns in Ireland. “Maybe the Dutch directors signed them but not filing itself.” (**Answer 266:** Page 50).

Their focus at all times was compliance with Dutch law and he didn’t concern himself with Irish law. (**Answer 269 and 270:** Page 51).

When asked who was “keeping him right and protecting him” as a director of the company vis-à-vis the Irish situation and Irish authorities he said it was “centralised through Fergal O’ Dwyer”. (**Answer 272:** Page 51).

He said he never asked if the Irish side of things were complied with but he presumed that they were. He explained that Mairead O’ Malley was doing some of the actual company secretarial work even though ING Trust was legally the Company Secretary.

Mr. Diepenhorst was then asked if he recalled the circumstances that gave rise to the calling of the meeting of the board of Lotus Green in early February 2000.

“The initiative of the meeting came from a call to my secretary I think, if I was available. I think that was the day before the meeting, not two days, the day before the meeting, I am not sure.” (**Answer 285:** Page 53). He explained that he was in Germany with a client at the time. The time was set for the meeting very early for the morning of the 3<sup>rd</sup>. No agenda. No specifics. (**Answer 287:** Page 54).

He said he didn’t know what the meeting was about before he went to it and he didn’t have any papers before he went.

**Question 293:** Who was at the meeting and what do you recall of it?

**Answer:** “The three board members were there and the Account Manager, Elodie van Sytzama was at the meeting...”

**Answer 296:** “Then Fergal O’ Dwyer gave an overview on the situation vis-à-vis the share price of Fyffes and explained what they had been doing the day before preparing a memorandum for the board and that we should consider to sell the shares in this market.”

Mr. Diepenhorst was asked how the conversation went.

**Answer 297:** “There was sufficient time for me to read the memorandum of course. It was not a long discussion.”

**Answer 302:** “I think there was a summary from Fergal on the contents of the financial situation, the share situation.”

**Question 303:** Did you have a sense or any understanding of what Fergal’s position was as to what should be done?

**Answer:** “Well it was jubilant. Happy.”

**Question 304:** Jubilant?

**Answer:** “That the price had gone up.”

**Question 305:** Yes was Fergal coming to you and saying ‘we are all very happy the share price has gone up. We think it is going to go up further and we should wait’. Or was Fergal coming and saying ‘the share price has gone up and we DCC in Dublin think now is the time to sell’?

**Answer:** “The price has gone up and we should consider to sell. He didn’t mention the Dublin view I think.”

**Question 306:** All right.

**Answer:** “He didn’t mention that specifically.”

**Question 307:** No, he may not have, but when Fergal was speaking who was Fergal speaking for or did you have any understanding as to who he was speaking for?

**Answer:** “Maybe he tried to influence the board members but there was no need for it because we all were very positive for a sale and at the back of our minds the markets as they developed in 1998.”

When asked why the price was set at €3.00 and not at the price it had achieved that day he said they were setting a floor below which they wouldn’t sell but wanted to give some flexibility in case there was some movement in the share price. (**Answer 314:** Page 58).

He said they were “building in a likelihood, a certainty that we wouldn’t miss the boat for selling some or all of the shares”. (**Answer 315:** Page 59)

The expectation thereafter was that they would receive an approach. “Like previous years there was no pressure to sell so we took the attitude, let them come and approach us, not to actively go and put the shares for offer to the brokers, actively ringing them, no.” (**Answer 317:** Page 59).

**Question 318:** You wanted it to be a sellers rather than a buyer’s market?

**Answer:** “Yes.”

He said he was informed that “expressions of interest had been received”. (**Answer 320:** Page 59).

**Question 321:** From whom, to whom?

**Answer:** “In Dublin.”

**Question 322:** From whom?

**Answer:** “From brokers.”

**Question 328:** So there shouldn’t have been any surprise that the interest would go to Dublin?

**Answer:** “I don’t think Lotus Green was an institution known to the share traders in Dublin.”

**Question 330:** ...What were the mechanics for how the sale was to take place?

**Answer:** “Well, since the raison d’etre, the reason of existence of Lotus Green was tax driven we felt that the sale should take place, the transaction should take place in the Netherlands so one of the Dutch board members would be the person to do the sale.”

**Question 321:** To communicate the acceptance of any offer that came, is that right? Or to go and look for offers?

**Answer:** “No to conclude the transaction on the telephone with the broker.”

**Question 322:** Okay. Who suggested that or how did that suggestion come about?

**Answer:** “It was a practical consideration. Who was available and we were made to understand that it was imminent that there was a real genuine interest.”

**Question 333:** Who made you aware of that?

**Answer:** “Fergal.”

**Question 324:** Yes. So your state of knowledge after the meeting or having met with Fergal was that there was going to be an approach from a broker?

**Answer:** “Yes.”

**Question 335:** And that it would be preferable from a tax perspective if either you or Mr. Roskam or Mr. Venneboer were the ones who concluded the transaction?

**Answer:** “Correct.”

**Question 336:** In the sense of communicating acceptance of any offer above €3.00 is that right?

**Answer:** “Yes.”

**Question 337:** Were there any further instructions given to you, did you have a script, as it were, did somebody write to you and say, listen this is what you are going to say or this is how you deal with this or was it left to you?

**Answer:** “No it was left. The price was locked in. We agreed.”

**Question 338:** Let’s say when you went from that meeting and if I was a broker and came on to you and said I want to buy the Fyffes’ stake that you hold what were you to say? ‘if you give me €3.00 I will accept’. Or what was to happen? You were the one who was ultimately delegated to accept the call is that correct?

**Answer:** “To accept an offer.”

**Question 339:** Right, how did you know how much that offer was going to be?

**Answer:** “There was no agreement on the exact wording. We had to wait what the offer would be.”

**Question 340:** Okay. So was it your understanding that anything above €3.00 you would accept?

**Answer:** “Yes.”

**Question 341:** I mean even if the share price had gone to €3.30 but somebody came on and said ‘I want to buy the shares for €3.00’ you were to take it

**Answer:** “If the offer came for €3.00 yes. Then I think there would have been a deal.”

**Question 343:** I am just wondering after Fergal left the meeting and went back, was there further communication between you and he as to tell you who was going to call you or what was likely to happen?

**Answer:** “I was informed at that stage that there was a €3.20 offer for a number of shares but at what moment that was certainly not at the meeting but maybe a telephone call later.”

**Question 344:** Who informed you of that?

**Answer:** “Fergal O’ Dwyer.”



**Question 345:** In that call or perhaps in a subsequent call did you learn that you would be getting a call from somebody to offer to buy a specific amount of shares at a specific price or were you expecting a more general call without a price?

**Answer:** “Before actually there was a telephone conversation Fergal had informed me what the broker had in mind, what he had to offer.”

**Question 346:** In terms of how many shares and what price?

**Answer:** “Of the number of shares and the price.”

**Question 347:** do you recall which broker contacted you?

**Answer:** “Yes I know from memory his name now. There were three transactions and the first I think was Ronan Godfrey.”

**Question 348:** Before speaking with him you had spoken with Mr. O’ Dwyer so you knew what he was going to say both in terms of the number of shares and the price and your job was to communicate acceptance of that offer?

**Answer:** “Yes.”

**Question 349:** Is that right?

**Answer:** “That’s right.”

**Question 350:** And that was subsequently confirmed by fax.

**Answer:** “And subsequently because the shares were in Ireland in their different companies, we needed information from Dublin to confirm to the broker the exact number and the shares.”

Mr. Diepenhorst was then asked if there had been any discussion at the early morning meeting on the 3<sup>rd</sup> about the freedom to sell the shares to which he answered “no”.

**Question 352:** As to whether there was any impediment to the sale?

**Answer:** “No. We never felt there was an impediment to sell the shares.”

**Question 353:** Did anyone ask any questions as to whether there was any impediment?

**Answer:** “No.”

**Question 354:** If there was an impediment how would you have found out about it without asking?

**Answer:** “The compliance issues. This is compliance, is it, would have come up in the Dublin office and informed us.”

**Question 355:** Yes so when you say the Dublin office. Somebody in DCC would have done something and then would have communicated that to you in Holland? Is that what your expectation was?

**Answer:** “Yes, if there was an impediment.”

**Question 356:** You knew that Mr. Flavin was a director of Fyffes?

**Answer:** “Yes.”

**Question 357:** Again I am not suggesting you did know, but you would not have been surprised if Mr. Flavin had inside information, that had a potential impact on the sale of the shares?

**Answer:** “It was absolutely not an issue that was in our minds.”

**Question 358:** If it wasn't an issue, why was it not an issue?

**Answer:** “Why not an issue? The shares were owned by Lotus Green and we could sell them independently.”

Mr. Diepenhorst was then asked how would he protect Lotus Green in relation to the profit that it was going to make without making enquiry about other information. He answered “we didn't see that as our role.” (**Answer 361:** Page 65).

**Question 362:** Why?

**Answer:** “That was not in the scope of the Dutch rules.”

**Question 363:** Can you explain to me why you didn’t consider that that was part of the scope or why that wasn’t part of the scope?

**Answer:** “The whole issue of insider trading was not thought of. It didn’t exist for us.”

**Question 364:** Yes, but it exists in Dutch law?

**Answer:** “As such yes.”

**Question 365:** And it wouldn’t have been a surprise to you to know that it existed in Irish law?

**Answer:** “No.”

He explained that although he knew that Mr. Flavin was on the board of Fyffes “there was no link for us that there would be any inside information”. (**Answer 368:** Page 66).

**Question 369:** If there was information about Fyffes you would expect the directors to know it. The directors of Fyffes?

**Answer:** “I am not aware of how well, how the structure is in Fyffes. I don’t know what was in what meetings.”

**Question 370:** Yes, in any event you didn’t ask any questions and nor did anybody else ask any questions about it?

**Answer:** “No.”

**Question 371:** In terms of other compliance issues with regard to recording the transaction and reporting it to the Stock Exchange, were you aware of those obligations under Irish law?

**Answer:** “We presumed there were obligations.”

**Question 372:** What did you do to ensure that they were complied with?

**Answer:** “Look at Fergal.”

**Question 373:** When you say ‘look at Fergal’, you mean you assumed that he would do whatever was needed to be done without?

**Answer:** “Like he did the last five years of compliance.”

**Question 374:** Without being asked or without you having to raise it, is that correct?

**Answer:** “Yes.”

He confirmed that he was the person who spoke to the broker on the 8<sup>th</sup> and on the 14<sup>th</sup> in relation to the second and third tranche of shares. He confirmed that he took his instructions from Fergal as to when to call or that he would be getting the call on, the number of shares and the price. He confirmed that he wasn’t negotiating he was just formally accepting the offers. He confirmed that after the transactions went through they were happy. “There was a happy atmosphere. Of course there was a loan to be repaid and the future of the company we touched on because there were many plans on investments by the DCC Group in which maybe the company could play a future role.” (**Answer 384:** Page 69).

**Question 385:** Again that was something that DCC was going to decide?

**Answer:** “Yes.”

**Question 386:** And you would await their instructions in that regard is that right?

**Answer:** “We saw it as a conglomerate of companies. There was the holding company so what was the most effective way of structuring future investments.”

**Question 387:** Okay.

**Answer:** “We were not active seeking a future for Lotus Green.”

When asked when he first learned that there was a potential problem or an issue arising over the sale of the shares in Fyffes by Lotus Green he said they were informed at a board

meeting towards the end of 2000 but that they had learned about the Fyffes' profit warning in March but 'felt it did not in any respect have an impact on us'. (**Answer 396:** Page 71).

It was not until the autumn of 2000 that it impinged upon him that there might be something more to this. He confirmed that in the five years from 1995 to 2000 nobody had ever imparted information concerning Fyffes that was not publicly available.

### **9.2.5 The Advisers**

#### **(m) Alvin Price**

Mr. Price confirmed that he didn't have any involvement with DCC in providing any advice to Lotus Green in the period after August 1995 and prior to January of 2000. He was however involved in 1998 in giving advice around a 'script dividend issue'. He explained that in 1998 there was a script dividend process which had become quite popular in plc's whereby shareholders would opt to take paid up shares in lieu of a cash dividend. He can't recall what the precise rationale for it was but he believes there was a tax benefit which was subsequently legislated against but at that particular time in 1998 it was still allowable. He believes it didn't work for individuals but did work for corporates.

"Therefore it became quite common for public companies to offer to the shareholders that they could elect to take paid up shares in the company in lieu of the cash dividend."  
(**Answer 12:** Page 6).

He explained that Mr. Neil McCann wrote a short note to Jim Flavin saying "I think for the sake of good order you should be requesting my consent in relation to the taking up of these shares". He understood that this was in response to Mr. Flavin phoning him to say that they were going to do that in March of 1998.

“There was correspondence sent backwards and forwards which went on between them until May 1998 which really focused on whether or not DCC was bound by the spirit of the Model Code which applied to dealings by directors and Fyffes seemed to be getting advice from Arthur Cox and DCC were getting advice from me and there was a difference in opinion on the matter. It ultimately ended up in my writing a letter to Jim Flavin just repeating advice that I had given him orally to the effect that provision in the Model Code was to the effect, that directors were required to get consent of the Chairman of the company and also any company which was controlled by a director.” (Answer 14: Page 7).

“And as DCC, Lotus Green and S & L were not companies controlled by Jim Flavin that didn’t apply. I think the point about the spirit was I felt, although there is a general rule about the spirit of the code being implemented, it seemed to me...” (Answer 15: Page 7).

“This was beyond the spirit. For example it defined what a family member was and it excluded brothers and sisters and included fathers and children and things like that so it was a very legalistically drawn provision. I think it ended when Jim Flavin sent my letter on to Neil McCann but I subsequently saw Jim Flavin in evidence wondering whether he had actually ever sent it on or not.” (Answer 16: Page 7).

**Question 17:** Right.

**Answer:** “But certainly I wrote to him on it.”

**Question 18:** It is certainly the case that the script dividends were taken up by DCC?

**Answer:** “Oh, I believe so.”

**Question 19:** And whilst Neil McCann might have been aware of it Jim Flavin never asked for his permission to do so?

**Answer:** “That is correct.”

**Question 20:** So DCC stuck to its guns in relation to it?

**Answer:** “It did indeed. I should just say I think the undercurrent there was there was concern on DCC’s part not to yield any ground on the point because it was felt that Fyffes was trying to control what DCC did with its shares and their correspondence referred to two things. One was disposing of any shares as well as acquiring shares under a script and there was also a reference to an agreement in 1993, I think, that neither would acquire shares in the other or increase their stakes in the other in a hostile fashion.”

**Question 21:** Yes. There was some issue as to whether the acquisition of the shares on the script dividend basis was increasing DCC’s stake in breach of that 1993 agreement?

**Answer:** “There was exactly.”

Mr. Price agreed that for so long as Jim Flavin was on the board of Fyffes and as long as DCC had a shareholding in Fyffes the disposal of the DCC stake in Fyffes was a matter of potential concern from an insider dealing perspective. Mr. Price explained that the letter that he wrote to Mr. Flavin in 1998 said at the end of it, having dealt with the issue about the Model Code, ‘don’t forget the company law insider dealing provision’. The precise quotation in the letter was ‘of course dealings by DCC plc., may be precluded from time to time by virtue of the Company Law provisions relating to insider dealing, but I know from our discussions that you are fully conscious of that point’. Mr. Price was asked what discussions he was referring to in that context and to what period of time did those discussions relate?

“I think that really referred to this period from sort of March to May 1998.” (**Answer 26:** Page 10)

**Question 27:** Yes.

**Answer:** “Yes I think I probably had a lot of previous discussions about insider dealings with Jim Flavin, but that paragraph I think just relates to that. The Fyffes’ correspondence had varied between saying it’s a Model Code point and then going on to say you may be right about the Model Code and the spirit of it but we would be very surprised if DCC could deal at a time when it had price sensitive information so they were kind of ...”

**Question 28:** Conflating the two?

**Answer:** “Yes. I suppose I was saying in that and I would have had discussions with Jim Flavin about that correspondence.”

**Question 29:** Yes.

**Answer:** “In the period March 1998 ending up to this letter in May 1998. I think what motivated this letter was Jim Flavin saying to me ‘we have got to put this point to bed with Fyffes one way or the other, would you ever write me a letter that I can send on to them’.”

Moving on to the insider dealing provisions in the 1990 Act.

**Question 35:** But can you just tell me how conscious were you as an adviser of those provisions, vis-à-vis your clients, including DCC. Is it something that immediately you heard of a client who was on the board of another company proposing to sell shares themselves or companies that they were associated with selling shares that your antenna would have been up in relation to it?

**Answer:** “Yes, I think that is fair.”

**Question 36:** I want to get a sense from you. We are all in terms of our own specialised area, just speaking as lawyers, we have antenna that are very sensitive when certain issues arise. Now I just want to get a sense from you as to what was the condition of your insider dealing antenna throughout this period?

**Answer:** “Yes.”

**Question 37:** Just to start with. The transfer of the beneficial interest to Lotus Green. Did that make Jim Flavin’s situation as far as you were concerned any different in terms of his obligations?

**Answer:** “No it didn’t make it any different, no.”

**Question 38:** Yes.



**Answer:** “I think the consideration back in 1995 was whether there was any price sensitive information at the time of the transfer, but I think your question is whether the fact of the transfer made any difference to the ongoing situation.”

**Question 39:** Yes.

**Answer:** “No, I don’t think so.”

**Question 40:** Not in your mind?

**Answer:** “Not to my mind.”

**Question 41:** From a governance perspective the views being articulated by the directors and by Mr. Flavin, and I can understand it from a governance perspective, that they had in a sense delegated the decision as to whether to dispose of the Fyffes’ stake to Lotus Green, and I can understand that from the perspective of ensuring that the tax beneficial efficacy of what they had set out to do in maintaining that position, but I would have thought, just from a legal perspective once it remained in any company within the DCC group any disposal of that while Jim Flavin was still on the board of Fyffes was a matter that was of potential concern, whether that was held by DCC Plc or S & L or Lotus Green didn’t really matter?

**Answer:** “I agree, absolutely. Well, it’s obvious there from that letter. But I am certain that Jim Flavin was well aware of that as well.”

**Question 42:** Yes, you would expect him to be conscious of it because whatever about who ultimately took the decision and had to take the decision as a matter of law in relation to the sale of the beneficial stake, it would have been – and maybe this is unfair to put to you, but in terms of your knowledge of the DCC group and Jim Flavin’s position in it, would you have thought it was likely or unlikely that that shareholding would have been disposed without Jim having a say in the matter?

**Answer:** “I would have always thought that it was unlikely if he was opposed to it that it would get to the point where the decision making organ would have made that decision.”

**Question 43:** Sure, that’s fair.

**Answer:** “I think in all the correspondence that there is, and I suppose I have been criticised for that, I don’t refer to Lotus Green Limited in the context, I always viewed it as a DCC group issue as to whether there was price sensitive information there and I didn’t make any distinctions about where in what subsidiary the shares resided.”

**Question 44:** In a sense that’s more consistent with your view that what happened in 1995 was internal to the group, in a sense it reinforces your view on the non-application of Section 67 because you took a view that it was all within the one family?

**Answer:** “I suppose it’s building on that, yes.”

Mr. Price was then asked if prior to 2000 he had cause to advise in detail on the provisions of Part V of the 1990 Act, the insider dealing provisions.

**Answer 46:** “I can’t say that I have any recollection of getting out the Companies Act and parsing and analysing the actual provisions, but there were a number of occasions, and I quite honestly don’t recall exactly when they were, when I was called in to advise companies who were concerned that they might be at a point where they should be making an announcement. There were certainly a couple of those occasions but I suppose there was no dealing involved at that particular point in time.”

**Question 47:** But the considerations would be similar if not identical?

**Answer:** “Yes.”

**Question 48:** Can you tell me what does a legal adviser called in to advise companies as to whether they need to make a Stock Exchange announcement.

**Answer 53:** “...Well there were a couple within DCC group where I was asked in relation to executives who were proposing to deal and there was a concern that perhaps there was a transaction in contemplation which would make it inappropriate for that executive who didn’t know about the transaction to be dealing in DCC shares at that point in time and I suppose there were a number of those types and they related to transactional type ones, but there were a couple of non DCC ones where I was asked about trading situations and

where there had been a downturn. I think both cases were downturns in trading but frankly I probably didn't learn an awful lot out of them by virtue of the fact that if you were asked to go to such meeting that nearly answers the question."

**Question 54:** Yes, and answers it in which way?

**Answer:** "Well, that you should make the announcement."

Mr. Price was asked what information he needed, to be put in a position, where he could give advice that was beneficial and useful.

"I suppose you just talk around the issue and try and get a sense of how bad the downturn is both historically and where you are in the year because where you are in the year normally was always quite a crucial point because the Stock Market works on the basis that people have expectations and that they have expectations on a half yearly and full yearly basis." (**Answer 64:** Page 18).

**Question 65:** Yes.

**Answer:** "If you are within a reasonable period of one of those ends and you are way behind expectations then the answer is fairly obvious."

**Question 66:** Yes.

**Answer:** "The further back you are from one of those events it becomes more difficult obviously."

**Question 67:** Month 11 would be more critical than month 5 and month 5 would be much more critical than month 1.

**Answer:** "Absolutely."

**Question 68:** Is that the way it works?

**Answer:** "That's the way it works."

**Question 69:** There might not be a linear connection in terms of the degree to which, but certainly if month 1 is not very critical it is moving in a direction towards month 11?

**Answer:** “It is. You are running out of time to improve a situation. I suppose in theory you might have to make an announcement because things are so much better than expectations.”

**Question 70:** What does the lawyer do then. I mean how do you calibrate? For me to say to you as the hypothetical Chief Executive ‘things are not looking good Alvin’, what does that mean to Alvin?

**Answer:** “I suppose part of my function would be to get the person to come to the conclusion and largely my gut feeling as I say would be if I am being called to such a meeting my predisposition is to persuade them that.”

**Question 71:** It’s safer.

**Answer:** “The safer course is to make the announcement. But balanced as I say in case it proves to be hugely premature so you are only trying to validate your own predisposition towards an announcement.”

**Question 72:** Yes, what are the questions that Alvin Price asks me?

**Answer:** “I wouldn’t say that I have a template for any of that.”

**Question 73:** Okay.

**Answer:** “I suppose I would be asking if it’s a purely trading issue I would be asking first of all where we are in the year, what are the published expectations for the half year or for the year, how far behind are you on that and is there seasonality involved that is going to help a catch up or has the good season already been behind you and any catch up is now much more difficult because you are in a seasonally low point, those kind of issues.”

**Question 74:** Sure, if we just move for a moment from the ...

**Answer:** “I did ask them also a little bit about the trading environment generally.”

**Question 75:** I mean if you are looking for something comparative, maybe compared to the same period in a previous year, or are you looking for by what percentage are you down or what you may have predicted?

**Answer:** “You would certainly ask about prior years all right. I wouldn’t have been particularly, rightly or wrongly, I don’t think I would have been particularly influenced by budgets for the current year other than when setting the budget the company tends to also set the market’s expectations in line with its budget. They do that by briefing analysts at the beginning of the year and saying we think this half year will be comparable to last year or 5% ahead of last year’s first half or whichever is the comparable half of the year. The budget tends to be the market expectation and the market expectation tends to be in line with the budget. Really I would always concentrate on what the market expectation was because at the end of the day price sensitivity is measured by what the market expects.”

**Question 76:** Okay, but there is a pretty close connection between budget and market expectation because your budget is your forecast.

**Answer:** “It’s your internal forecast, yes, cumulatively. You mightn’t get it right. Some companies as I understand it, budget on a linear basis, they just take the six months and they divide it by six and if they are expecting a profit of six million for the half year it’s a million each year.”

**Question 77:** Each month?

**Answer:** “Each month sorry. Others are more sophisticated and actually they graduated by reference to seasonality and other factors that might apply in the particular industry or trade they are in.”

**Question 78:** If we move from the consideration as to whether you would need to make an announcement to the position of an individual director, have you ever had to advise an individual director on his or her position vis-à-vis disposing of their own shares or the disposal of shares by other companies with which they were associated?

**Answer:** “I don’t believe I ever did, no. I don’t recall that happening.”

**Question 79:** How would they compare, I mean if I am a director of CRH and I am thinking of disposing of my shares in CRH at a given point in time, that's one possibility, or I am a director of CRH and I am also the Chief Executive of Elan and Elan has shares in CRH and Elan is thinking of disposing of that share, what's the difference in terms of the way you would approach your advice to those two different situations from a legal perspective, what would you need to know?

**Answer 80:** "Yes, in the first case the provisions of the Model Code require that that director go to the Chairman of the company of which he is a director and ascertain whether (he is free to sell), notwithstanding that it might not be a closed period, there is a closed period around the time that there is an announcement of results."

**Answer 84:** "I think more or less the same considerations apply. Leaving aside the subtleties about Lotus Green and S & L, the law is that a company is precluded from dealing at a time when one of its officers is precluded from dealing so exactly the same considerations apply."

**Question 85:** So the first thing you would need to know is whether it is a close period?

**Answer:** "Yes."

**Question 86:** Because if it is a close period whether you are a director selling your own shares or the director of another company that is selling the shares, you cannot deal?

**Answer:** "Correct."

**Question 87:** Is that correct?

**Answer:** "That's correct."

**Question 88:** So if you rule that out, that it's not a close period then you must move on to some other questions?

**Answer:** "Right."

**Question 89:** What's the next question that gets asked as the adviser?

**Answer:** “I think the next question that gets asked is; Is it a price sensitive period in relation to X,Y,Z...”

**Question 90:** What’s a price sensitive period?

**Answer:** “It’s a period in which there exists information which is not publicly known but if it were publicly known would be such as would materially affect the share price.”

**Question 92:** What was the materiality, what was the threshold for the materiality?

**Answer:** “I can’t say. I never got into the mathematical decision of that.”

**Question 93:** But was there any rule of thumb that you were aware of as to what was and was not material?

**Answer:** “The rule of thumb that I would have always been aware of was that anything 10% or more was definitely price sensitive, if it would move the share price by 10% or more.”

**Question 94:** Where did that come from?

**Answer:** “I really do not know where that came from, but it was a rule of thumb. I didn’t know that at the time but I think in the course of the case it was argued by somebody or some expert ventured the opinion that it was as low as 5%.”

**Question 96:** Prior to the court case if I was to say to you ‘Alvin legally, what’s the sensitivity threshold, what do I need to be worried about’ would you have said ‘listen if the price drops, if it’s information that could cause the price to drop by 10% you’ve got a problem?’

**Answer:** “Yes.”

**Question 97:** That’s what you would have said?

**Answer:** “Yes.”

**Question 98:** By implication then if it was less than that, I don’t have a problem?

**Answer:** “Yes.”

**Question 100:** It is a speculation as to how the market is going to react?

**Answer:** “It is.”

**Question 101:** At a time where you cannot know it because it hasn't happened?

**Answer:** “That's right. I am constantly surprised I suppose at the extent to which markets react to events, it is a constant surprise. Sometimes you hear something announced that sounds quite negative.”

**Question 102:** And the share price goes?

**Answer:** “And the share price goes up a penny or a cent and you just don't expect that. It seems to me that the market already were of a view something even more negative was out there and they were relieved to hear that it was only quantified at this amount and therefore the price goes up so it's very difficult to predict.”

**Question 103:** ... If you are a long standing legal adviser to a company like DCC and you had become aware on the 2<sup>nd</sup> or 3<sup>rd</sup> February (2000) of an intention or a likelihood of either a bid coming in for the shares or a likely disposal would you have proactively intervened and said ‘now wait a minute, have you given consideration to whether there is ... price sensitive information that needs to be considered’.

**Answer:** “I think I probably would, yes.”

**Question 104:** How would that manifest itself. Let's say on the morning of the 3<sup>rd</sup> February you had been contacted and said ‘listen there is an offer in for the shares, Fergal has gone off to Holland to persuade – not to persuade, to discuss this offer that we have received’ what do you think you would have done if you got that call from Jim Flavin on the 3<sup>rd</sup>?

**Answer:** “To be honest I don't think I would have done any more than I did on the 31<sup>st</sup> January.”



**Question 105:** On the 31<sup>st</sup> of January he was phoning you looking for advice?

**Answer:** “Yes.”

**Question 107:** That was somebody coming looking for advice from you and you gave it. Let’s say no advice had been sought from you and you said Jim Flavin was somebody who was well aware of insider dealing, would you have said ‘Jim, I think you need to examine your conscience’, to use the expression in your note but which he doesn’t think he would have used?

**Answer:** “Absolutely. No I think that definitely would have been said.”

**Question 108:** Yes. Why would you say that?

**Answer:** “Given the history of the matter. We were aware that all the ingredients were there, if you like, Jim was on the board of Fyffes and the issue of his possibly having price sensitive information from time to time had been addressed from time to time in 1995, 1998, 2000 and I am sure they are the only times that it was documented, I am sure other times we had discussed that point between us.”

**Question 109:** Tell me how it would have gone...If I am Jim Flavin and I phone you on the 3<sup>rd</sup> and say ‘great news. That which we have been waiting 5 years for Alvin, happy day, worldoffruit.com, the price of Fyffes has gone up enormously, looks like there is great institutional interest. Fergal has gone off to Holland so that we are in a position to move quickly on it.’

**Answer:** “Yes.”

**Question 110:** What would Alvin say, other than ‘that’s great news Jim’.

**Answer:** “I take your point that there would be a momentum at that point in time that would be difficult to stop. But I am certain that at the very least I would have asked the question ‘are you sure that this is a time in which you are free to proceed with the sale’. Effectively that is what happened on the 31<sup>st</sup> January, I think.”

**Question 111:** Yes.

**Answer:** “I believe that I was the one that brought up the issue.”

**Question 112:** And that’s only three days previously?

**Answer:** “I didn’t in fact hear any more about the thing between then and the 3<sup>rd</sup> but I suppose what you are putting to me, would be more likely to have arisen if there was some kind of a private sale and I was being given instructions to draft the contract or something like that.”

**Answer 113:** “In those circumstances I definitely would have raised the issue.”

**Question 114:** Even if you were just being contacted about the Section 67 notification point, if they just got on to you on the 3<sup>rd</sup> and say ‘listen, this is likely to happen. Who do we need to notify’ and nobody had averted to the insider dealing what I suppose I am trying to find out is would you have said ‘hold on a minute, you are asking about Section 67 – but has anyone given any thought to Section 108’?

**Answer:** “I have to say you can never be certain about a thing like that but I am pretty sure that I would have done that. I have to say that I am also pretty sure that Jim Flavin would have thought about it.”

**Question 115:** Right. What makes you so certain that Jim would have thought about it?

**Answer:** “When I mentioned it to him on the 31<sup>st</sup> he said he had thought about it, but he just was and is the type of person who does very little without thinking about it and he tends to tick all the boxes and ask all his executives in their respective spheres of responsibility to go and check things, that just is my experience of the way he was over many years. Price sensitivity, I know it’s ironic given where we are sitting now but I actually would think that Jim Flavin is one of the people that if there was a case starting now on price sensitivity and this had never happened Jim Flavin would be one of the people that I would think as being a possible expert because he studied markets, he was a businessman, knows a lot about trading, was always very good at predicting how a good

renouncement would affect the share price and things like that. It was that experience of him over a long period of time so it was a matter that was quite high in his mind.”

**Question 116:** Just to follow that up. If you think of him as an expert witness, an expert witness for whom, for either side?

**Answer:** “Just somebody who knows a lot about...”

**Question 117:** Somebody with a good nose?

**Answer:** “With a good nose for share prices and what affects them and what the investors are looking for and looking to avoid, just good at that.”

Mr. Price was then asked to look at the memorandum he took of the conversation with Mr. Flavin on the 31<sup>st</sup>.

**Question 124:** Just the sequence then, there was a telephone conversation on the 31<sup>st</sup>, you took notes during that telephone conversation or immediately after it and then subsequently those notes were typed up?

**Answer:** “That’s correct.”

**Question 125:** Would you have dictated your scribbles, just tell me the sequence of how that would have worked?

**Answer:** “Well, we would have had the telephone conversation and these are not the notes I took during the telephone conversation. I would have just jotted down points and this would have been dictated subsequently after the call was over.”

**Question 126:** So there would be a shorthand note taken or not of the detail of the conversation?

**Answer:** “Or not that’s true.”

**Question 127:** But immediately after the conversation or very shortly after the conversation it was your practice or was worthy enough to do a file note?

**Answer:** “That’s correct.”

**Question 128:** I take it from a Solicitor’s perspective you are meant to take file notes if not of everything, of important discussions, is that right? What’s the expectation?

**Answer:** “Yes, you should, we always do it to be quite honest. It depends really on how significant we think the telephone conversation or meeting would have been.”

**Question 129:** Right.

**Answer:** “This one must have been regarded as being of some importance because this formal note was dictated of it. Sometimes you just simply file the handwritten note itself.”

**Question 130:** I have had the benefit of the evidence you gave before the High Court in the transcript and there was some reference to telephone records being discovered suggesting a phone call around the middle of the day on the 31<sup>st</sup>, a six and a half minute phone call?

**Answer:** “Yes.”

**Question 131:** You seemed to be agreeing with Mr. Murray at that stage, that that was in all likelihood the conversation that took place between Mr. Flavin and you on that day. Is that right?

**Answer:** “Well, I was agreeing with him because he was telling me the records show there was no other telephone conversation that day.”

**Question 132:** It wasn’t on your mobile?

**Answer:** “No, it was definitely at my desk.”

**Question 133:** Can I take it that you were accepting that that’s the probability that it was a six and a half minute phone conversation between you and Jim Flavin on the day?

**Answer:** “Yes.”

**Question 134:** The sequencing of the note, if you just read the note cold it looks, or at least it looked to me when I first read it, that this was a telephone conversation between

the Chief Executive of DCC and its legal adviser, that focused on insider dealing concern. That this was the motivation for the call being made, and that the insider dealing concern was the central thrust of the conversation and why it came about. Now I know from your evidence and from what Mr. Flavin has told me that in fact his...primary focus in making the call was in relation to whether he had to get Fyffes consent, it was back to what I might call the '1998 issue' that you thought you had put to bed?

**Answer:** "Yes."

**Question 135:** Is that correct?

**Answer:** "That is correct, yes. That was certainly the first topic he raised."

**Question 136:** Why did you think that was being raised? I mean if that had been put to bed back in 1998 why would he be revisiting that as opposed to the main point of seeking advice – whether he was legally precluded or DCC was legally precluded from dealing. I am just wondering why that would be on the top of the agenda?

**Answer:** "I think it's very much back to Jim Flavin's personality where he liked to tick all the boxes. I think he wanted to be reassured that nothing had changed from 1998 in that he was as free under the Model Code as I had advised him back in 1998. I think what happened here, my very clear recollection is that the apparent purpose of the telephone conversation was that he was seeking confirmation that he didn't require to get consent from the Chairman of Fyffes. I think the line 'it was not a dealing by a director that was involved but rather a dealing by the company itself and DCC plc was not a connected person of him' is really the first three paragraphs of the letter of 1998."

**Question 137:** Yes.

**Answer:** "And is just a very truncated version of me just summing up that advice again."

**Question 138:** Okay, so in fact the first paragraph is dealing with that issue?

**Answer:** "It is dealing with that issue and that's the way, my very clear recollection is that that's what he came on about."

**Question 139:** Okay.

**Answer:** “He is more convinced than I am that it was I who raised the question of price sensitive information. I frankly don’t know. I know the conversation went on to that, but whether it was I who brought it on to it or he brought it on to it, I honestly do not recall.”

**Question 140:** Okay, then he said he had examined his conscience with regard to any price sensitive information and felt he didn’t have any. I suppose its very difficult to be dogmatic as to whether that arose because you asked him a question “Jim is there anything that you know from your directorship of Fyffes that would make this a price sensitive time”, or whether there was a silence and he said “oh and by the way Alvin I have examined my conscience on the price sensitive issue and I feel I don’t have any”?

**Answer:** “Yes.”

**Question 141:** It probably doesn’t matter a lot?

**Answer:** “The former sounds a bit more likely that I brought it up and he was responding to me but I just don’t recall.”

**Question 142:** In any event it arose and had to be dealt with and there was a discussion on it?

**Answer:** “Yes.”

**Question 143:** Then the next paragraph is all to do with what information was imparted to you?

**Answer:** “Yes.”

**Question 144:** Or information that you extracted from questions and it’s difficult to see which is which in here, is that right?

**Answer:** “Yes.”

**Question 145:** Is it a combination of both?

**Answer:** “It is a combination of both because I don’t think he would have talked about the worldoffruit.com venture unless I asked him are there any relevant transactions being considered by Fyffes.”

**Question 146:** Right. Then ‘the market has up-to-date information in regard to the company’. For you to be able to form an assessment you had to know some information, I mean would you have known what the Fyffes year end was before you got on the call?

**Answer:** “I don’t believe I would have known that, no.”

**Question 147:** So the information is there, he did mention that the company’s year ended on the 31<sup>st</sup> October. That told you something about whether you were in month 1 or month 11 of a cycle?

**Answer:** “Yes.”

**Question 148:** So that was of relevance to you?

**Answer:** “Indeed.”

**Question 149:** Do you see in the third sentence there the company’s and his knowledge, ‘the first two months trading had not been all that wonderful’?

**Answer:** “Yes.”

**Question 150:** As a lawyer that doesn’t mean an awful lot to me and I’m just wondering did that mean a lot to you the “all that wonderful”?

**Answer:** “No, I don’t suppose it gave me a flavour of whether or the extent to which it had been not wonderful.”

**Question 151:** You see I’m just coming back to your point about the 10% rule of thumb that would have been in your mind, I mean... there is probably not a linear connection. Let’s say Jim Flavin said to you “Alvin the first two months trading is down 10% from what was forecast”. Now that wouldn’t necessarily translate into a 10% drop in the share

price because there were other issues. Let's say that he said that trading had collapsed, you know, it was 50/60/70% down. Would that have prompted some questions in you?

**Answer:** "Oh, certainly. Certainly, it would have done yes."

**Question 152:** In your mind?

**Answer:** "Yes."

**Question 153:** And there is nothing to indicate there that you have, that there was a follow up, that there was any attempt made by you to find out or any attempt made by him to provide you with some more specific information on the trading other than that had not been all that wonderful. 'All that wonderful' does not really tell you very much?

**Answer:** "No, well I do have to say that this is a note dictated afterwards."

**Question 154:** Yes.

**Answer:** "It is not necessarily all..." (Interjection).

**Question 155:** Verbatim?

**Answer:** "Verbatim, yes."

**Question 156:** I'm sure. Can you tell me what you recall or how you think it would have gone if it doesn't give a (full) flavour?

**Answer:** "I think just going further on down:

'He indicated however that the company's track record was to have an uneven pattern of results and two relatively poor months would not have been unusual in the past.'

So I think there was some further discussion as to how, what did 'not all that wonderful' actually mean."

**Question 158:** "Yes."



**Answer:** “And that, the flavour of the response that I took from that was that it was not all that bad because it was similar to patchy periods in other previous financial years.”

**Question 158:** Yes.

**Answer:** “Beyond that at this remove I just can’t say”

**Question 168:** ... When this was presented to you did it cause you to reflect, ‘now let’s say there is a problem here, is there a way, we can insulate it by Chinese walls or some way of ensuring that Jim Flavin is not involved in the decision making process’. Did that... (Interjection).

**Answer:** “No.”

**Question 169:** Cross?

**Answer:** “I’m afraid that didn’t cross my mind, no.”

**Question 171:** Do you think it is because it was the novelty of the situation arising or because you had so much comfort that the company hadn’t decided to announce itself and everything that Jim told you suggested that this was, that any suggestion of insider dealing was fanciful. What do you think?

**Answer:** “Yes I think it is...” (Interjection).

**Question 172:** It is hard to put yourself in a position, I know, but as best you can.

**Answer:** “I think looking back at it from this perspective or from now it was the latter. I think that if Jim had, if I had, if my antenna had picked up any level of concern on his part that there might be price sensitive information I think I would certainly have gone to the next point which was ‘well we have to find a way if this transaction is to be done we have to find another way of doing it.’”

**Question 173:** Yes.

**Answer:** “And whether we would have ever found another way at that point in time would be a different matter.”

**Question 174:** Yes.

**Answer:** “But my mind never went to that because I, rightly or wrongly, got assurances in response to my questions.”

**Question 175:** Yes.

**Answer:** “Which were sufficient to convince me that there was no price sensitive information. I did go through transactions with him.”

**Question 176:** Yes.

**Answer:** “I did go on to trading. He said what he said about trading. He said it was not unusual and that it was very early in the year and I would, I would have been surprised then to be told that you could have price sensitive trading information that the company was doing nothing about. I would have to say that would have surprised me. I am sure that he conveyed to me that the company itself had not, that is Fyffes, had no concerns. You know I think that is where the ‘road shows’ and things came into the conversation.”

**Question 177:** ...Did it ever occur to you to say “well listen, one way of ensuring or trying to ensure that there is going to be no issue over this is to go to the company and say ‘do you consider that I have any price sensitive information’”? Now to what extent that would have insulated the director from it but if there was going to be an attack for insider dealing it was going to come from the company itself, isn’t that right?

**Answer:** “Yes.”

**Answer 178:** “To be honest I would have been probably more concerned with the criminal aspect of it than...” (Interjection).

**Question 179:** The civil?

**Answer:** “Focusing on the civil side of it. I would have been just of the view that if there was any concern we should not be doing it unless we, you know, sat back and found a very legally safe way of doing it within the Act.”

**Question 180:** Yes.

**Answer:** “But there was nothing coming from Jim Flavin that suggested to me that he had, that trading was a particular concern. Like when I asked him first about price sensitive information he talked about worldoffruit.com and that was the most significant thing going on within Fyffes at that moment but the market knew all about that. So in going through the hierarchy of things we ultimately got to trading. He was saying it is not that great but it is not that bad either. It is fairly similar to other periods in other years and it is very early in the month, very early in the year. There was nothing, rightly or wrongly, nothing caused me to be in any way concerned or alarmed by what he said.”

**Question 181:** It never occurred to you to say... “pick up the phone to Neil McCann and say listen, this is what we are thinking of doing, this is a possibility, am I, do you regard me as being” (Interjection).

**Answer:** “Yes.”

**Question 182:** ...In receipt of price sensitive information? That didn't occur?

**Answer:** “No it did not occur to me.”

**Question 183:** And.

**Answer:** “Even if it had it probably would not have changed the course of events.”

**Question 184:** Yes.

**Answer:** “Because I don't think they have ever claimed to have.”

**Question 185:** Believed?

**Answer:** “Believed that it was price sensitive information at the time.”

**Question 186:** Okay.

**Answer:** “But it did not occur to me, no.”

**Question 187:** I am just wondering if one of the reasons it did not occur was because of the skirmishing that was going on? I mean if you were, if you were not going to be asking for their permission to sell the shares, was it likely that you are going to go back and say I don't need your permission to sell them but please tell me, if I was going to do it, whether I have price sensitive information? Did that make that more of a non-runner?

**Answer:** "I don't think my mind went there but you are right if they didn't want you to sell they would, of course. have told you that it was highly price sensitive at the time."

**Question 188:** Sure.

**Answer:** "But it didn't occur to me I'm afraid."

**Question 189:** Okay.

**Answer:** "You see Jim Flavin was very, was very involved with Fyffes over a long period of time. You know he would have chatted with me so from time to time about, as he would see it, his problems in Fyffes. So in many ways I would have thought that Jim Flavin was nearly more on top of the figures and things than Fyffes were."

**Question 191:** Can I just ask you also in relation to your position, there was no impediment to you getting from your client detailed information, but did you ever have a sense that 'Jim is only telling me so much because he has a duty of confidentiality to Fyffes'? I mean you were in a sense his legal confessor?

**Answer:** "Yes."

**Question 192:** And.

**Answer:** "No I didn't get, I didn't get that sense at all."

At the conclusion of Mr. Price's note he says "having discussed the matter with him we confirmed that we shared his view that there did not appear to be any legal obstacle to their proceeding with full disposal of the shareholding".

**Question 213:** ...Were you just talking about the legality of that, or were you also there saying I agree with you there is no price sensitive information...

**Answer:** “No I don’t, I could not have been saying the latter.”

**Question 214:** Yes.

**Answer:** “I could only have been saying that on the basis of what you have told me and your assessment of what you have told me that does not appear to me to preclude you from dealing. I think that is really what I am trying say.”

**Question 215:** Sure. Okay. Again it was important enough to take a note. How much further thought or how worried were you?

**Answer:** “Frankly I wasn’t worried at all.”

**Question 216:** Were you not?

**Answer:** “Other than it just seemed like a conversation of some note and therefore I did a memo of it. I have to say that when I hung up it was not one of the ones, as you say, that makes you go grey prematurely.”

**Question 217:** Yes.

**Answer:** “...I was fully comforted by what he had said there in relation to price sensitivity.”

**Question 218:** Did you have any sense in which you hadn’t got all of the information you needed to advise or that he was holding back on anything or?

**Answer:** “I had no sense that he was holding back on anything but I suppose I didn’t ask him for precisely what the figures were.”

**Question 219:** Yes.

**Answer:** “But I can only think that I didn’t do that because they would not have meant anything to me. If he had said they were 10 million or 20 million or 30 million it wouldn’t have meant anything.”

**Question 220:** What about percentage terms, would that have meant anything to you?

**Answer:** “I don’t think so because he was telling me it was two months trading. Even in terms of William Fry’s trading the first two months of a year would give you no indication where you are going, you know.”

Mr. Price did not know that Mr. Flavin spoke to Mr. Scholefield on the following day. Nor did Mr. Scholefield ever contact him. He confirmed that nobody else contacted him about the transaction and the next he heard of it, was the phone call about the Section 67 Notice. He was contacted on the 3<sup>rd</sup> of February by Mairead O’ Malley and he had a conference call with Michael Scholefield, Mairead O’ Malley and Terry O’Driscoll from Price Waterhouse Coopers. “It was a conference call trying to settle on the terms of a Section 67 Notice.” (**Answer 231:** Page 51).

**Question 237:** Now you hadn’t had to look at the Section 67 issue in relation to the stake in Fyffes for five years?

**Answer:** “That’s correct.”

**Question 238:** Well for a little under five years?

**Answer:** “Yes.”

**Question 239:** Did you need any refreshing of your memory...

**Answer** “No, but I would have been familiar enough with Section 67.”

**Question 240:** As set out in the note you said there were three options as to what they could do: the registered holders stating that they were informing Fyffes on behalf of the registered beneficial owners. The registered owners could state the name of the beneficial shareholder or in addition to the registered holders completing a Section 67 notice Lotus Green could complete an additional Section 67 notice on its own behalf. Now from that memo there seemed to be some worry or uncertainty on the part of the company as to how

they should deal with the Section 67 notice. They would not have had to contact you about every Section 67 notice, I mean if it was a routine... (Interjection).

**Answer:** "Yes."

**Question 241:** ...Matter I take it they could have worked it out themselves but there was something a little bit unusual about this because of the split between the legal and the beneficial owners, is that right?

**Answer:** "Yes. That is true but I don't think it would have been routine for them. Like they would normally be recipients of Section 67 Notices rather than a giver of them I think."

**Question 246:** Do you remember much about that conversation?

**Answer:** "I don't. I think it is a reasonable summary of it. They were obviously very focused on the tax side of things...and were concerned to ensure that nothing in the Section 67..." (Interjection).

**Question 247:** Would jeopardise that?

**Answer:** "Would jeopardise that."

**Question 248:** Yes.

**Answer:** "And I don't see a lot of difference between options one and two there. I think what we were talking about was arriving at something which technically could fill the Section 67 requirement and also was neutral with regard to the tax situation."

**Question 249:** Well neutral to positive, I mean you certainly didn't want to do anything that anyone looking at, let's say if the notification just came from DCC and S & L and there was no mention of Lotus Green you could see a Revenue authority saying 'ha'?

**Answer:** "Yes, you could absolutely."

**Question 250:** When you were notifying you didn't even think that Lotus Green had to be notified or named on it?

**Answer:** "Yes."

**Question 251:** Would I be correct in understanding that the desire from the company's perspective was to do something to ensure that the Lotus Green footprint was on it, if it could be on it, or is that putting it too positively?

**Answer:** "It might be putting it a little bit too positively, I think the main thing they wanted to know was, sorry what they wanted to discuss was the giving of the Section 67 Notice, and then as a subsidiary point to that giving it in such a way that didn't jeopardise or to be in any way negative to the tax situation."

**Question 252:** ... You were now notifying and giving notification about Lotus Green for the first time. This was the first time perhaps that anybody publicly was knowing about Lotus Green's involvement with the Fyffes' stake?

**Answer:** "Yes."

**Question 253:** So far as you were concerned. Did that raise any concern in your mind? I mean had you ever had to notify on behalf of legal and beneficial owners before?

**Answer:** "No."

**Question 254:** At the same time?

**Answer:** "No I don't believe I ever had, no."

**Question 255:** Did that raise any issue in your own mind that made you sort of re-think what had been done in 1995 and say where the section provided and gave a wide definition of interest and here you were notifying two interests, the disposal of two interests at the one time?

**Answer:** "Frankly it didn't. The first time I began to wonder about that was when it turned up in discovery. Whether I had forgotten 1995 in 2000 or not."

**Question 256:** Yes.

**Answer:** "I just don't know but it did not occur to me at that point in time."



**Question 257:** Now there was also, there ought to have been a notification to the Stock Exchange, I think it is... (Interjection).

**Answer:** "Section 91, yes."

**Question 258:** Section 91. That doesn't seem to have been adverted to at this time. Do you know, is it the case just nobody twigged it?

**Answer:** "I am not sure. I saw somebody in giving evidence said that it had been..." (Interjection).

**Question 259:** I think it was Mr. Scholefield?

**Answer:** "Inadvertently over looked."

**Question 260:** Yes.

**Answer:** "I don't think it was ever raised with me and I don't think I ever raised it. I think I would have thought that the making of the Stock Exchange announcement actually fulfilled that obligation."

**Question 261:** Yes.

**Answer:** "Because had I been asked about it that probably would have been my instinct, in that that notification gets sent to the Stock Exchange and then they put it up on the screen so there doesn't appear to be any requirement to say that this notification is given for the purpose of Section 91."

**Question 263:** Yes.

**Answer:** "Like it seems to be just you notify the Stock Exchange and the Stock Exchange notifies the public and that is what was done."

Mr. Price confirmed that he had no further contact with anyone in DCC between the 3<sup>rd</sup> of February and 21<sup>st</sup> of March other than Michael Scholefield sent him the copies of the Section 67 Notices after they were sent.

**Question 289:** Were you at all surprised that the sale of the Fyffes' stake, insofar as the involvement of the DCC board was concerned, did not appear to have anything like the same attention as had occurred when the beneficial interest was transferred to a wholly owned subsidiary back in 1995. Did that ever –

**Answer:** “No I don't think, I just simply wasn't privy to what was going on. From my perspective it was a single phone call on the 31<sup>st</sup> of January, then getting a surprising phone call late on the 3<sup>rd</sup>. So it was quite opaque to me what was going on internally.”

**Question 290:** Did Mr. Flavin take any advice from you as to whether he should remain on the board of Fyffes after the disposal of the shares?

**Answer:** “No.”

**Question 291:** When he made a decision in relation to that did he ask you for your advice?

**Answer:** “No.”

**Question 292:** As to what he should or should not do?

**Answer:** “No.”

**Question 294:** When did you first learn that there had been a profit warning given by Fyffes?

**Answer:** “I think it was Jim, well I knew it was Jim Flavin rang me because when he phoned me I didn't know about it and he told me about it.”

**Question 295:** And do you recall when it was, was it on the day of the meeting or the following?

**Answer:** “I think it was the day after the meeting. I think the meeting was the 20<sup>th</sup> and I sent him out the note on the 21<sup>st</sup> in response to him calling me on the 21<sup>st</sup>.”

**Question 296:** You are fairly sure that the call was on the 21<sup>st</sup>. It wasn't that you got a call on the 20<sup>th</sup> and you sent out the note on the 21<sup>st</sup>?

**Answer:** “I am fairly sure on that. I couldn’t, I wouldn’t, I wouldn’t be happy to absolutely swear to it.”

**Question 300:** And what do you recall of that conversation with him on the 21<sup>st</sup>?

**Answer:** “I recall him coming on and telling me that...Fyffes had made a Trading Statement. He was upset about it. He may not have said that he was upset but he sounded upset. That it was a most unfortunate combination of events so soon after the share sale that there should be a profit warning.”

**Question 301:** Had the market reacted? I mean if you got the call on the following day how quick was the market response to the profit warning?

**Answer:** “I now know that it reacted pretty quickly.”

**Question 302:** But I mean by the time of your call had it?

**Answer:** “Well, he would have known that but I wouldn’t have known.”

**Question 304:** You say he was upset and this was unfortunate. Did you need to ask him what the nature of his, what had caused his upset?

**Answer:** “Ah no. He was very explicit that this just did not look good. Here DCC had sold its shares at a significant profit and now within six weeks shareholders in Fyffes were being told that the profitability, the expected profitability for the year would not be achieved.”

**Question 305:** And it wasn’t going to take anything more than adding two and two for people to start asking the questions as to what Jim Flavin knew or didn’t know, is that right? I mean it could have been entirely unconnected?

**Answer:** “Yes.”

**Question 306:** Or coincidental. But it was certainly... (Interjection).

**Answer:** “Yes, I can’t say that. He didn’t express that concern to me. He sounded as if he was more concerned about just the perception of being, you know, that it didn’t look good, it didn’t look right.”

**Question 307:** Yes.

**Answer:** “You know he didn’t express any concern that people would be looking back to see what did I know and that kind of thing but I suppose it was implicitly his asking for the note.”

**Question 308:** Yes.

**Answer:** “It might have been in the back of his mind that he wanted to have something which recorded what he, what was the information he had at the time, when he was looking to see that that was in my note, because he wouldn’t have known what my note actually said.”

**Question 309:** But he certainly remembered that he had spoken with you?

**Answer:** “He had.”

**Question 310:** Was he getting on to you rather than you getting on to him?

**Answer:** “No, that was the purpose of his call, I would have thought he was leading up to that.”

**Question 311:** So he obviously in his own mind said “right before this who did I talk to about this”?

**Answer:** “Yes.”

**Question 312:** He would have I mean, in terms of talking to you, it would have been ‘who did I talk to about price sensitive information and insider dealing’?

**Answer:** “Who would I have talked to about the trading situation in Fyffes?”

**Question 313:** But again, talking to you could only have been... (Interjection).

**Answer:** "Oh absolutely, yes."

**Question 314:** ... In the context of inside information?

**Answer:** "Yes."

**Question 315:** So to that extent he was being well, defensive perhaps, I don't mean that in any bad sense, in anticipation of him being asked, well 'did you take advice in relation to it. Did you talk to your Compliance Officer'?

**Answer:** "Yes."

**Question 316:** ...He was perhaps examining his own conscience again in terms of what he had done?

**Answer:** "Yes."

**Question 317:** Would that be right?

**Answer:** "I'm not, you may well be right but it is just a surmise. The flavour I got more at the time I have to say was this was more a PR issue, this just didn't look good and could reflect on his reputation."

**Question 318:** Yes.

**Answer:** "And that kind of thing, rather than from a concern that he had price sensitive information."

**Question 319:** Sure.

**Answer:** "Or the transaction was tainted."

**Question 320:** Did you give him any reassurance?

**Answer:** "I didn't at all because I, literally, he gave me a set of facts of what had occurred and then went on 'do you recall that I spoke to you about trading just before the

transaction happened'? I said I did recall it and he said 'did you do a note to file and I would like to see exactly what I said to you at the time'. I said 'yeah, I will dig it out and send you a copy of it Jim.'

**Question 321:** That was it?

**Answer:** "That was it."

**Question 322:** Did you know that there was going to be a board meeting of DCC?

**Answer:** "I didn't."

**Question 324:** You didn't attend that board meeting?

**Answer:** "No."

**Question 325:** Were you invited to attend?

**Answer:** "No. I am not sure. I might have attended two board meetings of DCC over the entire period."

**Question 326:** Right.

**Answer:** "So it would be very unusual if I did."

**Question 329:** When did it next...impinge on you that there might be something needing to be explained about all of this?

**Answer:** "There was either an article in the Sunday Independent in July or there was proposed to be an article in the Sunday Independent in July, I can't remember which but in response to that or in anticipation of that, I can't remember which, Jim Flavin prepared a note detailing his record of what had transpired through January and February."

**Question 330:** Did that include reference to his contact with you?

**Answer:** "I don't believe it did, no."

**Question 331:** Did you see it before it went out?

**Answer:** “Oh I did, yes.”

**Question 332:** Yes

**Answer:** “He sent it to me for my observations on it”.

When asked if he thought of saying that it should have contained reference to their conversation he said “I don’t recall, I don’t recall that occurring to me”. (**Answer 334:** Page 66)

“Again it was being handled very much at the PR level.” (**Answer 335:** Page 66).

“... You know the point that Jim was trying to get across, was that, DCC hadn’t set out to sell its shares, that there had been demand in the market, the brokers had come to him, it wasn’t the sort of classic case of I have bad information I am getting out and selling your shares.” (**Answer 336:** Page 67).

“... Before the share price collapsed. It was that kind of overview rather than drilling down into who spoke to who.” (**Answer 337:** Page 67).

Mr. Price said he then assisted in drafting a response to a Stock Exchange enquiry in September where again there was no reference to his note.

**Question 342:** Why was that?

**Answer:** “Well again that was quite a short reply.”

**Question 343:** Yes.

**Answer:** “The rationale for that was because we really didn’t understand the letter that had been received from Arthur Cox.”

“Because it started out saying that we need information in order to enable us to respond to a Stock Exchange inquiry, then it went on to say that ‘in furtherance of the interest of its

shareholders' and all the rest in protecting its reputation and standing in the community etc., so there were alarm bells ringing, we didn't understand what this is about. If the Stock Exchange really had questions about this transaction last February they will come to us." (**Answer 344:** Page 68).

**Question 345:** Did you think you were being set up by Fyffes or it wasn't clear to you?

**Answer:** "It wasn't, it just wasn't clear to us what was going on."

Mr. Price was then asked if there was any lesson he had learned from this that would cause him to approach anything differently in the future. He answered, "I suppose to be honest looking back on it now, knowing what I now know as to how low the threshold can be in terms of price sensitivity in the context of trading and being early in the year, you know I wouldn't now be taking anything like the level of comfort that I did from those facts. I would be insisting on drilling down much more into the facts and figures of the thing than I did then." (**Answer 349:** Page 69).

**Answer 350:** "But only because of what has subsequently (transpired)."

Mr. Price was then asked if he had any view as to whether Section 108(7) could have worked.

**Answer 354:** "Yes, well absolutely. I think had we stopped at the time of the telephone conversation and if Jim had, if Jim Flavin's comments had raised any concerns or indeed if Michael Scholefield had followed through in 1995, I think it was or was it later that he raised the point internally in DCC, we might well have tried to avail of ..."

**Answer 355:** "...coming within that subsection. I am not sure that the subsection is terribly robust itself in that it talks about 'written arrangements being in place'. I don't know what really that actually means."

**Question 356:** Yes.



**Answer:** “I would I suppose be concerned that in the ultimate that might have provided a...”

**Question 357:** A defence?

**Answer:** “A defence yes.”

**Question 358:** It might have been viewed as a sort of box ticking but not really substantive?

**Answer:** “Exactly, yes.”

**Question 359:** But you didn’t think of it at the time?

**Answer:** “No.”

**Question 361:** Have you seen it applying in practice?

**Answer:** “No.”

**Question 362:** In any other circumstance?

**Answer:** “No, I have never seen it.”

(n) **Terry O’Driscoll**

Mr. O’Driscoll explained that after the structure was set up in August of 1995 his involvement with Lotus Green would have been limited. “That would have been items like certain tax returns that needed to be filed in connection with the 1995 transactions and so forth and that would have happened some time afterwards.” (**Answer 158:** Page 42).

He confirmed that the first tax return for Lotus Green went in around December 1996. The only other substantive discussion he had was in 1998 in connection with the increase in the share price when Fergal consulted them in terms of what he was going to the

Netherlands about and what should he be doing in terms of giving directors information and so forth. (**Answer 160:** Page 42).

He confirmed that anything that was done after August of 1995 was to ensure that anything that they did in the intervening period wouldn't jeopardise the structure that they had set up in 1995.

**Question 165:** Your expertise is in relation to tax and, insofar as you had an involvement, it was to ensure that the edifice that you had constructed in 1995 did not become undermined by anything that was done in the intervening period?

**Answer:** "Correct."

Mr. O'Driscoll was asked how important the Dutch board was to the tax scheme edifice.

**Answer 169:** "The critical thing from a tax point of view is that the strategic decisions in relation to the company at the very highest level were taken in the Netherlands by the directors that it was managed from..." (Interjection).

**Question 170:** Could they have been Irish Directors?

**Answer:** "In theory they could, and again, some of it comes down to just different people or different advisers had different approaches to this. I mean, you could in theory have had a board just composed of Irish people..." (Interjection).

**Question 171:** Meeting in Holland?

**Answer:** "Meeting in Holland and taking decisions there. I suppose the concern would be that you know, actually these guys are meeting in Dublin everyday. They are meeting in the airport, and then they are going to Holland..." (Interjection).

**Question 172:** Yes how real is this?

**Answer:** "How real is this. So, it's as much, the attraction of actually having a magnet to pull them to Amsterdam or wherever. They'd say, look the substantive discussions are

going to physically take place here. The decisions will be taken there because, you know, the directors are not meeting in Dublin Airport and getting on a plane out to Amsterdam or whatever. Some advisers were probably saying not to have any Irish members whatsoever. Other people would say well, in principle, if you want it to work well in terms of actually somebody coming back from head office and so forth and keeping people in the loop it is useful, useful to have somebody there. So it comes down to talking to each client as much as anything else and seeing what way they in practice see it running. But the critical thing from our perspective would be to ensure that throughout the period from 1995 on, certainly up to the date of the disposal and beyond, that certain things would be happening in Dublin obviously on the day to day stuff in terms of secretarial support or whatever but in terms of the decisions that we could clearly document that those decisions were taken in the Netherlands. That the directors met and understood what was being presented to them and so forth. I suppose there is always a sort of – you were talking about a challenge there as well and I suppose if Revenue did challenge you and you produce a list of Irish directors, you were the next line of questioning you could think of immediately or whatever so you would like to have Dutch directors but not necessarily all Dutch directors.”

**Question 173:** Sure.

**Answer:** “And the critical thing was that board meetings were actually happening and that substantive decisions were taken at those board meetings.”

**Question 175:** ...To what extent was it important from a tax perspective that the boards of neither S & L nor DCC discussed or minuted what was to become of the Fyffes’ shares?

**Answer:** “I mean you could get obsessive about it.”

**Question 176:** Yes.

**Answer:** “Personally I would think it would be normal for a board if you were at the very top level of a plc to take an interest in the subsidiaries and what’s happening there in terms of looking through the companies in terms of the larger business transactions and that, ultimately, that was fine from a tax point of view provided that the decisions, and clearly

the decisions of the subsidiaries would be on the basis of information received from the parent or the group strategy and so forth. So, from a tax point of view, you didn't need a fiction of a subsidiary and a board of a subsidiary would act in isolation totally removed from information..." (Interjection).

**Question 177:** Sure, because that would be unreal to expect that. Let's say three Dutch directors or three Dutch directors with an Irish director would be taking decisions. I mean, they may have to take the ultimate decision but I take it both you and Revenue Authorities would recognise that it's unrealistic to think, particularly with a large stake, that the parent would not have an interest and be keeping an eye in relation to that?

**Answer:** "I am not sure Revenue would totally agree but certainly case law and logic would say you actually look to what's happening in the board level. In terms of specifically on DCC I would say Fergal, in particular, I would have got the sense that he had a very strong view that this was a matter for, you know, he was very keen to ensure decisions were not taken (by the plc) so I think maybe once or twice in that period I may have seen board Minutes of a plc which might have referred to..." (Interjection).

**Question 178:** Would they have been shown to you?

**Answer:** "They would, yes."

**Question 179:** Why would they be shown to you?

**Answer:** "I suppose, I suppose again I don't even remember having a comment on them whatsoever, but I think Fergal would have been just keen to say, look, are we doing anything at the top level that is going to come across."

**Question 180:** Would I be right in understanding, therefore, that from 1995 down to 2000 you were keeping, not a very close eye, but you were monitoring the operation of Lotus Green and DCC to ensure that the...structure which was set up in 1995 was run and operated in a way that gave you the best chance to defend it?

**Answer:** "Yes. But it isn't something that we in the firm would have been auditing on an ongoing basis."

**Question 184:** And nothing may turn on this ultimately but one of the consequences of the structure that was set up was that, of necessity, for tax reasons the centre of ultimate power of disposition over the Fyffes' shares moved from Ireland to Holland?

**Answer:** "Correct."

**Question 185:** And in so doing removed the board of either DCC or S & L which had owned it, from having, as it were control or oversight over the ultimate disposition of... (Interjection)

**Answer:** "They could not make the decision to sell the shares."

**Question 186:** Correct and that had to be for the tax structure to work, isn't that right?

**Answer:** "Correct."

**Question 187:** But, again, insofar as the consequence of that is concerned, it meant that the board of directors of DCC never met or could never meet to resolve to dispose of the shares.

**Answer:** "Well, if they were taking the powers of the Lotus Green directors away and effectively standing into their shoes and saying 'we are taking this decision'. I mean, in theory tax residence is an ongoing test. You know you don't lose it because one board meeting is held in Ireland or whatever, but in a decision like that, it would have been a very substantive decision."

**Question 188:** ...If you had been asked for a view as to whether the board of DCC plc should have resolved to sell the shares in February 2000, would I understand that you would have been... (Interjection).

**Answer:** "I would have been reasonably horrified that they..." (Interjection).

**Question 189:** Well, I was going to say less than happy?

**Answer:** "Less than happy."

**Question 190:** Okay, that makes sense.

**Answer:** “But I would have been happy that Fergal in particular is a cautious guy and he knew probably better than ourselves in terms of what needed to be done. But, in theory, that would not have been in accordance with...” (Interjection).

**Question 191:** Your advice?

**Answer:** “The advice.”

**Question 192:** To that extent it meant that – well depending on what view you take – either the Dutch directors or the board of Lotus Green were taking a decision in relation to a substantial asset without board oversight, without ultimate board oversight by DCC.

**Answer:** “Well, I mean, to a certain extent, the subsidiary always has oversight from its parent and so forth and guidance and gets a recommendation or whatever, that in itself wouldn’t kill the tax residence points but certainly in taking the decision it would have caused problems or whatever. Now, there is a line and it’s a thin line between actually the top board making a decision and it is clearly on the wrong side of that line.”

**Question 193:** Sure?

**Answer:** “What I mean, I would say Fergal tended to err on the line of ‘the more that this was reserved for Lotus Green’...” (Interjection).

**Question 194:** The better?

**Answer:** “The better.”

**Question 195:** Yes, sure.

**Answer:** “Actually the less involvement from Dublin, the better.”

Mr. O’Driscoll said that as far as his role as a tax adviser was concerned he would not have concerned himself or involved himself with whether there were any insider dealing issues. The only compliance issue he had cause to concern himself with, was as to the name which would be used on the Section 67 notification.

**Answer 203:** "...DCC would have dealt with us for a long time and they would know our level of expertise and what they wanted from us and what they wanted from Alvin. There would have been a clear demarcation between the company law and tax law. There might be errors like stamp duty or whatever which would fall between the legal and tax; you may too and fro there between Fry's and ourselves, but we wouldn't be expected and certainly in terms now of engagement letters in terms of the scoping exercise we would be quite clear what we do."

**Question 204:** And that was the position back in 2000?

**Answer:** "I can't remember was there a formal engagement letter or what but, I mean, I don't know that there is any doubt in terms of DCC's expectations of us and their expectations on the legal side."

Mr. O'Driscoll said the use of offshore vehicles for tax purposes was fairly common for large groups and the Revenue would have been aware of this. Once the tax return was filed in December 1996 he said the Revenue Commissioners would have been aware of the existence of Lotus Green and the fact that it had changed residence would have been brought to their attention. They wouldn't have heard about it thereafter because it was out of the Irish tax net. He explained that Lotus Green had to make one tax return in respect of the period when it was resident and then thereafter it would file returns in Holland unless it had an Irish source of income which he didn't believe it had. He said he thinks once it changed residence it closed the Irish Bank account. (**Answers 230 and 231:** Page 62).

Mr. O'Driscoll doesn't remember any discussion between July 1998 and February 2000 about the Fyffes' stake. To the best of his recollection he would have spoken to Fergal O'Dwyer on either the 1<sup>st</sup> February or the 31<sup>st</sup> January before he went to Holland.

**Question 239:** What do you recall that Fergal told you on those dates?

**Answer:** “I think, it would just have been the share price is moving. There is a lot of activity in terms of share movements around that time were happening in quite a few companies, it’s been a while since we actually considered it here, it wouldn’t have been Fergus’s style to give me...” (Interjection).

**Question 240:** Chapter and verse?

**Answer:** “Chapter and verse in terms of what was actually happening commercially. But he would have told me was going to go to a board meeting in the Netherlands and before that he thought it would be useful to come and dig out the 1998 strategy report and update that and see where that lay at the moment in terms of various things. I think he told me that he would meet with one of the directors in advance of the board meeting and go through that paper. So that he was going to the Netherlands to work on the paper and have a board meeting as well.”

**Question 241:** What was he asking you to do?

**Answer:** “I don’t think he was asking me to do anything specifically or for any specific advice. I think he was telling me what he was doing. It was probably just to let me know what was happening so that in the event of there being any sudden activity, that at least I have an opportunity to look at whatever papers I needed to look at and I think it was to get my head around it ...”

Mr. O’Driscoll explained that the rationale for the strategy paper which was discussed by Fergal O’ Dwyer on the 2<sup>nd</sup> February in Holland is that it would ‘have been helpful’ in the event of a tax challenges as well as board Minutes because Minutes by necessity tend to be very short. (**Answer 248:** Page 66).

Mr. O’Driscoll said he had no discussions with Mr. Jim Flavin at this time or at any stage in January or February. He said it would have been very rare for him to have direct dealings with Mr. Flavin. “There would be instances where there was something sensitive about an acquisition or about an executive or whatever that he would contact me directly.” (**Answers 256 and 257:** Page 67).



**Question 258:** But not in relation to Lotus Green?

**Answer:** “No. The only people he spoke with on the 2<sup>nd</sup> or 3<sup>rd</sup> of February were Mairead O’ Malley and Michael Scholefield.”

**Question 260:** Why Michael Scholefield? Why would you have been talking to Michael?

**Answer:** “Well, because he was on the phone with Mairead to be honest with you. I don’t think Michael actually rang me. I think it was Mairead that rang me and Michael at the time was, was Michael was Group Secretary at the time.”

**Question 261:** And I think Compliance Officer?

**Answer:** “Well, I would have been used to dealing with Michael on some secretarial issues and so forth.”

**Question 262:** So you weren’t surprised that he was on the phone?

**Answer:** “No, not necessarily. I think the query related to, I think the paperwork to do with the share transfer or something like that.”

Mr. O’Driscoll said he wouldn’t have been surprised that the brokers would contact Mr. Flavin but it was clear ‘that whoever was contacted would have to refer the matter back to the board of Lotus Green’. (**Answer 270:** Page 69).

**Question 272:** Had you given that advice to Fergal that whoever was contacted would have to, you know – or did Fergal need reminding that this was something that had to be done and the decision taken by... (Interjection).

**Answer:** “In terms of the broker in 2000?”

**Question 273:** Yes.

**Answer:** “I don’t actually remember having a substantive discussion in 2000 on that issue. But I think again it would have been clear from that period of time yes.”

He was then referred to Tab 37 in the 2000 core booklet which made reference to a Section 67 notification and was asked if he knew what a Section 67 notification was.

**Answer 275:** “I don’t believe so. I don’t remember the level of detail. Section 67 in itself wouldn’t mean anything to me. I’d they had to tell me whether it’s a company law notification we need to make or whatever.”

**Question 276:** Yes.

**Answer:** “I don’t remember that there was any detailed discussion on the reporting requirement. It was more in terms of tax. Did it matter whose name that was in and so forth, so I don’t remember that there was a very detailed discussion.”

He explained that he would have known broadly that when you change shareholdings you notify somebody in terms of the secretary or whatever but not the detail of it. (**Answer 277:** Page 71).

He said the consideration had more to do with optics rather than the substance.

**Question 280:** It wasn’t going to destroy the tax... (Interjection).

**Answer:** “Well, it was neither going to destroy nor make the tax argument.”

He went on to say that he was ‘quite happy that DCC plc and S & L were involved because they were on the register on the contract note because tax law is concerned with beneficial ownership’. (**Answer 282:** Page 72).

Mr. O’Driscoll said the focus for him on the day was not to do anything that would jeopardise the tax regime in Ireland or in Holland. Mr. O’Driscoll was not able to say who was directing the discussions in relation to the sale of the shares. Once the first tranche was sold he says he thinks he would have been told out of courtesy that the sale had happened. He explained that he had some details in the subsequent days doing memorandums of the discussions because there had been a bit of frustration about

confusing advice around whether they could or could not or should or should not sell the preference shares.

Mr. O’Driscoll was also told that Mr. Flavin would resign as a director of Fyffes and it was necessary for him to get clarification from PWC in Holland that it would have no implications on the Lotus Green structure in Holland since the original decision of the tax authority was predicated upon close connection between DCC and Fyffes through the participation of Mr. Flavin as a director. He explained that “well it assisted with the application (Mr. Flavin’s directorship of Fyffes). I am not entirely sure the weight that was attached to it. This was more than a passive investment...DCC actually had some influence in the broader sense still or some concern with this. (**Answer 310: Page 70**)

**Question 311:** Yes.

**Answer:** “That it was more than just like going out and buying shares on the Stock Exchange or whatever. So, that was one of the points that had gone into the submission and I think Peter had actually been aware of that, even the previous evening or that was one of the concerns.”

**Question 312:** I understand, yes. Did you get some comfort in relation to that?

**Answer:** “That specific point.”

**Question 313:** Yes.

**Answer:** “I wouldn’t say comfort, it was more that we would have to go back to the authorities and actually tell them that the shareholding had fallen number one, and number two that Mr. Flavin had resigned, was no longer on the board.”

(o) **Peter van der Hoeven**

Mr. van der Hoeven explained that his involvement in 2000 was as a professional tax adviser ensuring that whatever was done was done in such a way that the tax advantages

were preserved and that they would fully meet with the requirements of the Dutch authorities. He explained that from August 1995 onwards Price Waterhouse Coopers in Amsterdam were involved as professional tax advisers and also took care of filing the Lotus Green Tax Returns in Holland. He said he had no involvement in relation to any filings in Ireland. He explained that following the ruling of the Dutch Tax Inspector that Lotus Green was ‘incorporated in the fiscal unity with DCC in the Netherlands to consolidate the tax returns’. He said he had never had cause to have any contact with any authorities be they tax authorities or company authorities in Ireland. He explained that this would be very rare. In all my professional career I have never done that. (**Answer 9:** Page 6).

He also said he would not have known what Price Waterhouse in Dublin were doing in terms of tax returns because he would not be informed unless there was an implication for Dutch tax. He explained that Lotus Green itself had not filed tax returns but that the tax returns were filed by the parent, DCC International BV. The advantage of ‘fiscal unity’ was that you only had to file one tax return and not two or more. “And if one has a loss and the other has a gain you can mix. Of course if you have a parent who has a gain or a taxable income and a subsidiary has a loss or visa versa then you pay a higher tax when you consolidate it.” (**Answer 23:** Page 8).

**Question 24:** So when you consolidate you can net off the profit and the loss is that correct?

**Answer:** “Correct, that’s the major advantage.”

He explained that there was no real connection between participation exemption and the consolidation of group accounts. He explained that the participation exemption only applied to the Fyffes’ shares since that was all that was dealt with in the Dutch Tax Inspector’s ruling. “The importance here is that if you own more than 5% of the nominal paid up share capital in a non Dutch company then the participation exemption is applicable if the shares are not owned as a ‘portfolio investment’.” (**Answer 25:** Page 8).

**Question 26:** Right.

**Answer:** “So the basic issue here is if you invest in another quoted company which normally is a portfolio investment.”

**Answer 27:** “Unless you are a venture capitalist or an investment company whose goal it is to bring more companies of the same sort together and ultimately bring synergy effects or whatever.”

**Question 28:** Yes.

**Answer:** “Or if you have a direct participation in the management of that other company.”

**Question 29:** I understand?

**Answer:** “So that was the whole issue together. The actions of DCC plc being an investment company and also the other factors surrounding it meant that we applied for the participation exemption and the Tax Inspector agreed to the participation exemption. He agreed that one of the factors in support of the application for participation exemption was the fact that Mr. Flavin participated on the board of Fyffes. It was one of the issues. (Answer 30: Page 9).

He confirmed that he never attended board meetings of Lotus Green nor any of the DCC companies. He said ‘it might be that Fergal O’ Dwyer went first to our office for advice, regular tax advice, and then went to the offices (of Lotus Green) or the other way around I don’t know. They were very fee sensitive DCC and so just sitting in on a board meeting I don’t think they wanted to pay for that’. (Answer 37: Page 10).

Mr. van der Hoeven explained that most of his instructions and most of the requests for assistance were coming from Mr. O’ Dwyer and to an extent Mairead O’ Malley. He explained that his contact with the Dutch directors and in particular Mr. Diepenhorst was in respect of the tax return filing since Mr. Diepenhorst’s, ING was the Company Secretary. He explained that it was Mr. Diepenhorst who probably signed off on the Dutch tax return. Mr. van der Hoeven said that between 1995 and 2000 he had not been

called upon to provide any other advice for Lotus Green. He did provide it for DCC ‘DCC was already in place and had very sophisticated tax planning systems’. (**Answer 48:** Page 12).

Mr. van der Hoeven said he did not expect to be contacted unless there was a decision to sell. (**Answer 57:** Page 13).

“What would be the tax consequences etc., and we have a ruling in place, we should inform the Tax Inspector so as soon as there would have been decisions or they were thinking about it they would have contacted me.”

He does not remember being contacted between April and July of 1998. When asked when he remembers first being contacted in relation to the ultimate sale of the Fyffes’ stake in February 2000 he said it was around the period that it was sold. “It was a matter of days.” (**Answer 62:** Page 14).

Mr. van der Hoeven explained that in this period in early 2000 he was extremely busy and explained that he was not present for most of the day on the 3<sup>rd</sup> of February but when he arrived in the office he realised that some incorrect advice had been given because there was talk of ‘nominal shares’ which is not a concept known in Holland ‘the relevance was the nominal paid up share capital’.

Mr. van der Hoeven said it would not have been part of his function to consider whether Lotus Green was free to sell the shares in Fyffes ‘I am a tax lawyer so I am only dealing with the tax law’. (**Answer 68:** Page 17).

“I was paid for being a tax adviser.” (**Answer 69:** Page 17).

He explained that the first point of contact with Price Waterhouse Coopers in Amsterdam was when Mairead O’ Malley contacted Frederich Esterhuyse and then he, Mr. van der

Hoeven, helped Frederich Esterhuysen and in telephone conversations it was Terry O'Driscoll from PWC and Mairead O'Malley and Fergal O'Dwyer from DCC.

Mr. van der Hoeven was asked about the memorandum of the telephone call on the 21<sup>st</sup> of January which was dealing with the 'share buy back' proposal. Mr. van der Hoeven's recollection of that discussion is that they were considering selling because they believed that the Fyffes' share price had reached its full value and they were anxious to avoid high tax thereafter in the Netherlands.

**Answer 89:** "I cannot recall whether there was any already any specifics in that respect. Probably they looked at the stock market price and thought it is now time to sell."

On the 3<sup>rd</sup> February 2000, Mr. van der Hoeven advised that if not all of the shares were sold at once 'you should keep more than 5% of the nominal paid up share capital and whether that's ordinary shares or preference shares has no relevance in that respect'. (**Answer 92:** Page 21).

He explained that DCC's fear was that since they wanted to keep the participation exemption, they were afraid that if they sold off part of the stake that the participation exemption would get lost.

**Question 100:** Would you say that they had, one can have dual or triple focus, you can be focused on a number of things, did this seem to be the major focus of DCC through Mr. O'Dwyer and Ms. O'Malley during the 3<sup>rd</sup> of February and the following day?

**Answer:** "Exactly and I explicitly asked them whether they wanted the participation exemption because I mentioned already on February 3<sup>rd</sup> that if the participation exemption would get lost there would be a base (share) price and perhaps I have to explain that in more detail because this is very important in my view."

**Question 101:** Explain it to me.

**Answer:** “So if the participation exemption is applicable all the income coming from the shares of Fyffes respectively, all the capital gains or capital losses you might have on the shares of Fyffes are not relevant tax so they are excluded for tax purposes. As you know we have our commercial balance sheet, the profit and loss account is a different one as the tax profit and loss account and if the participation exemption is applicable any income, gains or losses coming from the Fyffes’ shares are not relevant for tax. Now the tax Inspector had ruled that the participation exemption was applicable, but if facts change I have to inform the Tax Inspector after the facts have changed. That is the reason why I have informed the Tax Inspector immediately after they have sold off the shares, the ordinary shares in a period from the 3<sup>rd</sup> to the 14<sup>th</sup> February. I have also informed the Tax Inspector that Mr. Flavin was not any more on the board of Fyffes. I informed DCC already that if the Tax Inspector would take the decision that the participation exemption would not be applicable any more then there is a tax situation which in our law was settled in a court case that the new cost price of the shares should be fixed.”

**Question 102:** At the price of the day when he decided it was no longer (applicable)?

**Answer:** “That’s correct.”

**Question 103:** Whether that was up or down you got a new base price?

**Answer:** “You got the new base price. Then there are two possibilities. The price goes up thereafter or the price goes down thereafter. If the price goes up and I can tell you that is in the documentation, I have taken with me, that the price ultimately was fixed on 14<sup>th</sup> February, the last day of the sale of the ordinary shares.”

**Question 104:** What price was fixed?

**Answer:** That was €3.90, the price of Fyffes. Thereafter the price can go up let’s say to €4.20 then the taxable gain on that is only 20 cent irrespective of what your original cost price was, but if the price goes down there is a tax loss which you can use against other profits.”

**Question 105:** Other profits in the group or just in Lotus Green?



**Answer:** “In the group because it was a fiscal unity in the consolidated accounts.”

Mr. van der Hoeven believed that in the context of my enquiry it was significant that DCC were so keen to hold on to the participation exemption. “If you think that the price might drop why would you want the participation exemption until April or June if you get tax a taxable loss which ultimately was €11 million? In other words if there was a fear that the value was going to go down in the shares DCC would be most unlikely to be getting me to fight hard to keep the participation exemption. They would instead be paying me to lose it.”

Mr. van der Hoeven said he had no involvement in relation to any Companies Act notifications in Ireland.

#### **9.2.6 The Stockbrokers**

##### **(p) Roy Barrett**

Roy Barrett explained that he was Managing Director of Goodbody Stockbrokers. Prior to 2000 he had been Managing Director for about four years. Mr. Barrett gave evidence in the **Fyffes –v- DCC and Others** High Court litigation. He explained that prior to January/February 2000 Goodbody’s had no commercial or advisory relationship with DCC up to that point in time. As regards Fyffes they had a relationship in that they had been appointed to advise Fyffes on the funding options for the worldoffruit.com venture. That relationship had commenced in late 1999. Mr. Barrett agreed that in the period from December 1999 to the end of January of 1999 there had been a fairly dramatic run up in the price of Fyffes’ shares.

“It had gone from around €2.00 at the end of 1999 to, early February, certainly up to about €3.20.” (**Answer 8:** Page 9).

Mr. Barrett agreed that he had attributed that rise in share price largely to the excitement surrounding the World of Fruit venture and not anything in the inherent fruit trading business of Fyffes. “It was entirely driven by hopes for worldoffruit.com and that was in the context of a market at the time which was very much focused on and being driven by technology stocks and the technology sector and when you look at it in context worldoffruit.com would have been something that came into the market’s consciousness in late 1999, but in early 2000, in January they made a statement to the effect that they were going to go live with worldoffruit.com and that, that was the catalyst for the share price movement. I suppose the overall market environment at the time was really being driven by the technology media and telecom sectors and the obvious manifestation of that was NASDAQ in the US and the reality of life when you look back, is that NASDAQ rose by over 75% in the period between October 1999 and March 2000.” (**Answer 9:** Page 9 and 10).

He then explained that it fell fairly spectacularly from the early part of March to May by about 35%.

Mr. Barrett was asked how familiar he was with DCC and with its people before the end of January of 2000.

“Well I knew quite a lot about DCC. It was a large company quoted on the Stock Exchange. We would have had quite an amount of contact with the company through our analysts and sales teams. The management of DCC would have come into Goodbody’s a couple of times a year to give briefings as to progress within the business. So, we would have had a reasonable amount of contact with them as a firm. Personally, I would have had some contact with Jim Flavin, in his role as a non-executive director of Eircom at the time and we had advised Eircom, Telecom Eireann, on its IPO. In 1999 he was a non-executive director of that so that would have involved quite an amount of contact with the board of Eircom of which he was a member.” (**Answer 12:** Page 10).

He said this is how he got to know Jim Flavin better.

He explained that it was ‘widely known’ that DCC had a shareholding in Fyffes. He said ‘my view and the firm’s view of the DCC shareholding in Fyffes was that it was anomalous in the context of its overall business. They had a diversified business but most of the businesses they had control over...’ (**Answer 19:** Page 12).

He said he always had the view that DCC ‘would exit in time’. When asked what prompted him to make contact with Jim Flavin in late January or early February 2000 he said “what led to that was fairly simply, the price movement and the price movement in January was dramatic and the price...had started rising from a base of about €2.00 at the end of 1999, and through January it kept rising through the €3.00 and the sole catalyst, in my view, for that was the view that worldoffruit.com was going to be a project of enormous significance for Fyffes. The belief was that it was going to become the ‘Amazon.com’ for fruit.” (**Answer 29:** Page 13).

“We had a piece of analysis at the time in late January, about the 20<sup>th</sup> January which tried to provide a context around worldoffruit.com and what it could actually mean for Fyffes. And the analysis at the time came to a view that the range of value of worldoffruit.com was the equivalent of anywhere between let’s call it 15 cent per share of Fyffes, up to about 650 cent per share for Fyffes. In the context of a share price which was €2.00 this was significant.” (**Answer 30:** Page 14).

“What was driving it really was there was a macro view that technology stocks generally was where you should be, but within that World of Fruit was an online exchange. There were a number of examples in the US market in particular, in different industries which were relevant. So there was a company called Kemdex, which effectively was an online exchange for the life sciences sectors, and that had risen in value hugely since its IPO. I think it ‘IPO’d’ at \$8, and over the period from January to January, 1999 to 2000 had increased by about 600%. There was another company called Vertical Net, which was another online exchange that, over the same period had increased 30 fold. There was another example of a company called Neopharma, which again had increased substantially

over the period. So when people were talking about worldoffruit.com they were looking at it in the context of what other comparable type ventures were out there and what value was attributing to them.” (**Answer 31:** Page 14).

Mr. Barrett was asked how World of Fruit would have had such a dramatic effect on the Fyffes’ share price.

“Well if you have a business which in the normal course is worth €2.00 per share and then you have this other development which you wholly own.” (**Answer 33:** Page 15).

“... the path that they were demonstrably going down was to try and raise external funding for worldoffruit.com and possibly then seek to float that business, or sell it or do whatever they were going to do. More likely float was the view at that time. The view in the marketplace was ‘well, ok Fyffes have actually an inherent advantage’.” (**Answer – 35:** Page 15).

**Question 36:** They know the business?

**Answer:** “Above and beyond that even some of the other online exchanges had – one, they were in the business and they were a significant player in the market place and two, the produce market, local produce market was so significant. So actually here was a company which had expertise in the market place which was vast, where there was no online exchange comparable to worldoffruit.com and at the time there were all sorts of names applied to these things such as ‘first mover advantage’ and all this sort of stuff which, when you look back you sort of say it wasn’t such an advantage after all but at the time ...”

**Question 37:** The wisdom was.

**Answer:** “The wisdom was and peoples’ perception was clearly that Fyffes had come across something which potentially was of significant value and possibly enormous value in the context of the Group. When I look back now, and when I even looked at it, at the time there was only one driver of the Fyffes’ share price and it was World of Fruit. There is no other logical explanation for what happened.”

Mr. Barrett confirmed that he had given evidence in the High Court that it was he who approached Jim Flavin. He explained that it was a cold call to the best of his recollection sometime around the 1<sup>st</sup> February. He explained that around that time they had genuine very wide interest in the Fyffes' story. He explained that most of the relevant institutions who were active on the Irish market would have an interest in whatever is going on in the Irish market place and at that time there were very few stocks which offered exposure to those sectors, which were really driving global markets, technology, media and telecom stocks.

“So from an Irish broker perspective, when you were talking to an international client you tried to have stories which were actually relevant to the global investor and Fyffes was one.” (**Answer 46:** page 18).

**Question 47:** Okay that made Fyffes somewhat exceptional at that time?

**Answer:** “Correct.”

He explained that it would be normal for Goodbody's to seek to generate business and the sale of 10% of a big public company like Fyffes was a big deal. He explained that the only way that Goodbody's were going to be involved was if they were very proactive in trying to put themselves into the middle of it. (**Answer 56:** Page 20).

He explained that before phoning Mr. Flavin he had genuine interest which had been fed to him through his sales team. He explained that although he was Managing Director he was very actively involved in all parts of the business on a day to day basis. (**Answers 59 and 60:** Page 21).

He explained that it was very clear to him and his team in Goodbody's that there was one large shareholder in Fyffes which they viewed was anomalous in the context of DCC's business. “So we said ‘right, there is a reasonable prospect that at some point in time these

guys are going to sell'. So we had the interest, let's put it to DCC and let's try and see if they are going to sell their shareholding. So that is what we did." (**Answer 62:** Page 21).

When asked if there was any doubt in his mind as to who he would call in relation to the Fyffes' stake in DCC he said 'no...I had no doubt that the person I would call was Jim Flavin'. (**Answer 63:** Page 22).

He explained that even if he had known that the beneficial ownership of the shares was in a wholly owned subsidiary of DCC that was registered in Ireland but resident in Holland. "It would have been irrelevant to me. I would have still called Jim Flavin because I wouldn't have known anybody in Holland." (**Answer 64:** Page 22).

He said it would not have been surprising to him that DCC plc would not own all its assets in the one holding company. He said he had met Mr. O' Dwyer and Mr. Scholefield and knew them all. "My view was that the relevant person to call was Jim Flavin. In similar circumstances with any other plc if a CEO was known to me and I had some form of relationship with that person that would be the person I would call." (**Answer 71:** Page 23).

Mr. Barrett explained that apart from the fact that he would have known Jim he would have had a view that 'to the extent that something was going to happen in DCC that Jim would have been involved in it or involved in the decision'. (**Answer 78:** Page 24).

Mr. Barrett explained that the first transaction on the 3<sup>rd</sup> of February was handled by Davy's and the second and third on the 8<sup>th</sup> and 14<sup>th</sup> were handled by Bruce Ashmore of Goodbody's. He explained that the first time he became aware of the existence of Tom Diepenhorst was on the 8<sup>th</sup> February. He explained that this did not ring any alarm bells and said he couldn't particularly remember what he thought of apart from the fact that it was an "unusual wrinkle at the end of a transaction, as far I was concerned, but no more than that and that for whatever reasons the process for DCC to sell these shares was

through Tom Diepenhorst in Lotus Green. Why? that was wasn't really of relevance to me." (**Answer 91:** Page 26).

Although he did not think much about it he assumed that the holding was there in Lotus Green for tax purposes 'but I didn't think deeply about it one way or the other'. (**Answer 94:** Page 26). He said that as far as he was concerned he thought that Mr. Diepenhorst was merely 'formalising the completion'. (**Answer 95:** Page 27).

"I didn't expect, put it another way, I didn't expect Tom, when Bruce rang Tom Diepenhorst I didn't expect Tom Diepenhorst to say 'no we are not selling that shareholding'. Rightly or wrongly." (**Answer 96:** Page 27).

**Question 97:** Yes or didn't expect him to say 'I want more'.

**Answer:** "No, in fairness, I didn't know precisely what to expect."

**Question 98:** Yes.

**Answer:** "But I didn't have a great concern about it. The principal reason at that time was that, going back to the 3<sup>rd</sup>, we had a situation where half of the shareholding was sold at €3.20 on the basis that we could have got demand on that particular day for all of the shareholding at €3.20, my view was then and is now that that shareholding would have been sold in its entirety. So we didn't have that. So we are going back then a number of days later with a bid...for 8 million shares at a higher price of €3.60, and we were asked by Jim Flavin to contact Tom Diepenhorst. I would have been very surprised if that bid wasn't accepted and similarly for the residual holding on the 14<sup>th</sup> as well. So, that was my mindset."

**Question 99:** Yes. What gave you that confidence?

**Answer:** "Because they had sold half the shareholding a number of days earlier at €3.20 and it was pretty clear to us at that time that if we had demand for all of the shares at €3.20 on the 3<sup>rd</sup> that they would have sold."

Mr. Barrett was then asked if Stockbrokers involve themselves in compliance issues for companies. He explained that they would be involved in drafting Stock Exchange announcements for companies 'where we are brokered to the company and to the extent that the company ask us to be involved. As relates to this series of transactions DCC made their own Stock Exchange announcements'. (**Answer 101:** Page 28).

He said that he would have known that the sale of the 10% stake was a notifiable percentage and that you had to tell the Stock Exchange. He wasn't familiar with the notification obligation to the company itself (under Section 67). "I wasn't focused on it at all." (**Answer 104:** Page 28).

He explained that in this transaction DCC didn't have to be advised about the obligation to notify the Stock Exchange because they knew they had the obligation themselves. He explained that the only person he spoke to within DCC on the 3<sup>rd</sup> February was Jim Flavin. He said he had contact with Davy's Stockbrokers also on that day. "One was with Kyran McLaughlin early in the day." (**Answer 115:** Page 30).

**Answer 118:** "Then very late in the day I would have had a brief conversation with Ronan Godfrey but that would have been in a different context."

Mr. Barrett explained that when a Stock Exchange announcement is made it is done through what is called the Regulatory News Service and when it is done the exchange release an announcement which is available on all the relevant news wires be it Reuters, Bloomberg, Thompson.

Mr. Barrett was then asked if he had any concern about insider trading knowing that he knew that Mr. Flavin was on the board of Fyffes. He explained that the question never crossed his mind.



**Answer 131:** “Well, firstly we weren’t offered the stock for sale...When I first raised this subject with Jim Flavin he said the stock wasn’t for sale. The easiest place for us would have been is if Jim Flavin said ‘well it is for sale and there it is now, go off and find a few buyers’ so it was never firmly for sale.”

**Question 132:** Yes.

**Answer:** “And going through the various steps, i.e. we had interest. I made contact initially with Jim Flavin. We had further interest on subsequent days. I heard that Davy’s were in the market trying to do something...I kind of figured the worst in that in some shape or fashion Davy’s had a mandate. It became clear that Davy’s actually didn’t have a firm mandate and I spoke to Kyran McLaughlin, and when I spoke to Kyran McLaughlin the mindset I had at the time was that Davy’s and ourselves were going to put together a bid at a particular price to DCC that they would either accept or they wouldn’t accept. Now, my view was that they would accept it but I never had a firm offer of stock in the first instance. Secondly, at the point of dealing I didn’t really deal with Jim Flavin. It was Ronan Godfrey who dealt with Jim Flavin or Kyran McLaughlin whichever of them. I didn’t reflect the bid in.”

**Question 133:** Yes.

**Answer:** “So in a long winded way of trying to answer your question which is ‘did I have a conversation with Jim to say listen Jim is this all right?’”

**Question 134:** Yes.

**Answer:** “Because rightly or wrongly my assumption was that if DCC felt that they could effect the sale of these shares it was a company which was always pretty straight down the line, always au fait with their obligations. I just had this impression of them.”

**Question 135:** Yes.

**Answer:** “So the question didn’t really arise at that time.”

**Question 136:** Let's just put it slightly different. Let's say Jim had come to you on the 1<sup>st</sup> and let's say Kyran McLaughlin was away on holidays and you had the field to yourself and Jim Flavin had come and said 'listen Roy I need you to get rid of this 10% stake for me in a hurry, do your best'.

**Answer:** "Yes."

**Question 137:** And I am just adding things, 'you know Roy I am on the board of Fyffes. This is a substantial stake'.

**Answer:** "I may or may not have asked him 'well are you free to deal'."

**Question 139:** Just take it away from this transaction. Let's say you are a broker to a company that is proposing to sell a stake and you know that, in the case let's say I am the Chief Executive, I am on the board of that company, would you routinely say 'Bill are you' (sure you are free to sell)?

**Answer:** "I would ask the question yes."

**Question 140:** What way would the conversation go?

**Answer:** "Typically it would be, if I was having the conversation as you describe it, then I would ask is there any reason why you can't sell these shares."

**Question 141:** Yes. Why do you do that?

**Answer:** "Because as a broker to a company you are in an advisory capacity with that company, so you are at a level, you are actually trying to protect them from themselves to ensure that whatever actions that they take that they are reasonable and that obviously they are within the (law)."

When asked what the follow up questions would be Mr. Barrett said 'well, one, are you in a close period and two, is there any information that you have which will preclude you from dealing in the shares'.

**Question 143:** Right.

**Answer:** “Now, if the person said to me ‘no there is not’ then I say that is fine. I am not too sure I would probe any huge amount of detail.”

**Question 145:** So you would, as far as you would feel that you were required to go, would be to ask the question so that the person would examine their conscience in relation to... (Interjection).

**Answer:** “Well examine their conscience but 9 times out of 10 most people will say ‘well what do you mean’? Then you talk about what information may be relevant. Then most people would say ‘well I don’t believe so’. Or they may query some information that they may have whether it is relevant or not.”

**Question 146:** Yes.

**Answer:** “So it is not a box ticking exercise. You would ask the question with a view to trying to make sure that whatever is done is protecting their interest and the company’s interest.”

Mr. Barrett said that one of the reasons he was not concerned was that his ‘impression of DCC, rightly or wrongly, was that these people, these were a group of people who were very straight, very straight in their dealings with the exchange and other investors and that they had reasonable knowledge of and sophistication around the Stock Exchange rules and regulations’. (**Answer 156:** Page 38).

“(DCC) was a business which actually had come out of the financial services.” (**Answer 157:** Page 38)

**Question 158:** Yes.

**Answer:** “So they were financially and regulatory literate as far as I would be concerned.”

**Answer 160:** “They were sophisticated.”

**Question 161:** Would that have been a commonly held view about DCC?

**Answer:** “Yes it would.”

He said that as far as ethics were concerned ‘if 10 is bad and 1 is good they were in the 1 to 3 category’.

**Answer 164:** “That was the common perception of them.”

His understanding of Mr. Diepenhorst’s involvement was that he was fulfilling a legal requirement as opposed to having a commercial input into the sale of the shares. He also confirmed that each of the bids that were made on the 3<sup>rd</sup>, 8<sup>th</sup> and 14<sup>th</sup> of February were all ‘market related’ deals. (**Answer 170:** Page 39).

He explained that the response from Jim Flavin on the 8<sup>th</sup> February when he came to him with a bid for 8 million shares at the price indicated was ‘well if that is the case you need to contact this guy Tom Diepenhorst in Lotus Green’ and he would have given me the details to do that. (**Answer 173:** Page 40).

Mr. Barrett said that his expectation was that Mr. Diepenhorst would accept the offer. “That would have been my view, yes.” (**Answer 176:** Page 40).

Mr. Barrett was then asked if he recalls his reaction when the Fyffes’ profit warning was issued on the 21<sup>st</sup> March 2000. He said “I didn’t think a huge amount about it to be frank because our view at the time of the announcement itself was that, and our analysts’ view at the time was ‘okay, well this is disappointing news’ but really at the end of the day they are talking about a trading period to March, from whatever it is from January to March, which is traditionally the least important period for the business and actually the key period is March to June or whatever the case may be, and that whatever ground they appear to have lost in a less important period they may make it up.” (**Answer 182:** Page 41).

**Question 183:** Make it up?

**Answer:** “That would be the first thing. The second thing is that the sales team were somewhat agitated because they had the management of Fyffes on road shows over the weeks previous to that announcement and at no time through those investor meetings was there any indication that there were trading difficulties. So people felt sore about that.”

**Question 184:** Sore in that ‘just a bit of egg on face’?

**Answer:** “Yes, but the practical reality is that things had become a little bit unsettled in any event, because just as the share price of Fyffes had materially benefited in January and February from the world’s focus on technology, media and telecom sectors, and that those sectors were really driving the market in the US and globally, at the start of March NASDAQ and those sectors began to fall and fall quite dramatically and that was having an impact on people’s perception of value for those sectors generally, but having relevance particularly to the types of companies that I alluded to earlier in terms of those, you know the value and hopes being attributed to those. So it was a period where you had trading information from Fyffes which was disappointing, but coincided with a time when the real support for the Fyffes’ share price, being lets call it NASDAQ and its rise, was beginning to undermine how it was beginning to roll over. So there were a combination of circumstances there where people were getting quite worried about the markets generally.”

He explained that since “the only logical driver of the share price from €2.00 to where it ended up, let’s call it €4.00 was worldoffruit.com and people’s perception of it, if investor confidence globally was being undermined in technology, the technology sector, World of Fruit.Com was going to suffer. It was a completely embryonic business.” (**Answer 185:** Page 43).

When asked when he first remembered thinking or being contacted, when concern was expressed about insider dealing in relation to the transaction he says he remembers it from a couple of weeks after the Fyffes’ AGM statement, that the Goodbody’s sales team were

very, were increasingly agitated principally by the fact that on the one hand they had sold these shares, the Fyffes' shares into the hands of institutions but more particularly they had Fyffes on the road over the period, i.e. meeting investors and nowhere in those investor meetings was there ever any impression given other than that trading was reasonable. So most of the focus of, I suppose our sales team, and where I would hear concerns, was actually on Fyffes and its management rather than a concern that DCC had sold. (**Answer 186:** Page 44).

He said that if there was disappointment or upset the focus was on Fyffes rather than DCC.

His first recollection of when there might have been an issue around this was in September when there was correspondence with the Stock Exchange. He explained that he got a couple of visits from Carl McCann sometime in the summer of 2000. When asked if this was in an attempt to deflect anger directed at Fyffes from institutions who bought shares and lost he said 'as relates to the company itself, yes there would have been disappointment that in meetings they didn't allude to any trading difficulties. But also institutions are only angry in circumstances where they lose a significant amount of money, and I think if people were being honest with themselves, and on reflection really the reason that they were losing money is that they bought into something which they believed was going to be real, which actually ended up not being real'. (**Answer 196:** page 45).

**Question 198:** They bought into a promise or belief that World of Fruit was going to be the next big thing?

**Answer:** "They did. I mean to be honest with you, and before coming today, I haven't read all of the expert opinions around this time."

**Answer 199:** "People's views as to 'was this relevant information, was it material,' but having been in the market place at that time and having been involved in these transactions and probably spent too much time thinking about it at this stage, it is absolutely clear, in my view that the only driver of the Fyffes' share price was worldoffruit.com."

**Question 200:** Up or down?

**Answer:** “Both in my view.”

**Answer 202:** “Secondly, the information, the AGM statement on the 21<sup>st</sup> March is, in my view, a compounding event. There is the overall event whereby NASDAQ has rolled over, so the value being attributed to all of these types of freaky stories, to be frank, is being undermined and Fyffes come out in late March and indicate that they have a trading performance which is behind expectations.”

**Question 203:** Right.

**Answer:** “That is a compounding effect.”

He explained that the Goodbody’s involvement in World of Fruit and the prospects for that project ended towards the end of 2000 because ‘it wasn’t fundable’. (**Answer 205:** Page 47).

Mr. Barrett was then asked what his view was of what happened in February 2000.

**Answer 212:** “I can only put myself back to the time.”

**Question 213:** Yes.

**Answer:** “All of what I can see at that time was going on. I don’t believe that Jim Flavin or Fyffes believed that they had information which was price sensitive.”

**Question 214:** Jim Flavin or Fyffes or Jim Flavin or DCC?

**Answer:** “Jim Flavin or Fyffes.”

**Question 215:** Or Fyffes, okay?

**Answer:** “The reason I say that is that one, the actions of people within Fyffes. So, firstly if they had this information around trading which they believed to be price sensitive or

material they would have had an obligation in December or January to disclose that fact. They didn't. Secondly if they believed it was price sensitive or material they wouldn't have allowed people within the company either to exercise options or buy or sell shares. Those things happened. Thirdly when the shares were sold on the 3<sup>rd</sup> and subsequent days, it was absolutely clear, to me that the people in Fyffes were very happy with that outcome. Rather than being quizzical on the 3<sup>rd</sup> and 4<sup>th</sup> and subsequent days about Jim's actions, they were encouraging of DCC to sell further shares, such that there wasn't an overhang on the market. When I had contact with Fyffes in the following weeks, which I did, they were very happy with the outcome and very happy that DCC had sold their shareholding. There was no question, as far as I can see that what he did in any way was something that they felt uncomfortable with in any shape or fashion. So, that is my view."

**Question 216:** Yes.

**Answer:** "When I look at that – it is only conjecture – and you never know these things but if it was believed that the information that was there around trading around that time was material, such that Fyffes made an announcement to the Exchange around that in January, do I believe it would have had any impact on the share price? My answer to that would be absolutely no impact whatsoever. Because the only driver, at that time, was nothing to do with the trading performance of Fyffes. It was all to do with hope for an embryonic concept, which concept had peer groups or peers in differing industries, and that those concepts had, the market had subscribed enormous valuations to, like enormous valuations, that is my view, it has always been my view. So call it luck, or call it what you will, of all of the interactions I had with all of the parties at the time and looking back at the actions of all of those parties, my view is that Jim Flavin didn't believe he had material information. And one of the reasons he may have thought that is because nobody in Fyffes thought he had material information and nobody in Fyffes believed that the information was material enough to allude to it either publicly through a statement or indeed an investor meeting. They had a lot of investor meetings through January, through February and through March and nowhere in that was there any indication that there were trading difficulties such that they believed they had a notifiable event. One of the reasons



for that is that they were dealing with a trading shortfall, let's assume, at a time and period of the year which was the least important, and the more important period was yet to come."

**Question 217:** Right, do I take it from all of that, that you think that both DCC and Jim Flavin therefore were unlucky, to put a neutral term on it in terms of the outcome of the litigation?

**Answer:** "Yes, you see I..." (Interjection).

**Question 218:** I mean, the law is the law and the Supreme Court has found what it has found... (Interjection).

**Answer:** "Unlucky and again I haven't gone through in detail the Supreme Court judgment, or even the High Court one. I can understand the finding that he dealt. Sure any conversations I would have had with Jim may ultimately have ended up in him not actually dealing the shares or offering them for sale, but yes, I can understand why people would say that that involvement was tantamount to dealing. I have no real issue with that. I don't accept though that the information that he had was information that anybody, including myself, believe was price sensitive."

Mr. Barrett was then asked how he thought this could have been avoided.

**Question 222:** What could Jim Flavin have done or DCC have done to insulate themselves from this?

**Answer:** "Well..." (Interjection).

**Question 223:** Short of not dealing?

**Answer:** "Well I suppose that comes down to did they believe that they had material information or not. To the extent that there was a doubt in their mind at that time or now that that was happening."

When asked if he could have contacted Neil McCann before shares were sold he agreed that he could have done that.

**Answer 225:** “Why he didn’t, I don’t know. I suppose then if he had, what would have happened? Neil McCann I suspect would have said ‘well okay, go ahead and sell the share’ because the action of Fyffes at the time was that they didn’t have any difficulty with directors of Fyffes dealing in their shares in or around that time, because in late January they presumably acquiesced to certain transactions, smaller scale but certain transactions nonetheless. So there would have been no reason to assume that they believed they could preclude or should preclude Jim Flavin from selling the shares because if you sell one or 100 million shares the principle is the same.”

**Question 226:** Yes.

**Answer:** “So the answer to what does it mean or what do you do, sure you have a duty of care, you exercise that duty probably with a much greater degree of thoroughness now than maybe existed nine years ago.”

When asked what he would have done and what advice he might have given to a client he said “I would advise the client to contact their relevant lawyers, to the extent that they believe that they had information where they had any doubt as to whether it was material or not. So that is what you would do now. But if you came back ten Minutes later and said ‘yes, I have checked that out and yes we are all good to go’ I would say fine.”  
(**Answer 228:** Page 53).

**Question 220:** Yes, it wouldn’t be your call ultimately.”

**Answer:** “Because I don’t have the information.”

**Question 230:** No but I mean it wouldn’t be your call, if somebody wants to sell. Are there any circumstances which you would refuse?

**Answer:** “Yes, there are quite a lot of circumstances where companies would come to me and they would ask my views about dealings and shares at particular times. When they

are in close periods it is straightforward enough you just don't do it. But when you come out of it and you know certain types of companies they always have things going on."

**Question 231:** In the offing?

**Answer:** "Yes. And they would say 'what do you think'? And then you would go through the issue with them and come to a view as to whether they should or they shouldn't or can or they can't."

**Question 233:** So Roy Barrett would say and has said 'no, you can't sell at the moment'.

**Answer:** "I cannot say it is ok."

**Question 234:** "I'm not going to put this transaction through for you."

**Answer:** "No, I would say 'I cannot say that is ok' and you can get legal advice. But there has never been a case where somebody has actually gone against the advice. In simple terms, if there is a reasonable doubt. Just don't do it. It's not worth it."

**(q) Kyran McLaughlin**

Mr. McLaughlin explained his current position in Davy's. He is Deputy Chairman and head of capital markets. He explained that capital markets would cover fixed interest, equity, institutional equities, corporate finance, corporate broker and research. He explained that he had that responsibility back in 2000, although the title might have been joint Managing Director at that stage, but effectively the responsibilities would have been the same. He explained that Davy's were corporate brokers to both Fyffes and DCC.

Mr. McLaughlin was asked if Davy's had provided discovery documentation in the Fyffes and DCC litigation. He explained that Davy's did discover some transcripts and a few other documents. He explained that he had not given evidence in the High Court although he was on the witness list of both Fyffes and DCC.

“I think there was a dispute as to which side wanted me and I fell between two stools and it never really happened. I thought I was going to be called by Fyffes and I thought I was going to be called by DCC and each side was waiting for the other side and it never happened.” (Answer 7: page 6)

When asked what that meant by being Corporate Broker he said “it means different things to different companies. It depends how engaged you are with the different companies. I would say you are meant to be there liaising with the market in terms of their dealings with the Stock Exchange, advising them in their dealings with the Stock Exchange if they wish to list new shares, you would advise them in relation to that, they would be using you as a source of feedback for what the institutional investors thought of them, you would be using them in terms of them trying to market their shares to the institutions. That broadly speaking is what a broker would be”. (Answer 10: Page 7).

He explained that a corporate broker would earn his fees on the basis of being involved in transactions. For example, if you were to raise money for the company you would be involved and you would get paid for that. Normally it would be expressed as a percentage of the money raised. If it was the sale of shares you would get a percentage of that. He explained that Davy’s was the ‘biggest player’ in the Irish stock broking market ‘part of the reason we are the biggest player is because we are the corporate brokers to most of the companies’. (Answer 17: Page 9).

He explained that ‘people would come to Davy’s to deal in Fyffes’ shares because they would think they would get best liquidity, best pricing and best ability to deal in Fyffes’ shares because they are the biggest broker’. (Answer 18: Page 9).

But not because they were the corporate broker. “The only reason, if Fyffes were having a rights issue tomorrow and we were doing that, clearly we would have a huge source of liquidity in terms of that. Now, they have never had a rights issue so it doesn’t arise, just as DCC has never had a rights issue either.” (Answer 19: Page 9).

He explained that there was fierce competition amongst the brokers for business. “There is a mutual hate all right.” (**Answer 21:** Page 10).

Mr. McLaughlin was asked what role if any the Stock Broker or corporate Stock Broker had in relation to insider dealing. He explained it in the following terms.

**Answer 26:** “Yes, well if a director wanted to sell shares in AIB tomorrow or whatever it was. If the director of AIB wanted to sell shares in AIB, you would assume that they would have checked that they were within an open period to do so.”

**Answer 28:** “For all public companies they should not sell shares from the end of their financial year until they actually declare the results, and the same would apply to their interim results.”

He explained for most companies there was just one interim but for companies like Elan or Ryanair there might be four because they had US obligations.

**Answer 30:** “... There are additional close periods when directors would be aware of particularly sensitive information about a company, if they knew it was going to be taken over tomorrow or an offer had come into the company, various other things and so on. So there would be close periods and there is a secretary/compliance area in every company that would say if a director wanted to sell shares in a company they would know that there were close periods. They would be advised by the secretary of the company that there are close periods.”

**Answer 31:** “The source of the advice would normally be that the secretary of a company would advise directors when they can or can’t sell shares. Also, if people wanted to sell shares, if they had any doubt they would check it with the Chairman of the company or the Secretary of the company whether they were free to deal in the shares or not, that would be normal procedure. The broker would never really say to somebody ‘do you know the rules of your own company’. Really because they would assume the company itself would

know much more than they would about what was a close period and what wasn't and whether people had sensitive information or whether they hadn't got it and so on. They would know themselves. So I wouldn't have thought, or it would never have crossed my mind going back to DCC selling shares in Fyffes, it would never have crossed my mind I wonder are they in their close period, which they weren't, or have they price sensitive information because you would assume that they would know that themselves."

**Question 32:** Is there any element though where you would be wishing to protect a client from themselves in a sense?

**Answer:** "You would in the sense that if somebody came on who you thought was very inexperienced or didn't know what they were about and so on and wanted to sell shares, you might say 'are you free to deal in shares' and so on. You might say that to them."

**Question 33:** Did that ever occur to you with Jim Flavin?

**Answer:** "Not in the slightest, no."

**Question 34:** Tell me how well you know Jim Flavin and what your estimation of him is?

**Answer:** "I know Jim for a long time. Basically we both lived in Blackrock. He was a year ahead of me in school, so I have known him since he was in Willow Park and I have known him the whole way through for a long, long time. So I know him on a personal basis since we were 10 years of age, so I know him for a long time."

**Question 35:** Knowing him as you do, what did that inform you in terms of his knowledge or the likelihood...? (Interjection).

**Answer:** "My view of Jim would be that he would be an extremely cautious individual, a careful individual, a proper individual, and would be very careful and correct in what he would try and do."

Mr. McLaughlin went on to explain that the debate in early 2000 in relation to Fyffes was about what was the value of World of Fruit and anybody's view was as good as the next persons on that. Therefore that was what the discussion was about. So there was no insider information on what the value of World of Fruit was. Everybody had a view on it. Therefore there would be no reason to say 'are you comfortable selling the shares' in the circumstances.

**Question 38:** If I understand you correctly, your level of caution or concern as to whether advice needed to be proffered or questions needed to be raised would depend to an extent on the person you were dealing with.

**Answer:** "Partly, absolutely."

**Question 39:** That would be a factor?

**Answer:** "That would be a big factor."

**Question 40:** Secondly, your awareness of debate or something external to the actual decision that is going on about the company?

**Answer:** "For example, just to take something at the moment, if a bank director got on to sell shares, say, in Anglo before they were nationalised because they were aware of the bad debt situation as opposed to other people and so on, you would really be saying even though it might have been an open period 'are you comfortable selling shares. You actually know much more than anybody else about this thing. Are you comfortable selling shares? Even though you are in an open period are you comfortable selling shares when you know much more than anybody else does."

**Question 41:** Yes, if they said, 'I am comfortable'?

**Answer:** "They would say no, I have no particular information no more than the market is aware of, at the moment. If that is your situation sell the shares. But the person buying the shares also knows that there is a director selling the shares and so on, therefore they are aware that you are saying that you have no information."

**Question 42:** How do you know that a director is selling it?

**Answer:** “You would normally tell a client who was selling the shares in circumstances where they potentially would have insider information. For example, in the Fyffes/DCC situation everybody knew it was DCC selling the shares. It wasn’t that it was some anonymous person selling the shares. People knew DCC were selling the shares.”

**Question 43:** How did they know that, because you told them or Davy’s?

**Answer:** “Davy’s would have told them, yes and I am sure Goodbody’s would have told them too. Even if they didn’t tell them they would have drawn the same conclusion in the sense that that there was no other block of stock about. I am sure Goodbody’s would have told them and we would have told them too.”

**Question 44:** Can you remember when you first spoke with Jim Flavin about the potential sale of the Fyffes’ shares in late January/February 2000?

**Answer:** “I have looked up nothing before I came down, so I don’t know. Whatever, the dates were in relation to Ronan Godfrey’s telephone calls.”

**Question 45:** I can help you to an extent there.

**Answer:** “It would have been a couple of days before or maybe a week before the transaction took place.”

**Question 46:** Right.

**Answer:** “We would have picked up on the market that Goodbody’s were trying to market the stock, so clearly they were trying to build an order book to try and go and convince...”  
(Interjection).

**Question 47:** Explain to me how that works, there would be sales people who would be on to Scottish Provident?

**Answer:** “They would be on to anybody and they would say ‘we are trying to build a book to try and make a bid for 10 million shares (or whatever it is) in Fyffes’ so they would go on to clients and say ‘listen, we are trying to bid for 10 million shares in Fyffes’ or they



might even be more disingenuous and say ‘we have an order to sell 10 million shares’ even though they mightn’t have. ‘How much will you bid for it’ and then get the book and then go back and bid the seller. So we would have picked up, because institutions talk to everybody and talk back to other brokers and say ‘listen there is someone trying to do something in Fyffes’ and then we would realise in those circumstances it would only be one seller, i.e. DCC. So in those circumstances I would have rung Jim and said ‘I see you are trying to sell your DCC shares’ and he would say ‘no, I am not’ but that would be the way it would work.”

**Question 48:** If we can put some dates on it. The shares were sold ultimately in three tranches on the 3<sup>rd</sup> of February 2000, the 8<sup>th</sup> February 2000 and the 14<sup>th</sup> February 2000?

**Answer:** “Yes.”

**Question 49:** If we take it that the first tranche is 3<sup>rd</sup> of February, you think a number of days before that you would have spoken... (Interjection).

**Answer:** “I would have spoken to Jim and I am sure expressed outrage that he would deal with Goodbody’s and would have said basically if he was selling the shares we would like to do it and we have a much greater capacity to do it, than they have and we would get him a better price and all the usual stuff in those circumstances. So that would have happened maybe 3 or 4 days before the actual transaction took place.”

**Question 50:** I have two days of the evidence of Roy Barrett on transcript which I don’t have from you...but I would just like to get the sequence right. Your first call, to the best of your recollection realising that it is now almost a decade ago, your first call to Jim would have been a reactive call?

**Answer:** “A reactive call having heard that there was a potential sale in the market place, that Goodbody’s were trying to build a book to try and have an order and so on, to try and bid Jim, but not knowing whether they actually had an order or whether they were just trying to bid on the basis of trying to create an order I would have rung Jim at that stage to see would he sell the stock.”

**Question 51:** When you talk about your outrage, there is nothing unlawful about what Goodbody's were doing?

**Answer:** "Not in the slightest, no. The thing about it is if you go round telling institutions you have an order to sell stock and build a book, the institutions open their position to you as a result of that and then if you can't deliver it you lose a lot of credibility with your clients so you really have to have some level of confidence that you would be able to deliver..." (Interjection).

**Question 52:** On both sides?

**Answer:** "Absolutely. So they may have just said 'we are trying to build a book' or they may have said 'we have an order to sell'. I don't know what they told, it could have been either or it could have been somewhere in between really."

**Question 53:** As far as you were concerned, here was somebody trespassing, and that might be too strong a word... (Interjection).

**Answer:** "We would have thought that if DCC were selling the Fyffes' shares given that (a) we were brokers to Fyffes and (b) brokers to DCC, we were in poll position to try and get the order. You are guaranteed nothing because at the end of the day they were going to have to sell to whoever bid the highest price, they would have a responsibility to do that. So that was the background to it and we would have known that too and I think Jim would have known that the outrage was really par for the course really as such on it."

**Question 54:** Protesting a bit too much?

**Answer:** "Exactly."

**Question 55:** "What do you recall of the conversation with Jim at that stage?"

**Answer:** "Again, I can't remember an awful lot about it, but I would have thought the conversation would have been on the lines that, first of all, I think he wasn't selling shares but he may have introduced the concept that Lotus Green was involved and it wasn't him at that stage or on some subsequent call that Lotus Green held the shares and that really it

was up to them whether they wanted to sell the shares or not and so on. That concept may have been introduced at that stage. I wouldn't have been aware of Lotus Green up to that. I am not sure what he would have said. I can't really remember. He might have said 'if you have a bid to make, make it' or something like that."

**Question 56:** In your mind in terms of the DCC stake in Fyffes, if you were putting a book together who would you have come to about that in DCC?

**Answer:** "Jim."

**Question 58:** But the man that you come to?

**Answer:** "In DCC everyone would have assumed that there would have been no decision on DCC without Jim making it, absolutely."

**Question 59:** I take it you equally wouldn't have been surprised if there was tax planning structures within DCC or surprised if there wasn't?

**Answer:** "Every company in Ireland holds various stakes in various subsidiaries in various countries in the world for tax planning reasons. I would be amazed if they hadn't had as well."

**Question 60:** If there was mention of another company or another entity, would that have deterred you from speaking to Jim?

**Answer:** "No, on the contrary I would have still assumed that Jim was going to make the decision at the end of the day because DCC was run by Jim, so even though there was a tax structure set up and I am sure it was compliant and all the boxes were ticked and there were board decisions and all the rest of it, the reality was no one really would have believed that the stock would have been sold without Jim's approval on that front."

**Question 61:** That doesn't come as a surprise but in terms of further dealings the awareness of the existence of Lotus Green didn't force you to change your focus or Davy's focus in terms of who you dealt with. You may have ultimately got a call from somebody in Holland... (Interjection).

**Answer:** “Basically Jim would have told us, and I can’t remember really because I would have passed it on to Ronan Godfrey at that stage who ran the institution desk, that basically if we had a bid, if we could put a bid together to get on and ring some fellow in Lotus Green or whatever it was, and make contact with him and so on that he was administering the exercise and so on. If we could put a bid, together to get on to him and make the bid and so on.”

**Question 62:** Just in terms of the sale of the Fyffes’ stake did you have any discussion with Mr. Godfrey about any concern about the transaction?

**Answer:** “No, no absolutely not. The only concern was whether we would do it or not. That was the only concern.”

Mr. McLaughlin was then asked if he was the one who secured the 50/50 deal with Goodbody’s.

**Answer 66:** “Well, I was in the sense that I made the first call because I would have known Jim best, so I would have made the first call. I would have had the closest relationship with everybody in DCC, in particular Jim as well. So I was the appropriate person to make the call initially on it. The institutional desk would have picked up the fact that Goodbody’s were trying to do something and they would have come on to me and said ‘this seems to be going on’ and I said ‘listen I’ll ring Jim Flavin and see what the story is’. That is how it would have happened.”

**Question 67:** Ronan Godfrey would realise that if this was slipping away from you or if there was a possibility of that, that you would be the better person to reel it back in?

**Answer:** “Yes, I would have a strong relationship with Jim, so if he was getting nowhere, that I might make another call on that basis but I didn’t have to in fact.”

**Question 68:** Do you recall having any concern about the insider dealing implications?

**Answer:** “No, not at all.”

**Question 69:** Can you tell me why you didn't have those concerns?

**Answer:** "Because, first of all, it was an open period. It was an open period in Fyffes' shares so there was no reason to think that there was any particular inside information as a result of that."

**Question 70:** Presumably insider information can... (Interjection).

**Answer:** "It can, but like every director if you are a director of a company and you haven't got insider information of what you are doing around the table in that sense, like, so every director has inside information."

**Question 71:** Yes, but price sensitive?

**Answer:** "Yes, they must have. Otherwise I don't know what they turn up for. Someone as experienced as Jim and as cautious as Jim, I would have thought alarm bells would go off if he thought he had price sensitive (information)."

**Question 72:** Would you have any reluctance, knowing him as well as you did and given your relationship, was there any fear on your part in saying 'Jim are you free to sell these shares'?

**Answer:** "No I wouldn't have thought that. I would have thought it with some other people but I wouldn't have thought it with him."

**Question 73:** Because you knew him and it can be because you respect their integrity, but on the other hand it could be whether they would take it so badly... (Interjection).

**Answer:** "No, no I wouldn't be embarrassed saying it to him at all. Not in the slightest, no. If I thought for a moment that he had inside information, I would say it to his face without any difficulty. No difficulty."

**Question 74:** Or suspected it?

**Answer:** “Or suspected it or anything, not at all. I would have no difficulty saying it to him. It wouldn’t have crossed my mind, there was no debate about Fyffes in terms of the trading information. The banana information and so on. There was no debate about it in the market and nobody was saying ‘I wonder how they are doing. Are they doing much worse this year than other years’. There was no discussion about it.”

**Question 75:** Did you think of or did you take any comfort from the fact that if there was poor trading information that Fyffes themselves would have had to do something about it?

**Answer:** “I would have thought so too. In fact, that is another level and again, I have to say I didn’t think about it. In hindsight it would be another level of comfort for me to say if there was something that should be announced – and the McCanns are cautious people too – that their obligation would be to announce something too. Also, I recall in one conversation vaguely that Jim said he would speak to Neil McCann about it before the shares were sold, so to that extent I think he said that he was going to have a conversation with Neil before the transaction took place.”

**Question 76:** Subject to correction I don’t actually think that happened I think there was certainly a conversation on the day of the transaction where... (Interjection).

**Answer:** “Maybe it was.”

**Question 77:** Where the McCanns were trying to find out who the institutions were?

**Answer:** “Maybe you are right. Maybe I am wrong on that.”

**Question 78** It is one of the things I asked other people. It might have been very good if he had?

**Answer:** “Maybe he didn’t. Maybe I’m wrong on that. Maybe he said I am going to speak to Neil McCann or something. Maybe there was something like that. Maybe he said I am going to speak to Neil McCann or I am going to tell Neil McCann or something. Nothing led me to have any worry about it in fact, absolutely not, given who he was and

given he was an experienced person, given he was a cautious person and given that banana things weren't even talked about as an issue and given the focus of World of Fruit for all those kind of reasons."

Mr. McLaughlin was then asked what the market or stock broking reaction was to the finding that insider dealing had occurred. It was made clear that I was not asking for his view on the law or the legal decision.

"The market obviously has a mixture of different people and different people have different views. I would say a lot of people in the market thought he was unlucky. At the same time, there were other people in the market who wouldn't have been fans of Jim who might have said 'he wasn't unlucky, he shouldn't have done it' and so on. So there would have been a mixture of views but the majority view would be that he was unlucky."  
(**Answer 79:** Page 29).

**Question 80:** Was that your view?

**Answer:** "That was my view too. My own view at the time in relation to the initial judgment was that I always thought, and I said it to many people before the case and so on and maybe that is part of the reason I wasn't called as a witness was I always thought he dealt in the shares and I always thought he hadn't got insider information. That was always my view. In fact the judgment was different."

Mr. McLaughlin was asked for his reaction when the Fyffes profit warning was issued in March 2000.

"... I didn't put the two of them together in the sense of had he got inside information and so on. What really happened was when that information came out the World of Fruit thing had run its course a fair bit there was nothing really left." (**Answer 80:** Page 30).

**Question 85:** The bubble was bursting?

**Answer:** “Yes. There was nothing left in that story and it was sort of fading a bit. Basically even though people bought the shares because of World of Fruit and everything associated with it there was always a core business behind it which was the level of support so there was a base business that was worth X and World of Fruit was worth Y and together they were worth the combined of the two of them. Then suddenly you had both bubbles being burst at the same time a bit so the World of Fruit thing had started to burst and then the core business just wasn’t as strong as people thought it was going to be. So there was going to be a double whammy in relation to the share price as a result of that. People were disappointed about it. I don’t think anybody jumped to the conclusion that the reason he sold the shares was because he was worried about the base price. Everyone had the impression he had a view that World of Fruit wasn’t as good as everybody else thought it was and that is why he sold the shares.”

Mr. McLaughlin was then asked about the press reaction, the first in February of 2000 which suggested that DCC had sold too soon and then questioning how DCC got out before everyone else.

“They (newspapers) are all right in hindsight in that sense but certainly when you are selling the shares to somebody you really have to sell them on the basis of they go up rather than they go down, so if you sold them at the absolute maximum price it looked even worse under those circumstances. So I think in selling people shares you could say that they have upside potential that is the argument you are making. The fact that they went up afterwards I don’t think anybody would have criticised or any shareholder in DCC would have criticised them for selling at €3.20 when they went up to €3.90 afterwards because you would say...” (Interjection) (**Answer 88:** Page 31).

**Question 89:** Nobody ever went out of business for taking a profit?

**Answer:** “Apart from that, you are selling to people saying ‘I think they are going to go up’, not ‘I am selling because I think they are at the top’. That is hardly a convincing argument to make. I think when the thing came out, when the fruit thing came out I picked up virtually no comment that people were saying ‘that is the reason he sold the



shares in Fyffes'. I don't think anybody saw that. I think people said 'the reason he sold the shares was he didn't believe World of Fruit was worth what the market was valuing it at'. I think that is what the general consensus was."

**Question 90:** Was there any sense that actually they were always sellers for a number of years but maybe there was no strategic interest in staying in Fyffes because they didn't control it. It wasn't core and this was just...? (Interjection).

**Answer:** "But I think everybody did assume they would sell it. In fact I would have had conversations with Jim in previous years saying 'you really should sell them. Sell Fyffes', maybe when the shares were half that price €1.50 or €2 and so on. I would have had plenty of conversations saying 'why don't you sell your shares in Fyffes. There is no strategic reason to hold it. Why don't you sell them...', and so on in the sense of trying to generate business for Davy's. There was always a negative response to that."

When asked if he had ever thought how the finding of insider dealing could have been avoided, he said 'I think in retrospect if Fyffes had issued a Trading Statement and brought people up to date on their trading before the exercise, the share price probably would have been unaffected in the circumstances and all this thing wouldn't have happened'. (**Answer 91:** Page 33).

**Question 92:** We know Fyffes didn't do that?

**Answer:** "They didn't do that."

**Question 93:** What could DCC have done?

**Answer:** "I don't think DCC could have done an awful lot really. It wasn't their responsibility to put out a Trading Statement for Fyffes. Fyffes decided for their own good reasons, as I understand it, that they thought the business would recover and that their profits would turn out to be in line with previous years and there was no reason to give a profit warning for it. That was their view. They decided they didn't have to do it in those circumstances and that was a judgment they made. Jim was on the board of Fyffes. He knew the judgment that had been made and so on. In retrospect if they had done that,

if the statements they had made was ‘business is behind budget, behind our expectations but we think we will make it up for the end of the year’, which was the position in their mind, I think people would have passed without notice in those circumstances and that would have cleared the decks and all this thing would never have happened. So it is a pity that didn’t happen.”

**Question 94:** Again if Jim had phoned Neil McCann at the end of January and said ‘listen we are getting a lot of interest, we are thinking of selling, but am I free to do it’ there was obviously a lot of evidence given about champagne being popped after it was done... (Interjection).

**Answer:** “In fact if in retrospect also, if he had rung Neil McCann in advance and said ‘I am going to sell the shares’ and Neil McCann had said ‘fine, off you go’, I am not sure what would have happened.”

**Question 95:** It would have been much harder for them to have mounted... (Interjection).

**Answer:** “Certainly Fyffes would never have taken a case against DCC. Now whether the institutions would have in their own right, they probably wouldn’t have because it is not their practice but they would have had the same case.”

**Question 96:** Yes, they might have taken it against both?

**Answer:** “They might have taken it against Fyffes, yes that is true.”

When asked for his overall assessment of what had happened Mr. McLaughlin said “I think this is just an unfortunate set of circumstances. Assuming companies know their responsibilities and, as I say, our corporate finance department would talk to all the plc’s about their responsibilities in relation to market abuse and all the rest and so on. So assuming everybody knows the rules, which they should know, and people are very careful and so on, there are periods when people can deal, there are periods when people

can't deal. As I said going back to these close periods before results it is clear and unambiguous that people can't deal in these circumstances. The other period is where they are aware of something. They are aware of very significant information like a takeover, but in fact they are also aware that they have responsibilities to advise the market where the market is misguided in relation to the view of its trading. That is a constant obligation that they have to advise and that is under current rules. So to the extent that Fyffes' interpretation of that, even as of today in the same circumstance if you go back, what would Fyffes have done as of today in all the circumstances? Would they make an announcement today in relation to information they had or not? If they know the rules, they know what has happened and they know all the rest and so on. Would they make a statement to say 'we are behind budget but we think we will make it up for the full year' and so on would they do that today or not? I don't know. I think this is just unfortunate. There was hindsight, there was a transaction and there were a whole lot of things put together. I think the rules are very clear. The market abuse rules now are really over onerous in terms of what you can and can't do. It is really a question of are you talking to people with integrity and high standards and who understand the rules and so on and interpreting a reasonable and balanced way. Most companies, I would say 99% of companies you would regard as being very compliant." (**Answer 98:** Page 35 and 36).

He was then asked if DCC would have been viewed as being compliant.

"They would have been viewed as a very compliant company, they would definitely, with a lot of governance, a cautious and careful company." (**Answer 99:** Page 36)

Mr. McLaughlin was also asked for his view on the current regulatory regime for insider dealing.

"I think corporate governance, I think now there is a lot of regulatory stuff out of Europe. A lot of these market abuse directives nearly allow you do virtually nothing at this stage. The reality of it is if you are a director of a public company, it is nearly impossible to deal in shares. Virtually impossible because you always have more information than the market. I am a director of two public companies, Elan and Ryanair and I would say the

shares I have, the only time I would ever be able to sell them is when I retire from the board because you always have information.” (**Answer 100:** Page 37).

### **9.2.7 Laurence Crowley**

Mr. Laurence Crowley began by giving some details of his professional background. He explained that he got a B.Comm degree from University College Dublin and then entered the accountancy profession with a firm called Kennedy Crowley which became Stokes Kennedy Crowley and which is now KPMG. He said after qualification he eventually specialised in corporate insolvencies, liquidations and receiverships and some corporate restructurings outside the insolvency framework. Then in 1990 he left SKC, as it was then called, and he joined the board of the Bank of Ireland and he became Executive Chairman of PJ Carroll & Company plc and then became Executive Chairman of the Michael Smurfit Graduate School of Business.

He said he was a director of Bank of Ireland for 15 years including Governor for the last 5 of those years. He remained Executive Chairman of Carrolls for about 18 months during which time they recruited a Chief Executive. Carrolls was taken over in the mid 1990s by Rothmans who were big shareholders from the beginning. He became a board member of Rothmans which is a UK Dutch company. He remained on the board of Carrolls as Chairman of Carrolls until about early 2000. He remained for 10 years as Executive Chairman of the Michael Smurfit Graduate School of Business to give it its then title. He joined the board of Elan and served for approximately 10 years. He was currently Chairman of Gaisce, the President’s award. In addition, he was Chairman of the Midleton Centre for Autism. He is also Chairman of the Gate Theatre and has recently been appointed as a director of Aer Lingus.

Mr. Crowley said that being a director of a company public or private after the 1990 Act was different than being a director beforehand. “There were new additional regulatory issues to be considered. And other things were happening. Cadbury and Greenbury and

Turnbull and Hakes and so on. There was more formality being brought into the equation.” (**Answer 11:** Page 11).

He explained that the Cadbury Report, which was the first such report, alerted people to the need for process and more formalised governance structures. “It didn’t invent corporate governance.” (**Answer 14:** Page 12).

**Question 15:** No, it existed?

**Answer:** “Ethical behaviour was really what corporate governance was originally called. There wasn’t any formality in terms of the 1990 Act because there were very specific things like insider trading, like notification and knowing who your shareholders were. If you went bust you better have behaved responsibly. Certainly there were implications for companies in crises. You would immediately be conscious of the 1990 Act.”

Mr. Crowley was then asked from his experience in Bank of Ireland and Carrolls what they did to ensure that they kept themselves compliant.

“I think in both cases the Bank and Carrolls relied upon the secretary of the company to ensure, he wasn’t called the Compliance Officer but his job was to ensure, that all the filings were effectively carried out within time limits etc., and it would be accepted that it was his responsibility to draw the attention of the board if there were any other issues which he felt in terms of a decision should be taken into consideration by the board. In America they went very much for the ‘general counsel’ role who would attend all board meetings but even to date that really hasn’t happened much here.” (**Answer 16:** Page 13).

**Question 17:** The general counsel would generally be a lawyer?

**Answer:** “He would be a lawyer but in-house.”

Mr. Crowley was asked if there were any particular qualifications for the company secretaries who held that position in Carrolls or Bank of Ireland.

**Answer 23:** “None as such, probably in both cases none.”

**Question 25:** Was there on the job training provided to them or was it made clear to them that they had ready access to lawyers if they needed assistance or how did they bring themselves up to speed with the changes that were wrought?

**Answer:** “I think mainly through consultations with the company’s solicitor and the Auditor they would both have been and they did issue memoranda saying the implications, these are the new acts, this is Cadbury and all that stuff.”

**Question 26:** Do you remember that happening in Bank of Ireland and Carrolls?

**Answer:** “I do.”

**Question 31:** Did Bank of Ireland have a Compliance Officer?

**Answer:** “No, not as such. The company secretary would be expected to do that.”

**Question 32:** Was there a compliance committee?

**Answer:** “No.”

He expected that the governance remit would come under the audit committee.

**Answer 36:** “You find that very often nowadays that the audit committee is the name of the committee which handles both the audit and governance.”

Mr. Crowley explained that even before the 1990 Act ‘people of integrity, to use a bit of an emotional phrase, would have realised long before then that you have to be very careful not to take advantage of information you have and not to attempt to rig the market in your own shares, so the fact that there was now legislation governing that conduct didn’t alter most people’s conduct’. (**Answer 62:** Page 21).

**Question 82:** Where the Chief Executive is the person who has to be interrogated about their knowledge or lack of knowledge does it pose a problem for the secretary because any suggestion of mistrust or even hinting that you don't quite accept what the Chief Executive is saying about what they know or don't know about their involvement in another company is not something that either of them could easily do?

**Answer:** "No, and there are a number of those tensions around in business of course. One which has always been there, in my lifetime is the tension between the relationships of the auditors with the Chief Executive on the one hand and with shareholders on another. The auditors report to the shareholders is the theory of it. They are appointed by the Chief Executive and the board. They work with the Chief Executive. The Chief Executive is the major influence often in fixing their fees so there is a big tension there. There are a number of them around in business, is all I am saying."

Mr. Crowley was then asked what qualities you look for in a board member.

"First of all integrity is the key. Second of all, to draw the distinction between being a non-executive director and the executive, that is sometimes hard for people to do. If you are running your own business as Chief Executive and then you go to the Bank of Ireland on Tuesday as a non-executive it is difficult for people to..." (Interjection) (**Answer 101:** Page 28).

**Question 102:** Switch off?

**Answer:** "Yes."

Mr. Crowley said of the then board of DCC he knew Jim Flavin, Tony Barry and Alex Spain and he held them all in very high regard. Mr. Crowley was then asked about his view on the reputation of DCC in 1995. He said 'at a general level...they would have been regarded as a fine company with a good reputation, a company with integrity. They would have been admired as an innovative company because they were doing things in Ireland that not many, if any, had done before. (**Answer 108:** Page 30).

**Question 109:** Like what?

**Answer:** “In taking substantial stakes in emerging businesses and in emerging business sectors.”

“They would have been regarded as a demanding company, a company of high standards, but if they were a financial partner of yours, they would demand, and correctly so, information on your business and accurate information and information on time. Some people found that a little difficult. They would have been regarded maybe as slightly lacking in interpersonal skills. That would have been the only kind of negative that I would have.” (**Answer 112:** Page 31).

**Question 113:** When you say ‘they’?

**Answer:** “When I say ‘they’, the company was led by Jim Flavin. He was clearly...” (Interjection).

**Question 114:** The boss?

**Answer:** “The boss yes, but Morgan Crowe and others worked with him obviously.”

**Question 118:** So when you were talking about what the perception was about DCC you were talking about something that was largely identified with Jim Flavin because he had founded it?

**Answer:** “Yes.”

Counsel for the company Mr. Donal O’ Donnell S.C. was then given an opportunity to ask Mr. Crowley some questions.

**Question 129:** In relation to the question of compliance Mr. Crowley and the concept of Compliance Officers can you identify roughly a date upon which that became a term in common usage?

**Answer:** “Yes, you have the 1990 companies Act which came into force”

**The Inspector:** August 1991.



**Answer:** “Thank you. I think it mostly came into the arena arising from the Higgs Report of I think it was 2003. I think the late Sir Derek (Higgs) he formalised a lot of things. He went into a lot of detail and I know some people criticised the report for being too detailed ‘you can only serve nine years on a board without this, that and the other’. But that is completely non sequitur. I believe it is really identified by the implementation of the Higgs Report and the term Compliance Officer and role.”

**Question 130:** In terms of the practice of Compliance Officers and I suppose addressing that, can you identify roughly when that would have occurred in Irish business and in what sectors it would have occurred first appointing somebody as a Compliance Officer?

**Answer:** “I think around the post-Higgs era would be when that mainly happened. Everybody was conscious of compliance, but actually delegating or making one person responsible for it, I recall to the best of my recollection was around the Higgs Report.”

**Question 131:** That was an example of formalising something that well run businesses were doing prior to the 1990 Act or post the 1990 Act?

**Answer:** “Yes, well run businesses since the 19<sup>th</sup> century.”

**Question 132:** In a sense, they did a lot of these things without necessarily calling them by the names?

**Answer:** “Correct.”

**Question 133:** From what you say, is it fair to say that a lot of the culture and the practice of, I suppose, the leading companies in Ireland would have been driven by that type of report on corporate behaviour that was emanating from the UK and possibly the USA?

**Answer:** “Yes.”

**Question 134:** And the influence as you said of the listing requirements in the UK and the USA.

**Answer:** “Yes.”

**Question 135:** In relation to the board of DCC, I think you said you knew personally three of the members but from your position in Irish business, what was the reputation of the make up of the DCC board through the 1990s...

**Answer 136:** "They would have been viewed very well."

**Question 137:** In relation to the advice from a Solicitor how would the board deal with that? I think you have seen and we can look at the actual advice that has been discussed here from Mr. Price to DCC, it is at Indent 44 and you have had a chance to look at that?

**Answer:** "I have."

**Question 138:** How is that dealt with by a board? Does it interrogate the advice and take its own view?

**Answer:** "I obviously don't know what happened in this particular situation, but if you get advice, either the secretary or the executive who was espousing the transaction so to speak, who was responsible for the potential transaction would inform the board of the advice, would show them the advice very often but not always and would then comment on what the advice was saying. The board members would ask the responsible executive or the secretary whichever it was very often 'what is the meaning of this' and interrogate it to use your phrase but not with a lawyer, the solicitor with the purpose of presenting the case, with the executive or whatever."

**Question 139:** In this case there was advice being given as to the notification requirements of what was described as an internal transfer within DCC?

**Answer:** "Yes."

**Question 140:** I think you have had a chance to look at that. Is there anything in that advice that would have raised any concern in your mind had you been sitting on that board in 1995?

**Answer:** "No. I think it is a straightforward piece of advice. There is nothing that would have raised a concern with me, no."

**Question 141:** The burden of the advice was that there was no necessity to notify a purely internal transaction?

**Answer:** “Yes.”

**Question 142:** Doing the best you can now, how do you think that would have appeared to you at the time?

**Answer:** “I really wouldn’t be worried about an internal transaction. The group was still the owner of the asset. The shareholders in DCC would still have an indirect investment in the assets exactly before the transaction took place and I wouldn’t be worried about it at all in that sense.”

### **9.2.8 Michael Buckley**

Mr. Michael Buckley is the current Chairman of DCC. He joined the board in September 2005 some three months before the High Court judgment was handed down. He was also on the board when the Supreme Court delivered its decision in July 2007 and also when Mr. Flavin resigned in May 2008. He explained that in anticipation of the resignation of Alex Spain as Chairman of DCC at the AGM in 2007, he and two of the other non-executive directors, had discussed with the Irish Association of Investment Managers whether it would be appropriate for Jim Flavin to become Chairman as well as Chief Executive for a transition period of three years and the Association had no objection at that stage. So for that transitional period which began in the early summer of 2002 Jim Flavin was Executive Chairman. Mr. Buckley explained that those discussions had taken place in February and March of 2007 in the knowledge that Mr. Spain was going to step down. Mr. Buckley agreed that in general the holding of the Chief Executive’s position and the Chair’s position by the same person is something that is not viewed with favour by the investment community.

“Yes, one of the principles in effective corporate governance is that it is not a great idea for the Chief Executive to be Chairman.” (Answer 18: Page 7).

However he explained that the board felt that to have in a sense a “brutal transition from executive to non-executive” in this case wasn’t a great idea and therefore they were suggesting a “step up” arrangement under which one of the executives would step up into the day to day managing director role. And Jim Flavin would stay on in an executive role but as Chairman as well. (Answer 20: Page 8).

Mr. Buckley was then asked whether the Supreme Court decision which was delivered in late July 2007 had any bearing on the board’s view in relation to the decision it had taken to appoint Jim Flavin as executive Chair. Mr. Buckley explained that on the day that the Supreme Court judgment came out, which he thinks was the 27<sup>th</sup> July 2007, a board meeting was convened which began at 2.30 that afternoon. In the interim between the announcement of the Supreme Court decision and that board meeting the company’s legal team had done a couple of things. It had first of all addressed the issue of what obligations they had to the market to inform the market about what the financial costs of the Supreme Court judgment in terms of accounting for profit would be. Before the board meeting began that announcement had gone out which effectively said that our belief was that €50 million would be the outside amount of the bill. He explained that the second thing that the legal team had been asked to address was whether any issues arose other than the actual judgment itself

**Question 28:** Other than the legal determination?

**Answer:** “That the information was market sensitive. Was there anything else that would either be positive or negative from a DCC point of view or from Jim Flavin’s point of view in the judgments.”

**Question 29:** Yes.

**Answer:** “So by the time we convened at 2.30pm we obviously had available to each of us all of the judgments and we had a short resume addressing the two issues from our legal team.”

**Question 30:** Yes.

**Answer:** “There was a sense of shock around certainly, but I think we were pragmatic in the sense that the first thing was to try and let our shareholders know what we could about the financial cost of this.”

**Question 31:** Yes.

**Answer:** “Then we began to address was there anything else in the judgment that required us to make a decision of any sort.”

**Question 32:** Can I just ask you?

**Answer:** “Yes.”

**Question 33:** Was Jim Flavin chairing this meeting?

**Answer:** “Yes, he was. Jim started the meeting. Basically we heard at the beginning of the meeting a summary of the judgment. We had a discussion, a clarification of points that occurred to people, questions that people asked Michael, Alvin Price was on the phone and Michael Scholefield was on the phone...so we heard quite a detailed summary. We were able to ask whatever questions had occurred to us because we had been running through or leafing through the judgments ourselves. Then Jim said in the knowledge that the Supreme Court judgment was coming up, he said ‘I have been thinking deeply about my own position in the event that the judgment went against us’. He said ‘I have thought about it’ and he said ‘in the light of the fact that the judgment did not raise any new issues that hadn’t been dealt with in the High Court that would bear upon issues like whether he had used that information in the context of the transactions, as to whether he had given misinformation to anybody, in the light of the fact that no such issues had been raised in the Supreme Court judgment his personal view was that he shouldn’t resign but he said it was a matter for the board rather than a matter for himself, that he was going to withdraw from the meeting’. In that case under the general principles of corporate governance the

senior independent director takes over the chair where the Chairman is conflicted and I was that person. Jim very clearly said on his way out of the room ‘look I will respect, irrespective of what my personal view is about whether I am required to resign or not’, he said ‘I will respect the view that the board comes to’.”

**Question 34:** Yes.

**Answer:** “We had quite an extensive discussion.”

**Question 35:** Was there full attendance at that board meeting?

**Answer:** “Yes, there was.”

**Question 36:** Can you just tell me who were the other board members attending?

**Answer:** “We had the two executive directors Tommy Breen and Fergal O’ Dwyer, we had Bernard Somers, Roisin Brennan, Maurice Keane, Paddy Gallagher, Tony Barry and myself.”

**Question 37:** Yes.

**Answer:** “We had quite an extensive discussion. Again part of it in a sense clarifying our minds about what was in the Judgment, what was not in the judgment etc.”

**Question 38:** Yes.

**Answer:** “At the end of that discussion I asked in a pretty formal way, I asked each one of the directors was there any issue on their minds that had not been discussed in the discussion to date. Was there any issue they needed to have clarified etc., none of them had any particular issues at that stage. They felt that they were in possession of all the information they needed because obviously this was something that had been on the agenda of the board for many years, the High Court judgment had been well internalised. The Supreme Court judgment, even though it was complex issue in itself, it was a single issue.”

**Question 39:** Yes.

**Answer:** “Our main concern was to see was there anything else that was said in the judgments that we needed to take into account in reaching a decision.”

**Question 40:** Yes.

**Answer:** “I then secondly asked the other members of the board, each of them in turn did they believe that it was appropriate for Jim Flavin to resign. Now, our discussion had largely been almost entirely, other than looking for clarifications, our discussion had been about the whole issue of integrity, did anything in the Supreme Court judgment go to the integrity of Jim Flavin as an executive in DCC or cast a question or a shadow over his integrity or his honesty. So I asked each of the directors then did they believe that Jim Flavin should resign and each of them very categorically said no, that they didn’t believe that.”

**Question 41:** Can you give me some indication of the extent of the discussion, I suppose measured in Minutes or measured in time?

Mr. Buckley confirmed that there was a detailed and frank discussion.

**Answer 44 and 45:** “We were all conscious that Jim was an Executive Chairman and that this was a relatively unusual arrangement, albeit a temporary one, that we had put in place for the purposes that I mentioned earlier on. The second thing is that we were conscious that this was an incredibly serious issue. The thing that was uppermost in our minds as I said was were there issues of integrity or honesty in any of the things that had been said in the Supreme Court and that’s why, in relation to one of the judgments, we had quite an extensive discussion about the meaning, if you like, of an introductory piece in one of the judgments...very clearly the High Court had said, and the Supreme Court hadn’t said anything different, that there was no issue of use of information so there was quite a serious discussion about all of that but it was very largely about integrity and honesty and whether there was a slur cast in a sense on Jim’s character such that it would be inappropriate for him to continue in an executive position of a public company. An extensive discussion, I couldn’t put Minutes or hours on it. Four hours is what the board

meeting took. There was a period at the beginning where we were getting a summary of what the judgment said and asking questions.”

**Question 46:** Four hours, was this a single issue board meeting?

**Answer:** “Yes.”

**Question 47:** You weren’t discussing?

**Answer:** “There were no monthly accounts or anything like that...”

**Answer 48:** “No, it was a single issue board meeting. At the back end of it, once a decision was made we did spend some time drafting, with the help of our lawyers and our public affairs consultant, a further announcement which went out after the meeting closed but it was a very serious discussion. I mean one of the other things that we had on our mind, there had already been a massive amount of publicity about all of this.”

**Question 49:** Yes.

**Answer:** “We were conscious that in the natural history of those events is that if something happens where there is an adverse finding against a person or a company the next thing that happens is a massive uproar of calling for the head of whoever was involved. We knew that that was likely to be the outcome and the atmosphere and environment with which we would be conducting ourselves over the following weeks.”

**Question 50:** Yes.

**Answer:** “So therefore we were very conscious that we had to take the right decision and a responsible decision...”

**Answer 51:** “And one that we could defend and one that we could defend in the first instance to ourselves...”

**Answer 53:** “And to our shareholders.”



Mr. Buckley was asked whether there was any sense in which loyalty was trumping their duty to the company and to their shareholders.

“Yes, those sort of comments have been made, but for a start Jim wasn’t our friend and isn’t our friend. He was a colleague on the board. We were not part of any social circle or anything like that. When I joined the board I hadn’t met several of the board people ever before other than immediately before joining the board. I had met Tony Barry the odd time running across him at social events or business events and whatever...Maurice Keane was the only one I would have known reasonably well... Bernard Somers I knew a bit through business so this wasn’t a sort of...club or a crowd of cronies or whatever and actually most of us are the least ‘club like’ individuals that you will come across.”  
(Answer 55, 56, 57, 58 and 59: Page 16).

**Answer:** “So there was none of that really. We were there as colleagues. I think we were all experienced enough to know that this was one of the most serious decisions that we would ever have to take and that it would be scrutinised more than pretty well any other decision we had to take and therefore we had to be absolutely sure in our own minds that we were doing the right thing.”

**Question 61:** Yes.

**Answer:** “As a senior independent director, I mean my job was to collect the opinions of the others, to make sure insofar as I could that there was nothing burrowing away underneath the surface in their conscience or in their minds that they wouldn’t put out on the table on the day and I knew that I was going to be one of the people that was going to have to take the weight of defending this to very serious international investors as well as domestic investors. For all those reasons this was an extremely serious discussion and as I have said, I mean I have laid out a lot of this in last year’s annual report, I put quite an extensive piece into the annual report just after I became Chairman but there was nothing in my mind that wasn’t discussed at that time that should have been discussed and looking back on it even from this distance I feel that we gave it its due weight. We have been criticised since for why didn’t you come back to it the following week or whatever, when

you have an obligation as a public company that when you have made your mind up you need to tell the market that you have made your mind up plus or minus. The discussion went on actually until after the market had closed, so in a sense, if we felt uneasy about anything, if there was anything where people said ‘look, let’s back off, let’s go home and go to bed’.”

**Question 62:** Reflect on it.

**Answer:** “And reflect on it and come back we had Saturday and we had Sunday. We were all happy that we had enough information to make a responsible decision and a decision that we could subsequently defend. Jim, or any sort of personal relationship with Jim, actually just didn’t come into it. It is understandable that people on the outside think people on boards are all cosy and all the rest of it but that’s not the way it was. This was a heavy weight situation.”

**Question 63:** Would you suggest therefore that in a way the easier decision was to invite him to fall on his sword?

**Answer:** “I certainly would because if we had taken that decision we would have had maybe as it were a tense half hour or something like that with Jim.”

**Question 54:** Yes.

**Answer:** “It certainly would have been a lot easier in terms of media and everybody else.”

**Question 65:** You took the view and take the view that it wouldn’t have been the right decision?

**Answer:** “It would have been the wrong decision. The next thing that happened then was we prepared an announcement. The announcement went out that evening I think around 7 o’ clock. The following Monday morning then we started communicating with investors on an individual basis and each of those investors was given the opportunity to talk to me on a one to one basis as the senior independent director.”

**Question 66:** How far did that go? Was it investors who had a couple of percent (share) in the company?

**Answer:** “Yes, I would say it was, broadly speaking it was about the top 20 investors.”

**Question 67:** All right.

**Answer:** “So we have a shareholder register where Fidelity would be the biggest investor. They had been around the double figures for a while and there would be two or three others up to that sort of level between 5 and 10% so it was about the top 20. A number of those investors, including Fidelity, brought in their corporate governance people, their compliance people into their consideration and the discussion of it. The only one of those international investors and remember DCC is about 85% owned by international institutions”

**Question 68:** International, as in non-Irish?

**Answer:** “Not based in Ireland.”

**Question 69:** Yes.

**Answer:** “Not managing funds taken out of the Irish market, as it were. The only one of those that actually wanted to speak to me was Bailey Gifford in Scotland.”

**Question 70:** Out of the 20?

**Answer:** “Out of the top 20. The rest of them expressed themselves as being happy with what they heard etc. I spoke to the Bailey Gifford, Fund Manager, I spoke to their compliance people and I got a letter subsequently from them saying that they fully supported the board’s decision. So over the next three or four weeks it was very clear to us that having explained the thing in detail to each of those top 20 investors that we had absolute support from them.”

**Question 71:** There was no big sell off of DCC shares? I take it that was part of the consideration as to how the market would react or was it?

**Answer:** “Well it was a consideration yes but the fundamental consideration was about ...”

**Question 72:** The right decision?

**Answer:** “Is there a shadow on integrity, honesty, and misinformation.”

**Question 73:** Of course, that’s for your decision. Let’s say that was a view that wasn’t shared by the market. It could have had an impact on the appetite for shareholders to stay with DCC?

**Answer:** “Absolutely. Equally if we had heard back, now I will come on to the Irish Association of Investment Managers in a minute, but if we had heard back from the international investors that...” (Interjection).

**Question 74:** You got it wrong?

**Answer:** “We are unhappy, we got it wrong, we would have been back in the room immediately because that would have been a very serious issue. We would have had to have dealt with it. That was understood all around.”

**Question 75:** Yes, when you say back in the room, to reconsider?

**Answer:** “To reconsider, yes. The Irish Association of Investment Manager – I had four meetings with them over the following three weeks.”

**Question 76:** Can I just ask you?

**Answer:** “Yes.”

**Question 77:** Do they have any responsibility for that 85% that you talked about?

**Answer:** “No.”

**Question 78:** They have only responsibility for the Irish institutions that are investors?

**Answer:** “Yes.”

**Question 79:** Is there an international body?

**Answer:** “No.”

**Question 80:** That looks after the interests of international investors? It’s all done on a national basis?

**Answer:** “It is yes. In the UK the ABI, the Association of British Insurers, is probably the closest you will get to that. Quite a bit of the stock would be held in North America, split between Canada and the United States.”

**Question 81:** How many Irish institutions would have been in that top twenty?

**Answer:** “My guess would be two or maybe three.”

**Question 82:** Two or three?

**Answer:** “There was at that time one quite big one. It would have been number two or number three.”

**Question 83:** That was who?

**Answer:** “That would have been IBI. So the Irish Association of Investment Managers wrote to me then in the middle of that following week and said look we would like to hear and understand, this is a matter of concern to us, we would like to hear and understand what was the basis for the board decision so I engaged in quite an extensive dialogue with them. I had four meetings.”

**Question 84:** Face to face meetings?

**Answer:** “Face to face meetings.”

**Question 85:** On your own?

**Answer:** “Yes.”

**Question 86:** Yes.

**Answer:** “Because at that stage it was the senior independent director and the investors so there was no question that Jim Flavin would be at any of those meetings. I had several meetings with, how will I say it, people representing the relevant committee of the Association of Investment Managers and I had a meeting each with the two biggest Irish shareholders who were members of the IAIM. There was some correspondence as well. I set out in a letter to them in detail the basis of our decision which as I’ve said largely was in quite similar form as in the annual report for last year. During the course of those discussions it was clear that there were different views about the matter within the Irish Association of Investment Managers, but one key investor, the largest of the investors in the Irish Association of Investment Managers, having heard what I had to say, told me at a meeting sitting across just like we are now that he was happy that I dealt with any of the issues that he had. So the matter was left there at that point as far as the Irish Association of Investment Managers.”

**Question 87:** Was there correspondence or was it all done (in meetings)?

**Answer:** “There was some correspondence.”

**Question 88:** Yes.

**Answer:** “So the matter was left there and on that basis we believed that as a board we had very strong support from the international investors and that while on the Irish side, how will I say, 15% or so, I am using round figures.”

**Question 89:** Sure.

**Answer:** “That the largest investor there, who would have been responsible for the guts of over half of that amount, was supportive. So we did not feel that on the basis of the interaction with investors that there was reason for us to reconsider that decision.”

**Question 90:** Without going into the minutiae insofar as there was adverse or negative feedback coming from the Irish body?

**Answer:** “Yes.”

**Question 91:** How was that being articulated?

**Answer:** “In terms of the reasons why they were uneasy?”

**Question 92:** In terms of the reasons, was it the optics, the appearance that it either had been the first finding of insider dealing, a finding against the individual and here he was still Executive Chair, how was it being articulated?

**Answer:** “There were two or three issues raised. One was, and I am now on recollection.”

**Question 93:** Sure.

**Answer:** “On the detail of this – there were two or three issues raised. One of the issues the newspapers picked up. Why did you make your mind up so quickly, was this not just a rubber stamping operation, that was the first thing. The second thing was that there was a certain amount of confusion initially, at least about the whole issue of the law the way the law had changed, the 2005 law versus the 1990 law and how that should be interpreted, not so much from a legal point of view but in the context of a decision being made by a board about the future. There was a certain amount of debate about whether we were being selective of what we took account of from the High Court judgment in relation to those things or not. They were the two main areas of discussion. As I say I felt that, and remember some of those Investment Managers also having interest in the outcome in the sense that they would be potentially, financial beneficiaries of the Supreme Court decision.”

**Question 94:** Right.

**Answer:** “So the two broad areas of discussion that I mentioned and then there was a point of view that said irrespective of anything else this has a huge public profile, it’s the first time that this sort of issue has been dealt with in such a way in the courts and really if there is any hint of public disquiet and there is more than a hint of public disquiet then.”

**Question 95:** Somebody should be made accountable for it?

**Answer:** “Yes.”

**Question 96:** Was it along accountability lines?

**Answer:** “Yes it was. At the end of the dialogue I had with them I don’t know whether I put it to you, but I put it to other people, I felt that on that front a ‘draw’ had been fought. Because they didn’t take it beyond a certain point and as I said I had on a one to one basis received a message of support personally, not personal to me but on a person to person basis, one of the key investors in IAIM. The whole thing went into some form of limbo for a number of months.”

**Question 97:** When you say it was a ‘draw’ and they didn’t take it further, what could they have done?

**Answer:** “They could have written because I asked them a number of times as an association during the dialogue I had with them, I asked them are you formally asking the board to re-open this decision.”

**Question 98:** They could have done that?

**Answer:** “They could have done that and they never did it so that’s why I called it a sort of score draw.”

**Question 99:** What’s the status of that request? Is it just an understanding that if your investors ask you to look at something that you will do it?

**Answer:** “Yes.”

**Question 100:** There is no legal obligation upon them or no code obligation?

**Answer:** “No. Obviously it’s complicated by the fact that proportionately they accounted for so little of the stock but given that we live in Ireland and the company is based in Ireland we took that dialogue very, very seriously but they never actually formally asked us to re-open or formally wrote to us and said anything at that point...” (Interjection).

**Question 101:** And there is correspondence to them asking them to do so, is that right?



**Answer:** “No, but there are notes of meetings where this issue...” (Interjection).

**Question 102:** There is no dispute but that they were invited?

**Answer:** “There isn’t, no, no. No. There is no dispute about that.”

**Question 103:** Again just to be a little bit crude was this sort of ‘put up or shut up’?

**Answer:** “No, that’s not my style.”

**Question 104:** Yes.

**Answer:** “I would have had that dialogue on a very rational basis with them. I don’t tend to be emotional about these things.”

**Question 105:** So then it drifted in limbo for a number of months?

**Answer:** “Well I wouldn’t say that. I would say that beyond that period of intensive dialogue, we didn’t hear any more from them.”

**Question 106:** Which lasted for how long?

**Answer:** “About a month.”

**Question 107:** Into August, September?

**Answer:** “The end of August time. Then sometime in the autumn the Director of Corporate Enforcement I think first asked one of the courts, I forget was it the High Court or the Supreme Court.”

**Mr. O’ Donnell:** Supreme Court initially.

**Answer 107:** “It was around October/November, about appointing an Inspector.”

**The Inspector:** Can you remember did the matter go back in for mention to the Supreme Court.

**Mr. O' Donnell:** It came back in for mention on an issue as what was to happen in relation to costs and remittal to the High Court. At that stage I think the Director came in and suggested that the court could itself make disqualification Orders. That then went back. The court refused that, but that was the first intervention and then there was a subsequent hearing in the High Court.

**The Inspector:** Before Mr. Justice McMenamin?

**Mr. O' Donnell:** Again, I think the Director intervened at that stage.

**The Inspector:** I think in terms of the chronology of that, it's probably set out in one of the...

**Mr. O' Donnell:** Affidavits.

**The Inspector:** Affidavits but if not, I think it is.

**Mr. O' Donnell:** It is certainly referred to.

**Mr. O' Sullivan:** I think it's set out in Mr. Appleby's first affidavit.

**Mr. O' Donnell:** It is one of the issues.

**Answer; The Witness:** "So that application was made. In the meantime there was a whole process going on to do with the accounting for profit. In a sense that was a major focus then."

**Question 108:** Was that being done by Fry's or was being done by Fergal O' Dwyer?

**Answer:** "Fry's were involved in it. Fergal was involved in it. At a particular point in time it was agreed between DCC and Fyffes that we would try and get a sort of conciliation approach involved so a couple of people were appointed as intermediaries

between the two companies and eventually as you know a settlement was reached in April of the following year. So that in a sense took us up fairly rapidly to April.”

**Question 109:** Then in April a compromise settled everything with Fyffes and the investors were going to get money back and costs?

**Answer:** “Yes, all of that was settled then in April.”

**Question 110:** You had a liability which was somewhat below the 50 million mark?

**Answer:** “That’s correct.”

**Question 111:** That you had made provision for?

**Answer:** “That’s right. At that point we had felt constrained, we as a board, from explaining our actions or our decision while that negotiation was going on with Fyffes.”

**Question 112:** Why?

**Answer:** “Well I suppose just on the general grounds that while you have commercially sensitive negotiations going on you don’t want to be putting any more fuel onto the fire.”

**Question 113:** Just a query I have that arises from that, Mr. Buckley. Was there ever a sense that you felt that if you, again crudely, got rid of Jim Flavin, that you were increasing your exposure to Fyffes that somehow the amount of damages you would end up paying would be more?

**Answer:** “No.”

**Question 114:** Whether Jim Flavin was gone?

**Answer:** “No.”

**Question 115:** The number was going to be the number?

**Answer:** “The range of the number we always believed was going to be somewhere in the range of 5% at one end to 15% at the other end.”

**Question 116:** Right.

**Answer:** “And probably around 10%. Anyway in April the settlement was announced to the market. Pretty soon after that we issued a statement setting out in some detail the reasons why we had taken the decision about Jim Flavin. Then within a matter of two or three days from that I was informed by the Irish Association of Investment Managers that they had revisited the issue of Jim’s continuation and that they were now going to issue a statement to say it was inappropriate that he would continue in his position which they did.”

**Question 117:** Were you given an opportunity to comment on that?

**Answer:** “No.”

**Question 118:** Before they did?

**Answer:** “No. I was simply told it was coming.”

**Question 119:** Ok. Any explanation as to why the change in mind to the extent of a change from saying nothing?

**Answer:** “That they had reached - maybe I am using that phrase loosely – that they had reached a decision that it was inappropriate that he would continue. I suppose the immediate thing that I had focused on was how could that be when somebody had said to me the previous autumn that they were satisfied with what I had said, that there had been no subsequent contact either from that individual or the association saying we are now changing our minds, could we have some more dialogue. I assumed then as I assume now that some other things had happened internally that I possibly will never know about.”

**Question 120:** Did you feel disappointed or let down?

**Answer:** “I did yes, both. So they made the announcement, we met as a Board pretty well immediately. We discussed it pretty seriously. We took some more soundings through our stockbrokers as to what the feelings of investors were insofar as they were getting feedback and out of that discussion obviously, Jim being involved in the discussion, we said look, it is appropriate that the original three year time horizon for Jim

to step down should be shortened. In fairness Jim was very much part of that discussion. In a sense this wasn't one that took place over here in a cabal. Then pretty much immediately the ODCE announced that he was going into the High Court to look for the appointment of an Inspector. We had another meeting, we were talking about two days, two meetings, one or two days after one another and having decided at the first meeting that Jim would be stepping down probably in June or July of this year, after the ODCE announced that he was going into the High Court Jim offered his resignation immediately."

**Question 121:** And it was accepted?

**Answer:** "And it was accepted."

**Question 122:** Yes.

**Answer:** "Because for obvious reasons we all felt at that stage with that pending there was no way that he could continue either as an executive or as director."

**Question 123:** Was the decision that the three years would be cut back to one year, was that ever indicated?

**Answer:** "No, events overtook it really. We were just about designing that."

**Question 124:** You had resigned to do it in principle?

**Answer:** "Before the ODCE announcement, yes, we had agreed that this was going to happen, that Jim's time would be foreshortened by that amount of time."

**Question 125:** Okay.

**Answer:** "So it just came back again 24 hours later literally into an offer by him to resign."

**Question 126:** The mere fact that the ODCE was applying to appoint an Inspector, was there a discussion or was this something that Jim decided on his own?

**Answer:** “Well, there was a discussion but in a sense in parallel Jim decided on his own. He just told us. I arranged a meeting. The minute that we heard that the ODCE – I am trying to remember have I got it clearly on this, but we arranged a meeting which I was going to chair and Jim then told us that he was going to resign.”

**Question 127:** Okay, or was asking you to accept his resignation or whatever way it was?

**Answer:** “He said I’m going to go immediately.”

**Question 128:** Okay, and there was then no need for the discussion. You all accepted that there was no attempt to ...

**Answer:** “We did have a discussion about it, but (a) Jim was very categorical, (b) we felt that the decision by the ODCE was a decision that materially changed the whole background, that you couldn’t have a company in which you had an Inspector appointed notably to look at all that that Chief Executive had done, and still have that person in place so it was a pretty net decision. That one didn’t take four hours.”

**Question 129:** Yes, can I just again, I don’t know whether this is relevant or not, did it ever occur to you to say that for Jim Flavin to go is actually giving the head that doesn’t deserve to be given merely because the Director of Corporate Enforcement decides that he wants an Inspector appointed?

**Answer:** “Jim wanted to go in a sense – I know I’m terribly mixing a metaphor, he put his own head on the plate, if you like, at that stage.”

**Question 130:** Again if the decision back in August was right, was there not a view that said ‘no, this is wrong, there is no personal integrity issues involved here, therefore we are not going to accept your resignation and we are going to fight the Director of Corporate Enforcement’?

**Answer:** “Well, those issues were discussed but from a business point of view it’s impossible for somebody to have executive responsibility for running a business with something like that.”

**Question 131:** Hanging over them?

**Answer:** “Going on, focused largely on that, not entirely obviously but to a very large part on that individual...”

**Answer 135:** “Up to the point where we had, if you like, what we believed was very overwhelming shareholder support, we were happy in a sense that our decision was aligned with what shareholders saw as their interests. Once that changed via the IAIM we were into review mode and then the ODCE decision led Jim to put an immediate resignation on the table. That’s the net result of the whole lot.”